



**JOINT MEMORANDUM ON THE DRAFT ACCESS TO INFORMATION (GENERAL)
REGULATIONS, 2021**

TO: THE COMMISSION SECRETARY
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INTRODUCTION

The Kenya Civil Society Platform on Oil and Gas, Natural Justice – Kenya, and Okoa Mombasa had an opportunity to review the Draft Access to Information (General) Regulations, 2021, and have made the following written joint memorandum of comments. This memorandum is premised on the organisations’ experience with challenges associated with the right to access to information, in various spheres of their operations.

Based on these experiences and their expertise, KCSPORG, Natural Justice – Kenya, and Okoa Mombasa make the following general and specific comments and recommendations for consideration in the improvement of the Draft Regulations: -

¹The Kenya Civil Society Platform for Oil and Gas is a platform of civil society organisations with an interest in the sector of oil and gas, which advocates for transparency, accountability and sustainability in Kenya’s oil and gas sector.

² Natural Justice – Kenya is an organisation rooted in the struggles of communities in Africa. Natural Justice strives to enhance the collective rights of people and protect the sacred relationships that indigenous peoples and local communities have with nature. Our work is informed by the values, knowledge and self-determination of the communities whom we stand in solidarity with.

³ Okoa Mombasa is a coalition of workers’ unions, businesses, professional associations, civil society organisations and others who have come together out of concern for the livelihoods and wellbeing of the residents of Mombasa.

A) General comment on the layout of the Regulations:

The layout of the Table of Contents of the Regulations does not conform with the corresponding layout in the body of the Regulations. For example, Regulation 19 on the Table of Contents relates to deferral of a request whereas in the body of the Regulations, Regulation 19 relates to fees payable.

B) Specific comments

No.	CURRENT SECTION OF THE REGULATIONS TO BE REVIEWED	PROPOSAL	JUSTIFICATION
PART I – PRELIMINARY			
1.	Regulation 2 - Interpretations: “Procurement records” means the information required to be maintained and disclosed in accordance with section 68 of the <u>Public Procurement and Disposal Act, 2015</u> .	To amend “ Public Procurement and Disposal Act 2015 ” to read “ Public Procurement and Asset Disposal Act 2015. ”	The title of Act No. 33 of 2015 is the Public Procurement and Asset Disposal Act.
2.	“Commercial interest” has not been defined.	To provide an interpretation for “ commercial interest ” for purposes of disclosure of information.	“Commercial interest” has been relied upon on several occasions to deny access to information. Having a clear interpretation by regulation will limit misuse of “commercial interest” as a blanket ground for denial of access to information. We have attached..
3.	“Confidential information” has not been defined.	To provide an interpretation for “confidential information” for the purpose of disclosure of information	“Confidential information” has been relied upon on several occasions to deny access to information. Having a clear interpretation by regulation will limit misuse of the confidentiality exemption as a blanket ground for denial of access to information

PART II – INFORMATION ACCESS OFFICERS

<p>4.</p>	<p>Regulation 5 (1) Delegation by the Access to information Officer is not mandatory</p>	<p>To amend the Regulation to make delegation mandatory, for public and private entities with regional or devolved offices as proposed below: 5. (1) Without limiting section 7 (2) of the Act, where a public entity or private body has departments, regional offices or semiautonomous units, the information access officer may shall delegate the performance of information access officer duties to an officer in those departments, offices or units.</p>	<p>This will promote access by local communities who are often not able to travel to Nairobi to access information. It will also make access to information for local communities less costly.</p>
<p>5.</p>	<p>Regulation 6 Functions of Access to Information Officer</p>	<p>Amend the Regulation to include the following function: “The Information Access Officer Shall Develop a feedback mechanism to update information requesters on the progress of their requests”.</p>	<p>A feedback mechanism will simplify the follow up process for information requestors who are often faced with the challenge of lack of a clear follow up mechanism, with clear timelines.</p>

