



Handbook on the Access to Information Act, 2016

 **KATIBA**
Institute
Constitution as an Instrument of Change

Handbook on the Access to
Information Act, 2016

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A popular Government without popular information or the means of acquiring it, is but a Prologue to a Farce or a Tragedy or perhaps both. Knowledge will forever govern ignorance, and a people who mean to be their own Governors, must arm themselves with the power knowledge gives.

— **James Madison** (often called the “Father of the [American] Constitution)

”

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Preface

Katiba Institute (KI) is a research and litigation organization operating as a non-profit non-governmental body established as a company limited by guarantee. The principal objective of KI is to achieve social transformation through the Constitution. To achieve that objective KI works to help promote the implementation of the Constitution; including its political, social and economic agenda, and values and principles. In the medium term, KI hopes that its work will help establish a culture of constitutionalism. It works on diverse areas of the constitution including issues of leadership and integrity, prudent use of public funds, human rights, devolution, unlawful appropriation of public and community land, evictions of indigenous people and long term settlers, protection against illegality and harassment by the police, and facilitating public participation.

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Abbreviation

ATI	Access to Information
IAO	Information Access Officer
IAC	Information Access Commissioner
CAJ	Commission on Administrative Justice
CS	Cabinet Secretary
CEO	Chief Executive Officer

Introduction

Governments are formed by people and societies to help guard their common interests. The interests include the provision of security and common social amenities such as roads and electricity. The people assign government various functions and the power to implement those functions on their behalf, and in a democracy the people choose from among themselves representatives in various levels of government. Several others are also appointed to run that government based on their expertise. Those running the government are required to be accountable to the people and to involve the people in making various decisions. For accountability and public participation to be effective, the people need information from the government; only well informed citizenry can effectively contribute to the affairs of government. This is why governments are required to disclose information about the government to the people.

In addition, there are other entities within society that affect peoples' lives in many ways. Many of those entities are classified as private entities. Since they affect the lives of people in many ways such entities should also be required to disclose information to the public when it affects the rights of those seeking information.

The Constitution of Kenya in Article 35 reaffirms the right of the people to access information from government and private entities. The enactment of the Access to Information Act, which took effect in September 2016, has given practical effect to right to information in Article 35. This Act forms the basis of this handbook.

The handbook tries to explain, in simple, easy to read language, what the right to access information is about, how one can access information and other issues such as the offences relating to non-disclosure of information, misuse of information etc. It also outlines the roles of the various entities involved in access to information, and provides sample templates that can be used to make access to information requests.

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The right of access to information is one of the rights that underpin the values of good governance, integrity, transparency and accountability and the other values set out in Article 10 of the Constitution. It is based on the understanding that without access to information the achievement of the higher values of democracy, rule of law, social justice set out in the preamble to the Constitution and Article 10 cannot be achieved unless the citizen has access to information,

Justice Majanja (in Famy Care Limited v Public Procurement Administrative Review Board & another & 4 others [2012] eKLR)

”

Section A: About ATI

1. What is the right of Access to Information (ATI)?

The right to ATI is the right to get access to information that is held by public entities (national and county governments, and all public agencies, such as commissions, public hospitals and schools) and in some circumstances by private bodies.

2. How do we have this right?

Article 35 of the Constitution guarantees every citizen a right to access information. In 2016 the Access to Information Act was passed, to fill in the details of the right, and provide for the mechanisms to protect the right. In brief, the Act provides how citizens may seek and obtain information, unless that information is protected from public exposure by one of nine exemptions in the Act. And it provides that the Commission on Administrative Justice (the Ombudsman) and the courts are to protect the right.

3. What is the Commission on Administrative Justice – Ombudsman (CAJ)

This is a Constitutional Commission established by Article 59 and section 3 of the Commission on Administrative Justice Act, 2011, with the task of receiving complaints about unfair administrative action by public entities, and in other ways to strengthen administrative justice. The Access to Information Act added to the responsibilities of the Commission overseeing the working of the Act and enforcing it.

4. What is “information”?

The ATI Act seems to assume that information is the same thing as records of information.¹ It is better to think of information as what is recorded: it is usually facts, but may be opinions, recommendations, even music. It is clear that it does not matter how the information is recorded: on paper, computer disk, tape—audio or video—or in any other way.

When you ask for information, you will probably not know how it is held. For example, suppose you want to know how much it costs to install traffic lights in your town, you will not know in what documents that information is contained. The body holding the information cannot be allowed to insist that you ask for a specific document (arguing that that is the “record”).

However, the word “records” indicates that you can only ask for existing information that is held by the body you approach. You cannot ask them to do research to find out information they do not already hold, and you cannot ask them to evaluate that information for you or provide you with an opinion. But if the body

already holds an opinion on the question in its records (like a report on whether the traffic lights were value for money) that would be information that could be asked for.

5. Who has the right to access information?

Every Kenyan citizen (a person with Kenyan nationality) has the right to access information in accordance with the constitution and the ATI Act. But a “citizen” does not have to be a human person: the ATI Act makes it clear any private body (like a company) is a citizen for this purpose if it is “controlled by” one or more Kenyan citizens.² A company in which Kenyan citizens had over 50% of the voting shares would be controlled by citizens.



¹ Access Information Act (ATI) Section 2

² Access to Information Act 2016, Part I- Preliminary. See also, *Katiba Institute v. President Delivery Unit & 3 Others* Petition No. 468 of 2017

6. Why do we have this right?

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Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law—

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Declaration of Principles on Freedom of Expression in Africa

Governments derive their power from the people, and without the will of the people government becomes illegitimate. Public bodies, therefore, hold information not for themselves but as custodians of the public good. In order for a democracy to function well, it requires an informed citizenry which is only possible through the transparency of information. An informed citizenry can also help to contain corruption and to hold Governments and public officers accountable to them. Sometimes information held by another body is not so much important for the public but for affected individuals—for example, medical records.

“

One of the objects of the right to information contained in Article 35 is to promote open and transparent government. It is a specific right that underpins the values of transparency, accountability, good governance and public participation. It is a right that implicitly recognizes that the citizen has a role to play, and indeed a responsibility, in prying open the affairs of state in order to achieve the values of the Constitution.

