

RESEARCH ARTICLE

Public access to information and open governance in Kenya

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ABSTRACT

This paper investigates the role of public access to information in open governance in Kenya; identifies the factors affecting access to public information in Kenya; establishes the extent to which access to public information has influenced open governance in Kenya; and recommends strategies to enhance open governance through access of public information in Kenya. The paper is based on a qualitative study designed as an exploratory survey. Qualitative data was collected through key informant interviews with staff of the Commission on Administrative Justice (Office of the Ombudsman), which is tasked with implementing the Act, and documentary analysis. Content analysis of reports generated by implementing or oversight agencies was also conducted. The findings of the study show that the implementation of the Access to Information Act (2016) has had major contributions to the attainment of Kenya's commitments to open governance. Access to information underlies initiatives relating to open data sharing, beneficial ownership and access to justice. However, the implementation of the Act in Kenya faces challenges such as lack of funding, corruption, low levels of citizen awareness, and a culture of secrecy. The study recommends that the government should set up monitoring mechanisms to evaluate milestones of open governance initiatives such as the Act so as to be able to better evaluate the contributions of each commitment internally rather than relying on external evaluators.

KEYWORDS

Freedom of information; Open government; Open data; Right of access to information; Kenya

1 Introduction

The economic and social development of developing nations have long been hampered by, among other factors, corruption, poor service delivery, lack of accountability and poor public participation in policy development and implementation (Alfada, 2019; Diop et al., 2010; Rose-Ackerman, 2005). These challenges have led to developing nations being unable to exploit their resources for economic benefit, thus remaining resource-rich but economically poor (Faruque, 2006; Li, 2013). It is in this context that the concept of open governance

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has been proposed as a panacea to the challenges. Open governance is a model of governance built on the principles of transparency, accountability and public participation (OECD, 2016). The principle of transparency involves ensuring that all persons affected by administrative decisions are aware of the process that led to the decisions being made and the results of the same. It demands that public officers act openly and information on government decisions is made available and accessible to the citizenry (Erkkilä, 2020; ICMA, 2022). The principle of accountability requires public officers to be able to take responsibility for their actions while performing their duties. They should, therefore, not misuse or waste public resources and should be able to justify the decisions they make (Carstens, 2005). The principle of public participation refers to direct or indirect ways in which citizens can express their opinions and ideally influence public policy. Public participation is usually spearheaded by stakeholders such as politicians, civil society, human rights movements, and business corporations, among others (Quick & Bryson, 2022). Open governance, in essence, allows citizens to monitor the government processes and be able to hold the government accountable for the distribution and use of public resources (Park et al., 2020). This, in turn, translates to better governance as well as economic and social advancement (Millard, 2018).

Open governance, however, cannot be achieved without public access to information. The ability of citizens to access public information is vital for transparency and public participation (Baumgärtner-Griffiths, 2022; Erkkilä, 2020; Kwanya, 2014; Rossi, 2019). The right to public information is based on the broader right of freedom of expression. Each citizen should be able to request and receive information from government offices. Some of the public information citizens should have access to include public procurement information, public recruitment/employment information, public administration and policy information, among others (Kwanya & Kiplang'at, 2016). With access to this information, citizens will be in a better position to hold the government accountable if resources are misused because they are aware of the resources allocated and can access the data on how they have been utilised by the different government offices. They are also in a better position to make informed contributions when engaging in public participation because they have access to the relevant information that would help them to evaluate the proposed policies (Androniceanu, 2021).