PART III – PROACTIVE DISCLOSURE

6.	<p>Regulation 7(2) - Scope of proactive disclosure</p>	<p>Amend the Regulation to include both electronic and non-electronic information as follows –</p> <p>(2) Electronic and non-electronic records of information that are subject to proactive disclosure under the law, shall be proactively disclosed in a machine-readable format and plain language format that is understandable to a lay person, including by translation into common local languages or dialects as may be relevant in the regional context.</p>	<p>This regulation subjects only electronic records/information to proactive disclosure yet some records are usually stored by government entities in non-electronic formats. Where non-electronic records are subject to proactive disclosure, these should be availed in either print form or converted into electronic form for purposes of transmission to the public.</p>
7.	<p>Regulation 8 Proactive disclosure obligations of public entities</p>	<p>Amend to include a requirement for proactive disclosure of the following information:</p> <p>(a) whether public participation was undertaken as provided in the Constitution, and how this process was conducted.</p> <p>(b) An entity's public participation policy if any.</p>	<p>Ensures transparency and compliance with various provisions of the Constitution on public participation including Article 10.</p>

		<p>(c) public participation reports, post a public participation exercise.</p> <p>Amend Regulation 8(3)(c) to explicitly state that the directory should contain contact information, at minimum a working email address or official phone number through which the public officers may be reached.</p>	<p>It is currently difficult to reach public officials as their contact information may not be readily available.</p> <p>For example, Parliament does not provide the official email addresses of members of parliament. It is difficult to reach them especially when new members take office. Further, there is no official record of correspondence in respect of the constituency the member represents.</p>
8.	Regulation 8(3)(j)	<p>We propose an additional requirement to proactively disclose monitoring and auditing reports submitted to relevant institutions pursuant to the law as suggested below:</p> <p>“(3) Without prejudice to the generality of paragraph (2), the disclosure under paragraph (1) shall include —</p> <p>....</p>	<p>This will encourage and enhance the participation of the public, especially those most affected by a decision, post the licensing or authorization stage which is important for monitoring and enforcing compliance with the law.</p> <p>As an example, environmental auditing and monitoring reports prepared annually and submitted to NEMA pursuant to the law should be made readily and easily accessible to the public.</p>

		<p>(j) information on the grant of licences, permits and other formal authorizations which have been issued by any public entity as well as annual monitoring and auditing reports submitted by to relevant institutions pursuant to the provisions of the law”.</p>	
9.	<p>Regulation 8 - Proactive Disclosure by public entities</p>	<p>Amend information to be proactively disclosed by a public body to include:</p> <ul style="list-style-type: none"> (a) information held by a public entity that is relevant to the exercise of any right or fundamental freedom. (b) Natural resource agreements entered into by the public entity. (c) Permits and licences issued by a public entity in relation to natural resources exploitation. (d) Information held by a public entity relating to public debt as defined in Article 214(2) of the Constitution 	<p>This will promote Article 10, Chapter 4 and Chapter 5 of the Constitution by ensuring that both public and private entities are under an obligation to proactively disclose this information.</p> <p>This will promote the principles of openness, accountability and public participation in public finance per Article 201(a) of the Constitution.</p>

		(e) Infrastructure project agreements and related information entered into by public entities.	
10	Regulation 9 (2) - Proactive disclosure obligations of private bodies: (k) any report or other information required to be made public in accordance with statute or regulation, including but not limited to annual financial statements and any other statement or report required to be published or otherwise made available pursuant to the <u>Companies Act</u> .	Amend the underlined words “Companies Act” to read “Companies Act 2015”	The title of the act is the Companies Act No. 17 of 2015.
11.	Regulation 9(2)(g)(iv)	We propose an amendment to this provision to read as follows: - “... (g) particulars of any contracts, natural resource agreements or other projects to explore, investigate, develop, extract or otherwise exploit in any way, natural resources, including the following information –	The Environmental Management and Coordination Act, 1999 and the Environmental Impact Assessment Regulations require project proponents to submit annual environmental audits as a way of monitoring compliance with the law and license conditions during project implementation. The audits should be made public both by the private entity concerned and the public authority (in this case NEMA) to enable third parties participate in and