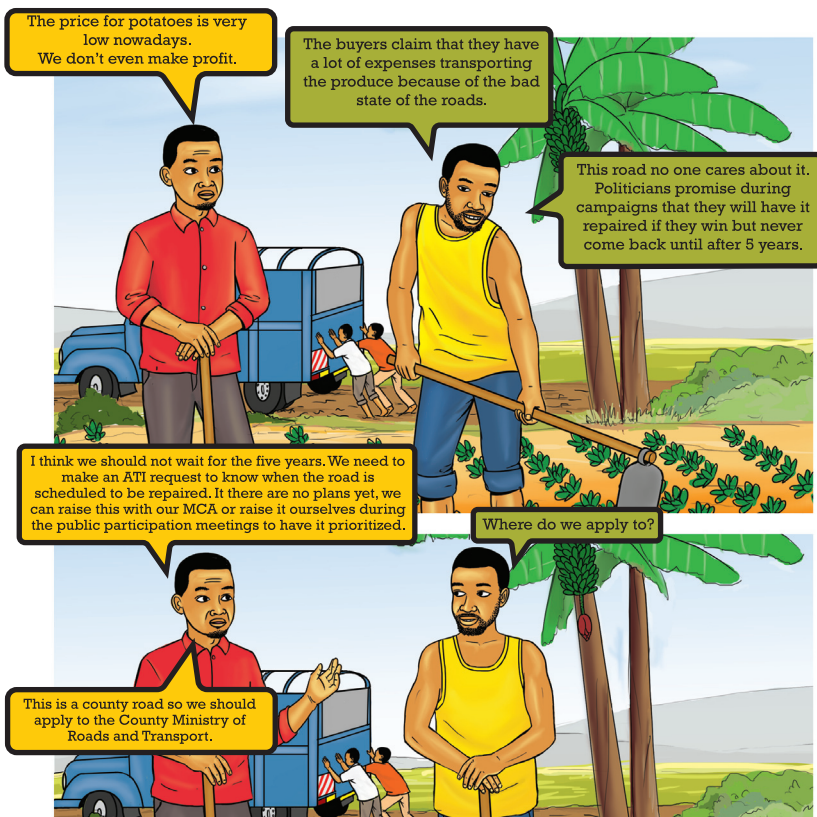
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Justice Majanja

7. What is the Right to Information Act designed to do?

The Act seeks to:

- i. give effect to the right of access to information by citizens as provided for under Article 35 of the Constitution
- ii. provide a framework for proactive disclosure by both the public and private entities (so bodies provide information without being asked)
- iii. provide a framework to facilitate access to information held by private bodies
- iv. promote routine and systematic information disclosure based on the constitutional principles of accountability, transparency, public participation and access to information
- v. protect whistle blowers (people who reveal information to the authorities in order to see that the law is enforced); and
- vi. provide a framework to facilitate public education on ATI



8. Who must disclose information when asked?

Public entities are required to disclose information without the need for the applicant to give reasons for requiring the requested information.³ Private entities are only required to do so if the information is needed to protect a right. But all are allowed to refuse to disclose certain information.

Public entities would include:

- i. The holders of offices (like the Auditor General)
- ii. Public bodies at national and county levels such as ministries and departments
- iii. The police and the military
- iv. Commissions, including independent commissions
- v. Government corporations, authorities and boards
- vi. Probably companies that government controls (this will need to be decided by a court some day).

Private bodies would include any non-public body, such as:

- i. A private individual
- ii. A company or association.

Private bodies are only required to disclose information if it is necessary to protect any right or freedom. However, it seems that the drafters of the Act envisaged that certain private bodies would be treated like “the State” under the Act. This is because it distinguishes between two classes of private bodies. One comprises bodies “that receive public resources or engage in public functions/-services or have exclusive contracts to exploit natural resources”.⁴

(See question 13)

The other class of private bodies is those possessing certain information even if they do not receive public money or perform public functions. The Act speaks of two types of information. The first information of “significant public interest” because of its value in protecting human rights, the environment or public health and safety, or exposing corruption or illegal actions. A private body holding information about illegal acts would usually have to reveal it to the authorities. But this Act is about revealing information to ordinary citizens.

³ Section 4(2)(b)

⁴ Section 2, the definition of private body



9. Shouldn't public bodies report to the public without being asked?

That is a very good question. Public entities are generally required to proactively disclose certain information and update it every year.⁵ This information must include:

- i. its functions and duties
- ii. the powers and duties of its officers
- iii. the decision making process including channels of supervision and accountability
- iv. the salary scales of its officers
- v. its guidelines, rules and regulations on dealing with the public and
- vi. a guide on the classes of information held by the entity.
- vii. all relevant facts before initiating projects, formulating policies, or laws or announcing decisions which affect the public
- viii. after signing any contract: publish on its website or any other media details on the activity being contracted, the sum of the contract, name of the contractor, and the period within which the contract is to be completed.⁶

in publicizing and updating the information annually, all public bodies must take into account the needs of persons with disability, and how to communicate in the local area, the cost etc⁷

⁶ Section 5(1)(a-e)

⁷ Section 5(2)

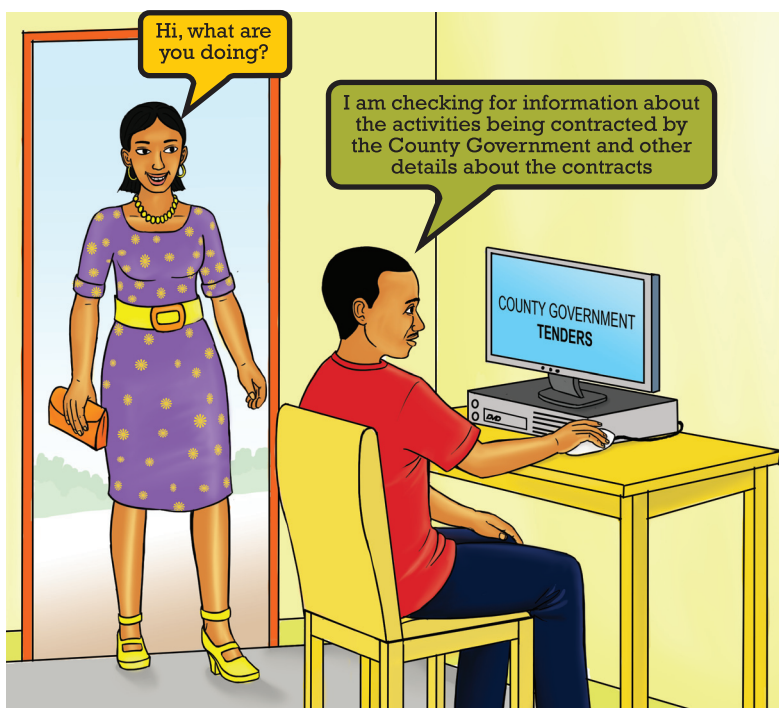
Section B: How to get information

10. How should I start the process of getting information?

You should first try to find the information by checking whether the entity holding the information has already published the information on their websites, media, publications, etc. Nobody is obliged to supply you with information that you could reasonably get hold of by other means.