2 Literature review

The adoption of open governance in Africa, in general, and Kenya, in particular, is still in its early stages. It is a slow process to cultivate a culture of openness and accountability to counter centuries of secrecy and non-disclosure (Brown, 2013). The incremental steps to open governance have been advanced by two main factors: the adoption of e-governance technology and the creation and implementation of freedom of information (FOI) laws. Kenya has been at the forefront of the charge in adopting e-governance systems in Africa. Notable ones include the adoption of Integrated Financial Management Information Systems (IFMIS) in 2013 and the e-procurement system in 2014, which increased financial transparency in the country (Kamotho, 2014; Rotich & Okello, 2015). Additionally, in 2011, Kenya was the first country in Africa to develop an open data portal as part of open government partnership. The platform was intended to provide government information from a single platform with the aim of improving transparency and accountability by encouraging data sharing (Mungai, 2018). Complementary to these steps is the adoption of e-service delivery through the e-citizen portal which was launched in 2014. It enables citizens to access government services through an online platform, thereby making government services more accessible to

the people (Ondego & Moturi, 2016). These projects are laudable. However, their implementation faced several challenges. The Kenya Open Data Portal, for instance, stagnated for close to eight months because most government organizations information was 'siloes' and rarely shared. Additionally, there was low awareness among users about the existence of the portal (Brown, 2013). Currently, Kenya ranks 121st out of 187 globally and 2nd in East Africa, after Rwanda, in the open data inventory with notable lack of data on reproductive health, pollution, poverty and income (Open Data Watch, 2021). An evaluation of the e-citizen platform in 2016 showed that 43% of the users felt that there had been no public engagement in the development of the platform. Only 8% of the users felt that there was sufficient user training to enable citizens to use the platform efficiently (Ondego & Moturi, 2016). It is clear, therefore, that on its own, the adoption of information technology solutions would not work without the requisite freedom of information legislative framework that would encourage information disclosure and access. Kenya, therefore, passed the Access to Information Act in 2016.

The Access to Information Act, 2016, article 96, gives every citizen the right to request and receive public information held by any government office. It goes further to state that public offices should proactively disclose information to citizens and that each county government and its agencies must designate an office for the purpose of information dissemination (Kenya Law, 2016; Kimalel, 2017). The enactment of the Act was intended to increase transparency in government dealings and by so doing, ensure accountability and encourage public participation, which are the keystones of an open government. Paradoxically, some scholars argue that freedom of information has curtailed the development of open government. Mabillard and Keuffer (2022) conducted a quantitative survey of Swiss counties and found that there was less transparency of information in counties that had FOI laws than in those that did not. Maseh and Katuu (2017) in their review of the Kenyan Judiciary open government initiative, noted that one of the challenges the initiative faced was too much openness, which led to an increase in litigations and consequently increased the backlog of cases, thereby reducing the efficiency of service delivery of the Judiciary. Bannister and Connolly (2011) argue that unfettered access to information violates the rights to privacy of public servants as it essentially turns their offices into proverbial 'glass houses'. This level of scrutiny often leads to public servants being even more secretive and hesitant to share information that they feel they will be judged for by the public. Additionally, Dalton (2020) states that public hearings and transparent government can significantly slow down government decision-making and lengthen administrative processes due to lengthy public participation processes. Open data initiatives are curtailed by data protection laws that limit the way in which data can be collected, processed and shared. While these data protection laws are necessary for the ethical use of personal data by the government, they indirectly or directly contradict access to information laws by increasing barriers to the sharing of information with the public by forcing government agencies to balance the public's right to information versus the individual's right to privacy (Parker & Jain, 2015).

These arguments challenge the commonly held perception that access to information automatically is beneficial for open governance. It can, however, be argued that the problem lies in the poor implementation of access to information practices rather than the access of information itself. Poor implementation of the access to information laws may take the form of uneven access to information by citizens because of the existence of a digital divide, with the majority of the rural population in the country being unable to access the ICT infrastructure and Internet at affordable rates compared to the urban population (Mutula, 2005). Lack

of enforcement of access to information laws, poor record keeping, and poor information management practices lead to the generation of poor quality and quantity of data, further undermining open data-sharing initiatives (Mutula & Wamukoya, 2009; Thurston, 2015). Additionally, transparency has hidden costs incurred in the production and processing of data and sharing information. These costs are often passed on to the information users and can lead to access to information being prohibitively expensive for the citizens (Ugah, 2007). Given these shortcomings, it is difficult to gauge the contribution of access to information to open governance. However, Gavelin et al. (2009) argue that despite these shortcomings, the existence of freedom of information laws, and their implementation, are a vital indicator of open governance because while accessibility of information does not necessarily mean open government, it is not possible to have an open government without access to information. Therefore, the existence of FOI laws and the level of success or failure of their implementation in a country can be used as an indicator of the level of adoption of open governance models.