		... (iv) all relevant environmental and social impact assessment study reports and annual environmental audit reports ".	contribute to the process of monitoring compliance.
12.	Regulation 9 (5) Proactive disclosure by private bodies: (5) If a record of information required to be disclosed in accordance with this Part is known to exist or to have existed but cannot be found, the fact that such record exists or existed but cannot be found shall be disclosed, and if the record is subsequently found, it shall thereafter be included in the disclosure.	To include the statement " not later than 2 working days from the date of such discovery " after the statement " it shall thereafter be included in the disclosure ".	There's need to set timelines for the right to access information which did not previously exist. The timeframe for access to information is as stated under Article 259 (8) " <i>If a particular time is not prescribed by this Constitution for performing a required act, the act shall be done without unreasonable delay, and as often as occasion arises</i> ". However, due to the need for consistency, we suggest that Section 9 (5) be amended to similar to Section 8 (4) on proactive disclosure by public bodies which provides for disclosure of information not later than 2 working days from the date of such discovery.
13.	Regulation 10 Information access guide. (2) The information access officer of a private body shall ensure that the information access guide required by regulation 10(2)(1) of these Regulations	Deletion of the numeric (2) after the words ' Regulation 10 '.	Paragraph (1) of Regulation 10 is what refers to the information access guide and not sub section (2). Regulation 10 (2) makes reference to the information access guide referred to in (1) above.

	is regularly reviewed, updated and made accessible.		
14	Regulation 10 - Information Access guide	Amend the Regulation to detail on how these guides are to be made accessible to local communities, through easily accessible media, and in a language they will understand.	This will promote Article 35 of the constitution and section 4 of the Access to Information Act. Further, International Instruments such as the 1992 Rio Declaration, to which Kenya is a signatory, require that the right to information is achieved only when disclosure is timely, accessible, and in a comprehensible language.
15	Regulation 11(4) - Scope of reactive disclosure	Amend the Regulation to expressly exempt the payment of fees for translating documents into Kiswahili as stipulated in Regulation 11(3) and Regulation 19 (not 20) of these Draft Regulations. (4) Records shall be translated into another language, other than Kiswahili as specified in sub-regulation (3) above , upon request and payment of a reasonable fee in accordance with regulation 19 20.	This will eliminate ambiguity and provide clarity that reasonable fees will only be charged for translations done from English to another language other than Kiswahili. Additionally, this is in line with Regulation 19 of these Draft Regulations and not Regulation 20 as indicated in this provision.
PART IV – REACTIVE DISCLOSURE			
16	Regulation 14(a) - Processing of request	Provision requires a time and date stamp for requests received but should also require	It is not clear how a requester would know that the request has been received especially if the request was sent electronically or through social media platforms.

		acknowledgment of receipt to the requester.	
17	Regulation 18 Deferral of access when requested information requires a further action to become official.	Amend the Regulation to require the Information access Officer to give clear timelines upon deferral of disclosure. Timelines for deferral	This will avoid the risk of information holders intentionally delaying the action required to make information official, to escape disclosure.
18	Regulation 19 – Fees (1) No fees shall be charged: - (g) for withdrawal of a request in accordance with <u>regulation 21</u>	Amend Regulation 19 (1) (g) to read, “for withdrawal of a request in accordance with <u>regulation 20.</u>”	Regulation 20 provides for withdrawal of a request for disclosure whereas Regulation 21 relates to closure of requests.
19	Regulation 19 (3)	Review to completely waive, or revise downwards to a reasonable amount, the Kshs. Two Thousand Five Hundred (2,500) per page fee required for translation of requested information to a local language.	This amount is too high and will certainly hinder the disclosure of information to local communities in a language they will understand. This provision severely limits the right to information. The amount is punitive and prohibitive, and will hinder full enjoyment of the right to participation, right to information, and right to access to justice, as guaranteed under the Constitution
20	Regulation 21 - Closure of requests	Amend the time lapse for closure from 30 days to 60 days. We are proposing that a notice of intention to close a request be issued to the requester at the lapse	A sixty days’ window will allow for sufficient time for various actions required to facilitate disclosure. For instance, getting consent from a third party, or acquiring any fee required to enable disclosure