If you are unable to find it, you should write to the entity that you believe holds the information. Bodies holding information are required to publish a guide sufficient to enable anyone wishing to apply for information to identify what types of information it holds and how to seek access to it.⁸ You should always write to the Information Access Officer (IAO) of the entity that has the information. If the entity has not designated an IAO, the chief executive officer of the entity is responsible for dealing with information requests.⁹

All requests for information must be in writing in either English or Kiswahili. You should take care to give enough details for the official receiving the request to understand what information is being requested.¹⁰ If the applicant cannot make a written request because of illiteracy or another disability, an information officer must take steps to help the applicant to make a request that fits their needs. In this situation, the applicant must be provided with a copy of the request filed.¹¹



⁸ Section 5(1)(a)(vii).

⁹ Section 7 (1)(2)

¹⁰ Access to Information Act 2016, Part III Section 8. (1)

¹¹ Access to Information Act 2016, Part III Section 8. (2)

11. Suppose I do not know who has the information?

If the information is not held by the first body you approach, the body's information access officer should transfer the application to a body that does hold the information, and inform you. Whether the application is transferred or not, the timetable for supplying information remains the same.¹²

This applies only to public bodies. It would be unreasonable to expect private bodies to use their time and money to contact others on your behalf.

In reality, you should try to find out which body does hold the information. You might seek help from an office of the CAJ or some other body that might know.

12. Isn't there a special format for making an information request?

The ATI Act allows public entities to prescribe a form for making an application to access information but it says that such a form should be easy to use by the applicants. However, the Act says that an application should not be rejected simply because it is not presented in a prescribed form.¹³

In the Annex of this Handbook there is a suggested format for writing a request letter and one possible template for an application. These are not official models, and if the body from which you want information has its own form, you should use that.

13. Do I have to say why I want the information?

If you are asking a public body, you do not have to say why. If the body that you are making a request to is a public body, it ought not to include any question like: "Why do you want this information?" And even if they do, you do not have to answer. But if you are asking a private company, body or person, you must explain that you need the information for the protection of a right, and explain what that right is and how the information is relevant. It seems that you may ask for information if you need it to protect the rights of someone else, or for the public benefit—not just for your own rights. This is the most reasonable reading of the provision about bodies holding information "significant public interest"—that a body holding such information must reveal it when asked provided reasons are given. It clarifies that a citizen may ask for information relevant to protecting the rights of the public and of others, not just their own rights.

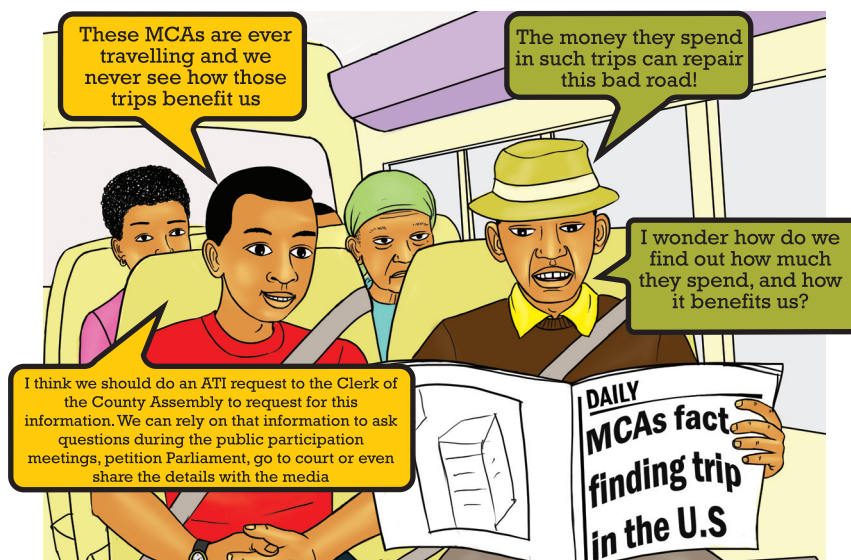
The Act does not clearly say that private bodies that receive public funds, carry out public functions or services or have exclusive contracts to exploit natural resources have the same duty as the State (to disclose without reasons being given). A duty on such bodies would be most useful, and appropriate, and does exist in some countries.

If information sought even from a public entity is refused and the matter goes to court, you might have to explain why you wanted the information. This would be

¹² Section 10(3)

¹³ Section 8(4)

so if the court was being called upon to decide whether the public body should be required to disclose information that is protected from disclosure, because where the public interest in disclosure outweighs the harm that might be done by disclosure.¹⁴



14. Will I be required to pay fees to seek or obtain information?

You do not need to pay to make an ATI application. Similarly, if the information requested will not require making of copies or reproduction of the information then you are not required to pay.

But if copies are to be made and where costs will be incurred in supplying the information to the applicant, a fee may be charged.¹⁵ The fees must not be more than the cost of making the copies or supplying the information.

The Cabinet Secretary can make regulations about fees, and there is nothing to prevent those fees providing for exemptions or reductions for some classes of applicants. So, for example, Kenya could follow the Indian Right to Information Act which exempts people who live below the poverty line from paying any fees normally required. So far there are no regulations.

15. How soon will I know if my request is approved?

An information officer must make a decision about your application as soon as possible. In fact the Act contradicts itself, saying at one point a decision must be given within 21 days, and at another that a decision to supply information must be given within 15 days.¹⁶

If you do not hear within that time (let us assume it is 21 days) you can assume your application has been refused.¹⁷

¹⁴ Section 6(4).

¹⁵ Section 12(1+3)

¹⁶ See S.9(1) and S. 11(1) of the Act.

¹⁷ Section 9(6).

“

We must appreciate as a nation that the right to access information is not a fringe right to other rights in the Bill of Rights. It is integral to the democracy conceptualized by our Constitution, in that it encourages public participation, abhors secrecy in governance and above all seeks to ensure that public power delegated to leaders is not abused,

Justice Mwita (in *Katiba Institute v President's Delivery Unit & 3 others* [2017] eKLR. Para 57)

”

16. Suppose I urgently need the information and I cannot wait the 21 days?

As a principle, the Act requires that information be provided quickly and efficiently irrespective of the nature of the information requested. But the deadlines given in the previous paragraph generally apply.

However, if the information requested concerns the life or liberty of a person, the information should be provided within 48 hours. The only exemption is where such information (concerning the life and liberty of a person) is large or requires a lot of searching or long consultations; then the law allows the IAO to extend the period for response for not more than 14 days.¹⁸ In the case where the information requested does not concern life and liberty but is required urgently, the applicant should indicate in the application the time within which the information would be usable, and based on the principle of speed and efficiency, an entity holding information should take reasonable steps to comply with the request.

17. May disclosure of information be refused?

Access to information can be refused for various reasons. However, the Act also says that, even if one of these reasons applies, the information must still be disclosed if a court decides that the public interest in having the information disclosed is much greater than the interest that would be served by not disclosing.