3 Context and Rationale

Kenya, following the promulgation of its new Constitution in August 2010, began to move towards an open government. In 2011, Kenya became a member of the Open Government Partnership, a global platform of 77 countries and 106 local governments that made the commitment towards having governments that are transparent, accountable and inclusive. In keeping with this commitment, Kenya has adopted e-governance through the setting up of portals for public services that include *Huduma* centres (2013), e-citizen portal (2014) and the enactment of the access to information law (2016). Additionally, the devolution of government services from the national level to county level has brought services closer to the people. However, despite these actions, there is scarce data to indicate that transparency, accountability and public participation have improved. According to the Transparency International (2022), Kenya's corruption perception index remains high, with the country being in position 123 out of the 180 countries ranked. This position indicates that Kenya is still plagued with high levels of corruption. Given that access to public information is vital for open governance, it is necessary to investigate this paradox (Adu, 2018) through evaluating the contribution of access to information to the advancement of open governance in Kenya. The objectives of this paper are, therefore, to investigate the role of public access to information on open governance in Kenya, identify the factors affecting access to public information in Kenya, establish the extent to which access to public information has influenced open governance in Kenya, and recommend strategies to enhance open governance through the access of public information in Kenya.

4 Methodology

This was a qualitative study designed as an exploratory survey. Qualitative data was collected through key informant interviews with staff of the Commission on Administrative Justice (CAJ) – also known as the Office of the Ombudsman – which is mandated to implement the access to information law in Kenya. Additional data was collected through documentary analysis of reports generated by relevant implementing or oversight agencies. The Commission has offices in Nairobi, Kisumu, Eldoret, Isiolo and Mombasa. It also has officers stationed in *Huduma* centres across the country. The study purposefully selected three rep-

representatives of the CAJ office to participate in the study. These were the Commissioner of the CAJ and two representatives from the *Huduma* centres (Nairobi and Eldoret). The commissioner was represented by the Director of Legal and Advisory Services of the CAJ. In addition to primary data collected through the survey, the study also applied content analysis of relevant public documents, such as reports by the Government of Kenya on open government initiatives as well as a systematic review of literature on open government and information access in Kenya.

5 Findings and Discussion

The findings of the study are presented and discussed in this section according to the specific objectives of the study.

5.1 Role of public access to information on open governance in Kenya

The Kenya National Action Plan IV 2020-2022 is the guiding policy on the implementation of open government in the country. In the action plan, Kenya makes eight commitments: 1) Ensure beneficial ownership of organisations and business in Kenya; 2) Implement open contracting; 3) Encourage open data for development; 4) Enhance public participation and legislative openness; 5) Improve public service delivery and delivery performance; 6) Ensure access to information; 7) Ensure access to justice, and 8) Build open government resiliency (Government of Kenya, 2021). The inclusion of access to information as a milestone is an acknowledgment that it is vital for the achievement of an open government. Indeed, without the enactment of access to information laws, it would not be possible to achieve open data, open contracting and beneficial ownership since the achievement of these milestones are directly dependent on government information being available and accessible to the public.

The OECD shortlist of indicators for an open government includes the existence of FOI laws, the existence and efficiency of an ombudsman or information commissioner's office, the existence and efficiency of supreme audit institutions and the existence and implementation of consultation policies (Gavelin et al., 2009). Of these indicators, Kenya meets the criterion of having enacted the Access to Information Act, which established the Commission for Administrative Justice (CAJ) or the Ombudsman (See Table 1).