		of 30 days, and subsequent notice of closure at the lapse of the 30 days' notice of intention to close.	
21	Regulation 22 - Access to Information Register (2) The Access to Information Register shall include, in relation to every request for access: (k) the fees charged, the method of payment made, and a copy of the receipt provided in accordance with <u>regulation 20</u> , if applicable.	Amendment of Regulation 22 (2) (k) to delete the words “Regulation 20” and to read “(k) the fees charged, the method of payment made, and a copy of the receipt provided in accordance with <u>regulation 19</u>, if applicable” .	Regulation 19 is what relates to fees payable for disclosure of information whereas Regulation 20 relates to withdrawal of a request for disclosure.
PART V – DISCLOSURE OF INFORMATION OBTAINED FROM A THIRD PARTY			
22	Regulation 24 Consent of a third Party (1) The information access officer shall obtain the consent of the third party in Form 6 set out in the Schedule before disclosing any information in <u>regulation 24....</u>	Amend Regulation 24 (1) to read “The information access officer shall obtain the consent of the third party in Form 6 set out in the Schedule before disclosing any information in <u>regulation 23.</u>”	The information to which consent must be issued is set out in Regulation 23 and not Regulation 24. Reference should be made to Regulation 23.
PART VI – MANAGEMENT OF RECORDS			
23	Regulation 26 - Public Records Management (3) To facilitate access to information, information access officers shall ensure that their	Amendment of Regulation 26 (3) to include (a) and (b). Inclusion of Regulation 26 (3) (b) to read “with respect to (a) above, the ICT Authority shall refer to the	The Regulations do not contain a definition of the ICT Authority. Currently, the ICT Authority is a State Corporation under the Ministry of ICT, Innovation and Youth Affairs. Refer to

	respective public entity is compliant with the current Government ICT Standards on Electronic Records and Data Management issued by the ICT Authority, or other public entity with such authority at the relevant time	Authority established under the Ministry at the time in charge of information, communication and technology”.	https://ict.go.ke/state-corporations-under-mict/ and https://icta.go.ke/who-we-are/
PART VII – REVIEW BY THE COMMISSION			
24	Regulation 27(3) Application for review by the Commission (3) Every application for review shall include an email address or a telephone number to which written communications regarding the application may be sent	Amend this provision to broaden the means by which written communication may be sent to reflect the realities on the ground. (3) <u>Every application for review shall include contact details which written application may be sent to. These may include, but not limited to: an email address, a postal address, and/ or a telephone number.</u>	The means by which communication may be made to an applicant should be broad enough to accommodate the different realities and conveniences of the different groups within the society.
PART VIII – OVERSIGHT BY THE COMMISSION			
25	Regulation 28 (14) Refers to referral of a matter by the Commission to the National or County Assembly for further action.	Amend this provision to instead give effect to Section 23 of the Access to information Act. Relace referral to the county or national assembly with procedure/directions for filing the	Section 23 of the Access to Information Act provides that an order issued by the Commission may be filed for enforcement at the High Court. This Part should expound on the procedures required to facilitate the implementation of Section 23 of the Act.

		order issued by the Commission for enforcement at the High Court.	The National and County Assembly do not have judicial authority to enforce Article 35 of the Constitution The matter should proceed to the High Court as is intended by Section 23 of the Act.
SCHEDULES			
26	Title of the forms Republic of Kenya Access to Information Act, 2016 <u>Access To Information Regulations, 2019</u>	Amendment of the title of the forms to read: Republic of Kenya Access to Information Act, 2016 <u>Access To Information Regulations, 2021</u>	The Regulations are made in 2021 and not 2019. This is reflected in the Regulation's long title.
27	FORM 1	Amend the Form to include a section for fees (if any) chargeable depending on the nature of the request, while also stating where there is a possibility of a waiver.	Transparency - to inform the applicant of the cost of their request beforehand, to allow them to make an informed choice on the nature of their request, i.e., whether they will want the information in electronic or physical form. This will also give further effect to Regulation 12 (2), and 19 (3) of these Regulations.
28	FORM 1	Part I (5) and (8) contains repetition to the extent of identifying and describing nature of disability. Further the information of format required under (8) is well	The suggested amendment is to avoid repetition. (8) does not achieve any additional purpose that is not well capture under (5) and (9).

captured in (9). This part should be amended by deleting (8), which reads as follows:

"8. If the requester is a person with disability, state the nature of disability (eg. visual, hearing) and type of format required ..."

We propose that an amendment be made to part I (3), which required the national ID of the requester. This is personal details and should therefore be optional.

"3. National ID of Requester (optional)..."