18. Isn't that very difficult to decide?

Yes it would be, but the Act helps by listing what is describes as “constitutional principles” that might help the court to decide that public interest in disclosure is the more important. These are:

- i. Promoting accountability of public entities to the public
- ii. Effective oversight on expenditure of public funds
- iii. Promoting informed debate on issues of public interest
- iv. Keeping the public adequately informed on any danger to public health or the environment
- v. Ensuring that any statutory authority with regulatory responsibilities adequately discharging its functions.¹⁹

19. So what are the reasons that justify refusing to supply information?

The first justification is because supplying the information would this would undermine the national security of Kenya. The Act gives quite a long list of examples, including:

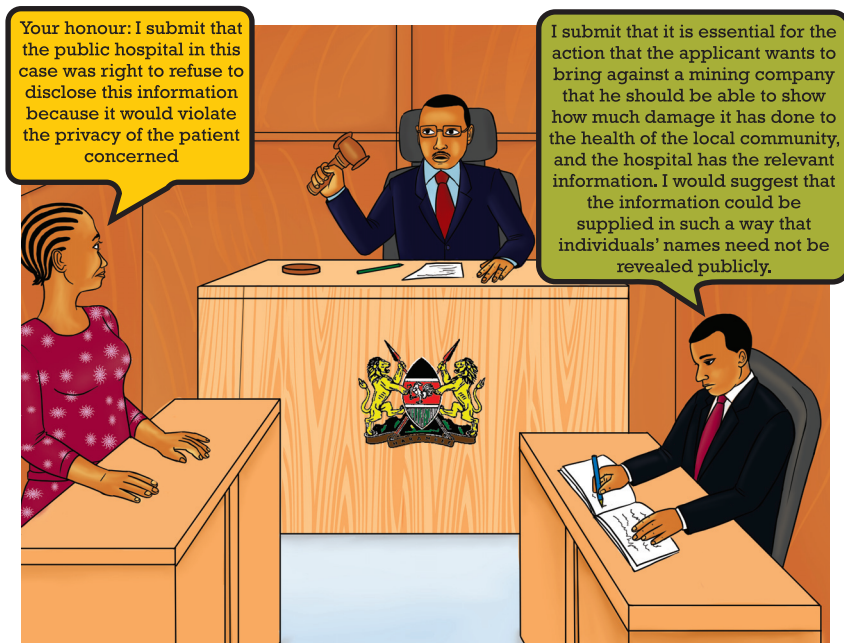
- i. Military strategy
- ii. Intelligence activities
- iii. Cabinet documents, and
- iv. “Any other information whose unauthorized disclosure would prejudice national security” (this is very wide and vague and a court might hold it unconstitutional)

¹⁸ Section 9(2) and (3).

¹⁹ Section 6(6)

Other justifications for not giving information include:

- i. Preventing the “due process of law” (for example, if the information is not allowed to be disclosed even to the court at a particular stage of the case such as an accused person’s previous convictions (not to be looked at unless and until the accused is convicted and to be sentenced))
 - ii. Endangering someone’s safety, health or life (which might include revealing the location of a protected witness)
 - iii. Endangering a person’s privacy
 - iv. Breaching professional rules about confidentiality (applying to lawyers or doctors for example)
 - v. The commercial interests of a company
 - vi. Creating difficulties for the government in managing the economy (premature leak of information affecting a government decision might be an example)
 - vii. Damaging a public entity’s position in any legal proceedings
- The final exclusion is that the public or private body is still considering a matter, and disclosing the information would make it hard to give full consideration to the matter. Sometimes delicate negotiations require some secrecy, for example.



20. Can a body refuse to allow access to the information because it has been held since before the ATI Act came into effect?

No. The Act says that the same rules apply whether the information was held before or after the Act came into effect.

21. What happens if the body says “We have destroyed those records; we no longer have the information”?

The law requires public entities to keep and maintain/preserve records that are accurate, authentic, of integrity, usable and in a manner that facilitates the right of access to information. This, therefore, means that public entities cannot just decide to destroy information within their possession so that it is not available when required.²⁰ However, if records have been destroyed, [which should be in accordance with the rules made by the Attorney General in consultation with the Kenya National Archives and Documentation Service and the CAJ and subject to the provisions of the Public Archives Act (Cap. 19)],²¹ then the public entity must explain and transfer the applicant to whoever else possesses the information.

In fact, if an information request has been made, and the requester would have been entitled to receive the information, it is a crime to alter, deface, block, erase, destroy, and conceal any record held by a public entity with the intention of preventing the disclosure of that information.²² This provision also applies to all persons under the direction of the affected public entity. A person found guilty of this could be fined up to 500,000 shillings or sentenced to imprisonment for up to 1 year or both.²³

22. What happens next if I am allowed to have access to the information?

When the request for information is approved, you should receive a written response within 15 days of submitting the application stating:

- that the application has been granted
- the details of any fees you will have to pay for access and how the amount was fixed
- how you should pay the fees (if any)
- the proposed process of accessing the information once the payment, if any, is made including that the information will be contained in an edited copy, where applicable.²⁴

Once you pay the fee, if any, the information/inspection must be provided/done immediately but not later than 2 working days from the date of receipt of the payment.

23. How would I actually receive the information?

This will depend on the nature of the information itself and of the way in which it is held. The ATI Act assumes that you would be able to go to a place where the information is available (maybe an office where files or books are kept, for

²⁰ Section 18(1)

²¹ Section 2 (2) Records Disposal Act (Revised edition, 2015) <http://www.archives.go.ke/wp-content/uploads/2016/10/RecordsDisposalAct12of1962-2.pdf>

²² Section 18(1)

²³ Section 18(3)

²⁴ Access to Information Act, 2016 Part III- Access to Information Section 11. (1)

example, or even given access to a computer with soft copy on it). In reality, things may be much more complicated. The body holding the information may have to seek out material from several sources. The file, soft copy or paper version, may contain information that you are not asking for or are not allowed to see. The notice you receive saying your application is granted will tell you how the information will be provided. If you want it in some other way (or for example they say you can come to their office to read a file but you insist on a photocopy) you will probably have to pay any extra costs involved.

The law, however, requires public entities to computerize their records and information management systems in order to facilitate more efficient access to information.²⁵ Public entities have until September 2019 to comply with this requirement. After that is done it should be easier to get soft copies of information, by email or on a disk in some format.

24. What can I do if they refuse me access to information, or if the way they offer to provide it is unsatisfactory?

If you receive a notice rejecting your application the body concerned should give reasons and also tell you the procedure for objecting to the decision. First, you could appeal to the Commission on Administrative Justice (CAJ), also called the Ombudsman, within 30 days from the day you receive the decision. If you are unhappy with the CAJ's decision, you can appeal to the High Court within 21 days from the date of the CAJ decision. You would have to notify all the other parties within 30 days of the filing your appeal at the High Court.²⁶ (See also question 29) The other side also has the same right to go to the CAJ and then the High Court against any decision in your favour.

25. How do I take my complaint to the CAJ?

At present you can make your complaint in writing or you could go personally to the CAJ office and make your complaint to the Secretary of the Commission. The CAJ may make rules about how to make complaints in the future.