The Access to Information Act, as mentioned earlier, came into effect in September 2016. The Act set up the CAJ, which is commonly referred to as the Office of the Ombudsman. It was not until 2018 that commissioners were appointed to the Commission and the implementation of the Act began in earnest. The Commission has set up offices in major towns in the country, such as Nairobi, Mombasa, Kisumu, Isiolo and Eldoret in order to bring their services closer to the people. It also trains public officers as well as sensitising them on the Act. The Director of Legal and Advisory Services in the Commission stated:

"We (CAJ) have trained public officers and the county governments over the past two years. We now want to sensitise the citizens... we thought we should start with the public officers who have first to understand the law, what is required of them and the consequences of not doing what is required of them. We have trained county governments and a good number of public institutions. In fact, right now, we have had every county government appoint information access officers whom we will be training now and again."

According to its 2020/2021 report, the Commission trained 1,952 public officers from 80 public institutions. The training focused mainly on service delivery, and complaints manage-

ment procedures. The Commission also provides a training kit on its website, which consists of documents to be used for facilitating training on the Act and its implementation (CAJ, 2022). The CAJ also lobbied every county office to appoint an information access officer. The appointment and training of information access officers in every county is another major step that the Commission has taken in implementing the Act. In so doing, the Commission ensures that there is a point of contact for citizens seeking information from public offices.

Table 1 Access to information in Kenya as an indicator of open government as assessed using the Open Government indicators by OECD

Open Government indicator	OECD criteria	Kenya's context
Law on access to information	Law presumes proactive publication of information	Access to Information Act, 2016, mandates all public institutions to proactively share information on government allocations and grants, their expenditure and budgets, contracts and contract details of service delivery.
	Implementation of law meets citizen's demand for information	All public information is available with the exception of information that would violate privacy of individuals or endanger their lives; undermine national security and impede the due process of law.
	Law ensures equal access to information and documents for all citizens	Request for information can be made in person at relevant public offices. All county government agencies and national public offices are required to have an information officer whose role is to handle information access requests. 77,845 requests for information were made to public offices in 2020/2021 fiscal year, out of which only 28 were not acted upon (CAJ, 2022).
	Complaints appeals mechanisms available to meet the needs of the users	The CAJ has set up a portal for handling complaints known as the Complaints Management Information System, which the public can use to present their complaints to the Commission. Additionally, the Commission has offices in major towns like Kisumu, Isiolo, Mombasa, Eldoret and Nairobi, where members of the public can visit in person to make their complaints.
Ombudsman/ Information Commissioner's Office	The Ombudsman/Information Commissioner is independent of the Executive.	The commissioners of the CAJ are appointed by the president on secondment of the Judiciary. They can only be removed from office through a petition to the National Assembly on grounds of violation of the constitution, bankruptcy, physical or mental incapacity or gross misconduct. The National Assembly on reviewing the petition can send it to the president who can suspend the commissioner pending investigation of allegations by a tribunal he appoints. Only after the tribunal concludes its findings and makes its recommendation can the president remove the commissioner from office. This elaborate procedure provides the office of Ombudsman with independence from the Executive, allowing the commissioners to conduct their duties without pressure from the executive.
	The Ombudsman/Information Commissioner's findings are acted upon.	The office of the Ombudsman has powers to investigate complaints, summon and question anyone with respect to the subject under investigation. The Commission can also make orders for the release of unlawfully held information, compensation and legal redress. Orders from the Commission are acted upon as orders from the High Court. If an individual defies the summons from the office of the Ombudsman, they face fines and possible arrest.
	The Ombudsman/Information Commissioner provides equal access to its reports and services for all citizens	Complaints to the office of the Ombudsman in Kenya are free of charge. The Commission meets all the costs for investigation on behalf of the complainants. Resolution of complaints is made public by the Commission and included in its annual report.

From Table 1, it is clear that Kenya meets the threshold of the basic indicators of an open government on the implementation of access to information laws and the efficiency of its ombudsman office.