26. What does the CAJ do if it receives an objection to a decision about giving access to information?

When it receives a complaint, the commission will ask for a response from the respondent (the person or body that the complaint is directed at) within reasonable time. Then it will inquire into the complaint. There is no particular procedure, and the way the Commission works will depend on the circumstances²⁷ The Commission has power to summon any person to appear before it and be questioned, and to produce any relevant document or record.

²⁵ Section 17(3)(c)

²⁶ Section 23(3)(4)

²⁷ Section 22(3)(b)

27. What happens if I or the other side is not happy with the decision of the CAJ?

Either side who is dissatisfied can appeal to the High Court within 21 days from the date the CAJ's order was made. The Commission may make regulations about the procedure in consultation with the Chief Justice, but has not done so yet.²⁸ Unless there is an appeal, the CAJ decision must be followed.

28. If I have a constitutional right to access to information, can't I just go to the High Court to get the information I want?

No. Even before the ATI Act was passed, the courts said that a person can only go to court to complain of a violation of the right if they have already asked for the information and been refused or the body they asked has not replied. However, in an urgent situation, the High Court may be able to assist in putting more pressure on an office to release information more quickly (for example, information relevant to election matters by IEBC).

29. Can I go to the High Court directly if my request has been refused instead of first lodging a complaint with the Ombudsman?

Yes, there is nothing in the Act preventing you from seeking redress in the court directly. The High Court has also said that one can file a constitutional Petition without having gone to the CAJ first.²⁹

30. Suppose information is disclosed by a body to someone else, and it concerns me, and is defamatory about me (injures my reputation)?

You cannot sue the body that supplied the information under the ATI Act.³⁰ However, if the information was supplied with a wrong motive – to injure you – you could sue. This applies only if the information was supplied by someone else to the public or private body that gives access to it under the ATI Act.

The person who receives information under this Act has no special protection. If the person passes on defamatory information then they may be sued unless the usual law of defamation would protect them. This is a complicated topic – too complicated to be dealt with here in detail.

It is also true that anybody holding personal information may be able, or even required, to refuse to give access to that information if it “involves the unwarranted invasion of the privacy of an individual” (see question 19)³¹

²⁸ Section 23(3)(4)

²⁹ *Katiba Institute v. President Delivery Unit & 3 others* Petition No. 468 of 2017 (see question 40).

³⁰ Section 19

³¹ Section 6(1) (d).

Section C: Other issues about the ATI Act

31. What other things does the CAJ have to do about access to information?

The Commission is supposed to oversee the operation of the Act generally. It can ask public bodies for reports about how the Act is working. It does not have to wait for a complaint about this, but can decide to investigate whether the Act has been violated. If it finds that there was infringement of the Act, it can order release of information, and make a recommendation for the payment of compensation or any other lawful remedy or redress.

It should educate the public about access to information. And it should encourage other bodies to respect and promote the right.

Every year, public bodies must report to the Commission, covering, among other things, how many requests they have received for information; how many have been refused, and reasons; the average number of days taken to process requests; the total amount of fees collected, and the number of full-time staff (or equivalent of full-time staff) devoted to processing requests. So public bodies must keep careful records of ATI activities.³²

And the CAJ itself must report annually to Parliament, including “an overall assessment by the Commission of the performance of the Government with regard to access to information during the period under review.” It may also submit special reports to the relevant Cabinet Secretary.³³ These might be about a particular investigation, for example.



³² Section 27(a-e)

³³ Section 26(1) and (2)

32. If the CAJ makes proposals about improving ATI, will these be carried out?

The Cabinet Secretary (the Cabinet Secretary for Information Communication and Technology (ICT)) is supposed to lay CAJ reports before Parliament within 2 months and is responsible for implementing the recommendations made in the Commission's report and reporting to Parliament on the steps made.

33. This Handbook mentions whistle-blowers; what are they, and what does the law say about them?

The ATI Act does not really use the expression, but its objectives include: "providing for the protection of persons who disclose information of public interest in good faith"³⁴ The phrase "whistle-blowers" usually means a person who gives information to the authorities about matters concerning the organisation where the person works because he or she believes this is wrongdoing. The Bribery Act states that people who give information to the Ethics and Anti-Corruption Commission are to be protected from harassment—like dismissal. Anyone who discloses information must not be victimised if disclosure was in the public interest. If the disclosure is to a law enforcement agency (like the police or the Anti-Corruption Commission) this is in the public interest.³⁵ The ATI Act gives examples: it would be in the public interest to give information about human rights violations, mismanagement of funds, conflicts of interest, corruption, abuse of public office and dangers to public health, safety and the environment.³⁶



³⁴ Section 3(e)

³⁵ ATI Act Section 16(1) and (2).

³⁶ Section 16(5)

34. What if a whistle-blower and the party against which information is disclosed reach an agreement under which the whistle-blower agrees not to use the information any more?

Any agreement not to pass on accurate information cannot be enforced.³⁷

This provision is to discourage whistle-blowers using information to extort money, and people buying off whistle-blowers to conceal their wrong-doings.

35. Are there any more detailed regulations about how to obtain information?

We can expect both the Cabinet Secretary (the Cabinet Secretary for Information Communication and Technology (ICT)) and the Commission to make more detailed rules and regulations, about matters like making applications, how information is to be disclosed, how records should be maintained, how complaints and appeals should be made to the CAJ and the High Court.³⁸

36. Suppose information held about me is inaccurate?

The ATI Act provides that a person may apply to a public or a private body to have any inaccurate personal information held about him or her to be corrected, updated or annotated (a note is added giving the correct position).

The body must comply, if it is clear that the information is wrong, and must do so at its own expense.³⁹

Information is “personal” if it is about a person who can be identified even if not named, and includes information about their race, gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, age, physical, psychological or mental health, well-being, disability, religion, conscience, belief, culture, language and birth, about their education or medical, criminal or employment history, about financial transactions in which the individual has been involved, about any ID or other identifying number, their fingerprints, blood type, address, telephone or other contact details; their opinion of some other person, as well as some other listed types of information.

37. Will officials and other people who do not do what they are supposed to under the Act be punished?

There are a number of offences with fines, imprisonment or both under the ATI Act.

A private company that is convicted (or if its officers are convicted) under the Act may, after a fair hearing, be excluded from entering into any future contract with government.

³⁷ Section 16(7)

³⁸ Section 25(1)(2)

³⁹ Section 13.

“

Access to information is the key pillar of democracy. It will facilitate public participation in public affairs, more importantly, the free flow of news and information is one of the hall marks of a functioning democracy. An informed society is able to better participate in design and execution of public policies. It is also more resourceful and creative in addressing social challenges. Such a society is therefore, better placed to increase productivity and prosperity

President Mwai Kibaki – 3rd President of the Republic of Kenya

”

Section C: Other issues
about the ATI Act

A person who	If convicted may be sentenced to fine of up to KShs	Or a term in prison of not more than (or both)
Provides false information intended to injure another person	Kshs 500,000	3 years
Knowingly discloses exempt information (unless disclosure is justified by the public interest)	Kshs 1,000,000	3 years
as an IAO, refuses to assist an applicant who is unable to write; refuses to accept a request for information; fails to respond in time; fails to take reasonable steps to make information available in a form that is capable of being read, viewed or heard by an applicant with disability	Kshs 50,000	3 months ⁴⁰
as an IAO, charges a fee exceeding actual cost of making copies; fails to respond to information required for protection of a right; fails to respond to a request to correct personal information or fails to correct, destroy, delete or annotate the information within a reasonable time	Kshs 100, 000	6 months ⁴¹
as a private company, fails to make publicly available the name and contact details of its IAO	Kshs 500, 000	
fails to honour a Commission summons; knowingly gives any false or misleading statement of information to the Commission; or obstructs proceedings before the Commission	Kshs 300, 000	6 months. ⁴²
alters, conceals part of or misrepresents information disclosed to him or her under the Act with intent to deceive .	Kshs 200, 000	1 year. ⁴³

⁴⁰ Section 28(3)

⁴¹ Section 28(4)

⁴² Section 28(8)

⁴³ Section 28(10)

A private company that is convicted (or if its officers are convicted) under the Act may, after a fair hearing, be excluded from entering into any future contract with government.⁴⁴



38. Does the right to information change other Acts that affect the holding and disclosure of information?

The ATI Act has specifically amended several sections of other Acts. The Act amends any earlier Act that is inconsistent. The most important older Act is the Official Secrets Act which makes it a crime to have certain documents. But now that Act does not apply if it is inconsistent with the ATI Act. The ATI Act is also clear that if any other Act allows information to be disclosed, the new Act does not prevent that.

⁴⁴ Section 28(7)

39. What are the roles of the various entities involved in disclosing information, accessing information and promoting access?

No.	Entity	Roles	Timelines, if any
1.	Public entities	Proactively provide information	
		Provide information on request without requiring the requester to give reasons for requesting information	
		To limit non-disclosure to the circumstances exempted under section 6 of the Act	
		Produce a guide to enable any person wishing to apply for information under this Act to identify the classes of information held by it	
		Publish information 12 months after commencement of the Act ⁴⁵	21/9/2017
		Publish statements updating the information published under section 5(a) – yearly ⁴⁶ Publicize relevant information proactively disclosed ⁴⁷	from Jan 2019
		May limit access to information only to the extent allowed under section 6 of the Act and to consider the words used e.g.: substantial, unwarranted, significantly	
		May be required to disclose information where the public interest in disclosure outweighs the harm to protected interests as may be determined by a Court. ⁴⁸	
		May not be obliged to supply information to an applicant if that information is reasonably accessible by other means	
		Chief Executive Officer is the information access officer but may delegate that role to any officer	
		Disclose information within the required time under Section 9 and 11, namely 21 days or 48 hours If the request is declined to give reasons	
		Transfer requests to another public entity if the information requested is held by that other entity ⁴⁹	
		Correct personal information upon request ⁵⁰	
		Keep and maintain records that are accurate, authentic, have integrity and usable and in a manner that facilitates the right of ATI	
		Keep records relating to its policies, procedures, decisions, transactions & other activities it undertakes ⁵¹	
		To computerise their records and information management systems within 3 years	By 21st Sept. 2019
		Not to alter, deface, block, erase, destroy, or conceal any record held by it with the intention to prevent disclosure. Also applies to persons employed or that are subject to the direction of the public entity	

⁴⁵ Section 5(4)

⁴⁶ Section 5(b)

⁴⁷ Section 5(2) and article 35(3) of the Constitution

⁴⁸ Section 6(4)

⁴⁹ Section 10

⁵⁰ Section 13

⁵¹ Section 17(3)(a)

No.	Entity	Roles	Timelines, if any
1.	Public entities	Will not be liable for defamation if information was supplied to it by a third party unless the body itself proved to have acted with malice (wrong motive) ⁵²	
		Relevant public officers or investigative agency to be available to support the investigative work of the Commission ⁵³	
		Submit to the Commission a report covering the preceding year: number of ATI requests: received & processed; denied and reasons; the average days taken to process requests; fees collected; full-time staff On or before 30th June – each year	
		Not to knowingly disclose exempt information. It is, however, a defence if the exempt information disclosed is already in the public domain	
2.	Private bodies ⁵⁴	Proactively provide information appropriately (maybe if they receive public money, perform public or have exclusive contract to exploit national resources)	
		Provide information upon request appropriately (if is of significant public interest or is necessary to protect rights of the requester or others)	
		To assist an applicant if they are unable to make written requests because of illiteracy or disability	
		Correct personal information upon request ⁵⁵	
		Will not be liable for defamation if information was supplied to it by a third party unless the body itself proved to have acted with malice (wrong motive) ⁵⁶	
		Make publicly available the name and contact details of its IAO(s)	
		If convicted or in serious breach of the Act may, after a fair hearing be debarred from entering into any future contract with government	
3.	Citizens and entities owned by Citizens	Make information requests with sufficient particulars to be understood by the IAO	
		Apply for review of decisions of public and private entities on a request for ATI	
		Request the CAJ to review decisions of public entities on information that they are required to proactively publish	
		Can act as a whistle-blower and not be penalized ⁵⁷	
		Not to provide false information maliciously intended to injure another person ⁵⁸	
		Not to reach a settlement that imposes an obligation of confidentiality on any party to the settlement on an accurate information which was or was proposed to be disclosed ⁵⁹	
		Can lodge complaints to the Commission orally or in writing ⁶⁰	
		If not satisfied with the order of the Commission, can appeal to the High Court within 21 days ⁶¹ If party to a case before the Commission, can file an order of the Commission in the High Court as regulations may prescribe and give written notice to all parties within 30 days ⁶²	
		If no appeal, the party in whose favour the order was made may apply (ex-parte) to enforce the order ⁶³	
		Participate in developing, with the Commission, guidelines for reporting by public and private entities	

⁵² Section 19

⁵³ Section 19

⁵⁴ Section 24(1)

⁵⁵ a) Receive/perform: public resources, funds, functions, services, exclusive contracts to exploit natural resources.

b) Have information that can protect/expose: environment, human rights, public health and safety corruption or illegal actions

⁵⁶ Section 13

⁵⁷ Section 16(1)

⁵⁸ Section 16(4)

⁵⁹ Section 16(7)

⁶⁰ Section 22

⁶¹ Section 23(3)

⁶² Section 23(4)

⁶³ Section 23(5)

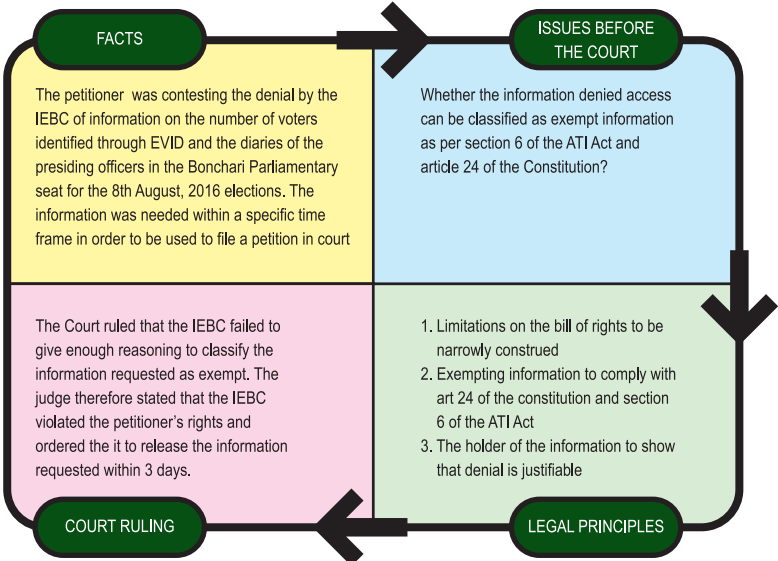
		Roles	Timelines, if any
4.	Relevant ministry for information (Cabinet Secretary (CS))	Make regulations, in consultation with the Commission, prescribing anything required to be prescribed by the Act or for better carrying into effect the provisions of the Act ⁶⁴	
		CS to lay the annual report of the Commission before Parliament within 2 months of receipt with their comments	
		Report to Parliament annually on the steps the government has taken in implementing recommendations made in the Commission's reports	
5.	Commission on Administrative Justice (CAJ)	Review of decisions of a public entity or private body in relation to request for ATI.	
		Decisions listed in Section 14 of the Act	
		An application for review of decisions to be made within 30 days	
		On its own initiative or upon request review a decision of a public entity refusing to publish information that it is required to publish under this Act	
		May notify third parties to whom the information relates in reviewing a decision	
		Oversee implementation of, and enforce, the Act	
		Be guided by the national values and principles of the constitution in performing its functions	
		Designate one of the Commissioners as the "Access to Information Commissioner" with specific responsibility of performing the functions assigned to the Commission under this Act	
		Investigate on its own initiative or upon complaint violations of the Act	
		Request & receive reports from public entities on the implementation of the ATI and Data Protection Act (Not yet enacted): assess & evaluate the use & disclosure of information & protection of personal data	
		Develop and facilitate public education awareness on ATI and protection of personal data With public bodies promote the right to ATI	
		With other regulatory bodies promote data protection in terms of legislation (not yet passed)	
		Monitor State compliance with international treaty obligations on ATI and personal data protection	
		Promote protection of data	
		Any other functions as it may deem necessary to promote ATI and data protection	
		Its decisions bind the national & county governments	
		Issue summonses to any person to appear before it and production of any relevant document in performing its functions under this Act	
		Question any person on any subject it is investigating	
		Require any person to disclose information, within their knowledge, relevant to their investigation	
		If satisfied that the Act has been infringed, can: order release information, recommend compensation, any other lawful remedy or redress	

⁶⁴ Section 25(1-3)

No.	Entity	Roles	Timelines, if any
5.	Commission on Administrative Justice (CAJ)	Develop regulations in consultation with the Chief Justice on how a party can file an order of the Commission in the High Court	
		Develop and publicize guidelines for reporting by public and relevant private entities and consult with the public in the development ⁶⁵	
		Receive reports from public and relevant private bodies	
		Can utilise the services of any public officer or investigative agency for investigation pertaining to an inquiry but to pay for expenses ⁶⁶	
		Submit an annual report to Parliament – to include an overall assessment by the government on ATI in the period under review	
		May submit special reports to the Cabinet Secretary on any matter relating to its functions	
6.	Parliament	Receive an annual report from the Commission and the CS	
		Assess the CS report on the steps taken by the government in implementing recommendations made in the Commission's report	
7.	Judiciary	Develop regulations in consultation with the Commission on how a party can file an order of the Commission in the High Court (Chief Justice)	
		Receive appeals from persons not satisfied with orders of the Commission	
		Allow filing of an order of the Commission by a party	

40. How have the Courts interpreted various issues on the rights to access information?

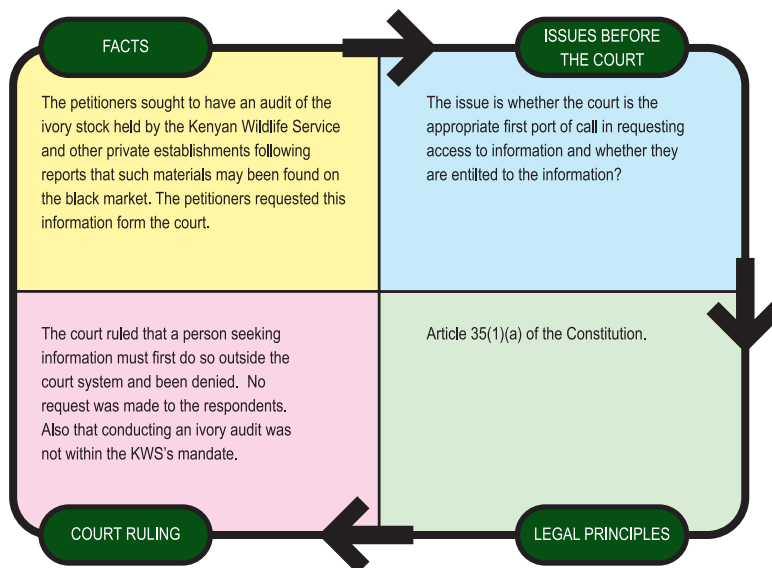
i. Zebedeo John Opolo vs The Independent Electoral and Boundaries Commission (2017)
Available at: <http://kenyalaw.org/caselaw/cases/view/140609/>



⁶⁵ Section 23(7)
⁶⁶ Section 24(1)

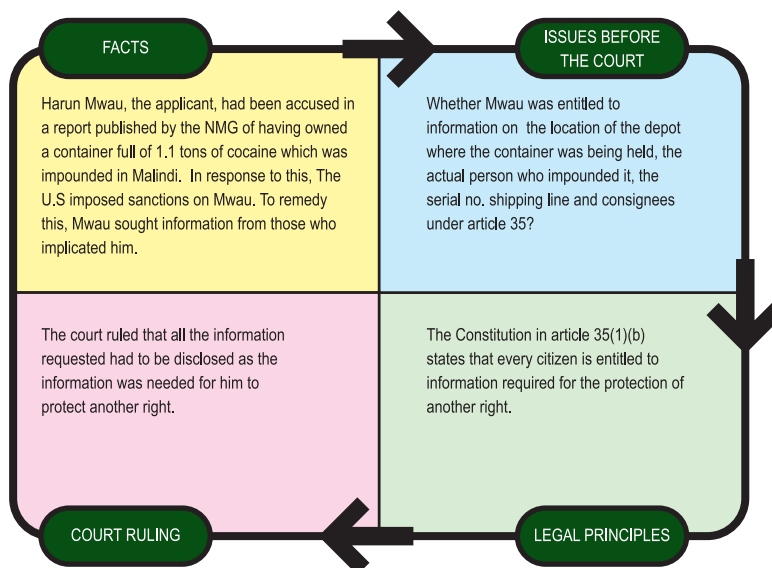
ii. Kahindi Lekalhaile & 4 others vs. Inspector General National Police Service & 3 others (2013)

Available at: <http://kenyalaw.org/caselaw/cases/view/92539/>



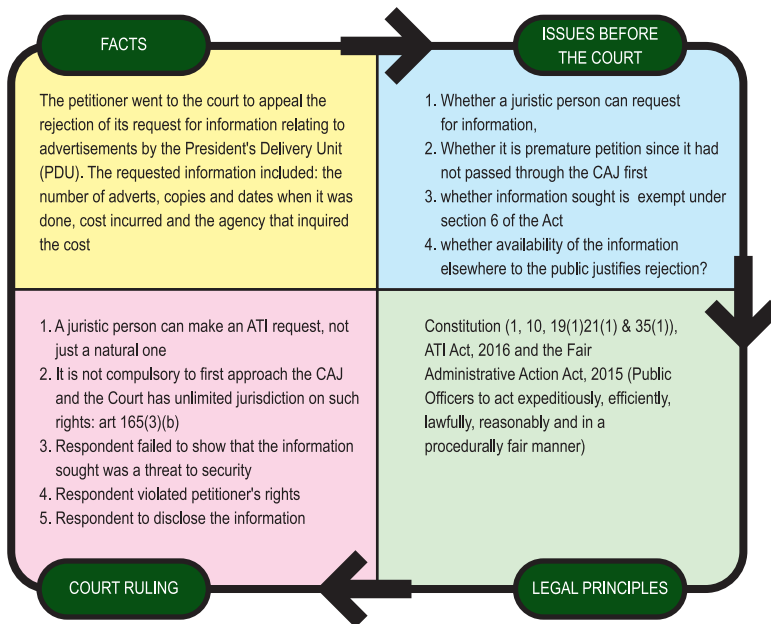
iii. John Harun Mwau vs. Linus Gitahi & 13 others (2016)

Available at: <http://kenyalaw.org/caselaw/cases/view/119817/>



iv. Katiba Institute v President's Delivery Unit & 3 others [2017] eKLR

Available at : <http://kenyalaw.org/caselaw/cases/view/144012/>



Section C: Other issues
about the ATI Act

“

Access to information helps in running away from white elephants. We are in a country where we have many half-finished projects like hospitals, schools, roads and markets, and I wonder how a half-finished market or road helps anybody. These half-finished projects end up consuming money and not being of benefit to anybody. History in this country is replete with stalled projects which money has been sunk in. For us to use our resources well, economically and optimally, we need access to information

Hon. Priscilla Nyokabi, Member of Parliament 2013-2017 and mover of the Private Members Access to Information Bill, 2016 (which became law)

”

Annex: Sample template letters of request for information

Sample 1

Date:

1. Name and postal address of Applicant:
2. Name and address of the public authority:

**Subject: Request for information under Article 35 of the Constitution and the
Access to Information Act, 2016**

3. Description of the required information: Identify the documents as precisely as possible
4. Period for which information is required, if any
- 5a. Form of access sought: Photocopies/CD/certified copies/certified samples/inspection
- 5b. If inspection is sought, indicate required duration
5. Whether information will be collected in person or is required to be sent by post, email etc.?
6. An undertaking to pay the cost incurred during the reproduction of the information and the postage charges as per the ATI Act
7. Can include the statement: "I request that you avail this information as soon as possible, but in no event later than 21 days from the date of receipt of this application, pursuant to section 9 of the Access to Information Act"
8. Signature of the Applicant

Sample 2**Access to Information Request Template****Art. 35 Constitution of Kenya; s.4 -12 Access to Information Act, 2016**

(This form should be filled in duplicate)

Date of request			DD	MM	YYYY
Name of the applicant(s) <i>(If institution, name of citizen in charge)</i>					
Applicant(s)' national ID card number					
Applicant(s)' Email:			Phone:		
Name of the public or private entity (PE)(from whom information is being requested)					
Chief Executive Officer/designate/the head of entity / information access officer (if known)					
Description of the required information: Identify the documents as specifically as possible:					
1.					
2.					
3.					
Relevant period of information (dd/mm/yyyy)		From To			
Preferred form of access (tick appropriately)		i. Inspection <input type="checkbox"/> iv. Entity's website <input type="checkbox"/> ii. Hard copies <input type="checkbox"/> v. Other <input type="checkbox"/> iii. Soft copies <input type="checkbox"/>			
<i>(Attach further details in the attached separate sheet provided, if necessary)</i>					
Is the information needed relating to a matter of life or liberty? <div style="text-align: center;"> <input type="checkbox"/> YES <input type="checkbox"/> NO </div> <i>If YES, the expected date of response is 2 Days</i>					
If information is needed before the legal deadline of 21 days, State the expected date of response DD..... MM YYYY					
State briefly why response is urgent:					
Signature (applicant).....					
Date					

SECTION B: FOR OFFICIAL USE¹ *(to be filled by the receiving officer/ information officer)*

Name of receiving officer			
Designation of receiving officer			
Date of receipt of application	DD	MM	YYYY
Is the information requested available?	<input type="checkbox"/> YES <input type="checkbox"/> NO		
Cost of making copies, if needed (to be filled within 21 days)	No of pages and cost (cost per page not to exceed market price) ² Total amount:		
Contact details (for tracking response to application)	Email: Mobile:		
Result of the request	Information disclosed Date.....		
Result of the request	Information disclosed Date..... Format..... Information denied Reasons: • •		
Signature Date..... (Information Access Officer/ Receiving officer)			

The form is also available on: <http://atikenya.info/>
 and on <http://www.katibainstitute.org/what-we-do/research-publications/>

- 1 All relevant sections of the form should be filled at the time of making the request. The applicant should leave with one copy stamped by the IAO acknowledging receipt.
- 2 In 2017 the cost per page should not exceed 2 Ksh per page for black and white copies or 10 Ksh per page for coloured copies

Handbook on the Access to Information Act, 2016

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Handbook on the Access to
Information Act, 2016