5.2 Factors affecting access to public information in Kenya

From the interviews conducted with respondents from the CAJ, the following major challenges emerged:

5.2.1 Funding

The Commission is funded by the exchequer. Its accounts are audited annually by the Auditor General and the report is published proactively on its website. In the fiscal year 2020/21, the Commission was allocated KES 474,480,613, a majority of which was spent on employee compensation and social security benefits (CAJ, 2022). Consequently, it is clear that the allocated budget is insufficient. This has made it difficult for the Commission to fulfil its mandate, especially on public education on the Act. A respondent said:

"It is a very expensive law to implement. When we want to do public education, for example, it is very difficult to do that without resources. So, funding is a very big challenge. If you want to sensitize citizens, you want to buy space in the newspaper, you want to go to West Pokot; all those require resources. You have to hire venues, tents, and chairs and sometimes the bad Kenyan culture is that even those people you are going to educate think you are supposed to give them fare."

In addition to providing information, the Commission undertakes investigations to gather information about injustices so as to be able to resolve the complaints it receives. While these services are provided for free to the public, they require funds and facilitation to perform effectively. Needless to say, the Commission requires to be well funded to be able to perform its roles. The effects of budgetary constraints can be seen in the low rate of resolution of complaints by the Commission. The Commission received 2,930 new complaints in 2021 and carried forward 8,139 complaints from the previous year. Of these, only 25% were resolved.

5.2.2 Low level of awareness of the Act by the public

There is generally a low level of public awareness of the Act. A majority of people are not aware of the Act and its provisions. This may be the result of little public engagement and low public education by the Commission because of inadequate funding. Additionally, other factors, such as lack of Internet access, may contribute to the low level of awareness. Most of the information provided by the CAJ on the Act is on the Commission's website. However, not all regions of the country are served by reliable Internet. One respondent from the Commission said:

"As a Commission, we mostly deal with people who do not have knowledge of or access to the Internet, especially in the rural areas."

The publications provided by the CAJ, are published in English and thus limit those who can access the information about the Act to the literate and those who understand English. This disproportionately affects populations in the rural areas, especially the nomadic communities with low levels of literacy.

5.2.3 Culture of non-disclosure

Before the implementation of the Act, the culture of government officers was one of non-disclosure and privileged access to information. This culture is one that is difficult to change. As the Director for Legal and Advisory Services at the CAJ put it:

"There has been a culture of secrecy in the delivery of public services. You remember there were days we had the Official Secrets Act, which has been repealed to some extent by the Access to Information Act. In fact, public officers used to sign oaths and everything in government was confidential; even a newspaper that has been bought on the street was stamped confidential. So coming out of that culture, it is a struggle to deal with that culture of secrecy that has been brewed over a long period of time."

This culture of secrecy could be the reason why proactive disclosure of information by government officers is difficult to implement. In January 2019, the Commission conducted a survey to ascertain the status of proactive information disclosure by public entities and concluded that there was a high non-compliance level. About 48% of the institutions failed to meet the prescribed levels of proactive disclosure. It also concluded that the institutions were largely opaque when disclosing information on how they made decisions (CAJ, 2019).

The Act contains a whistle-blower clause. This clause, in its current form, is not sufficient to protect whistle-blowers from backlash. The Commission provides for anonymous filing of complaints in cases where the individual complaining may be targeted for revealing maladministration. The Director for Legal and Advisory Services said:

"It is not sufficient in terms of whistle-blowing. That is why I have participated in drafting the whistle-blower protection bill that would then take care of all whistle-blowers."

5.2.4 Non-compliance or lack of cooperation

The Access to Information Act, when implemented fully will have the impact of reducing corruption by encouraging transparency in government offices. However, despite knowing what they ought to do in terms of providing information to the public, there are still instances where public officers refuse to provide this information, leading to complaints by members of the public that could have been easily avoided. A respondent from the CAJ said:

"We are living at a time where people are not serious with their work. They just sit in their offices waiting for the end of the month so that they earn their money. Many are reluctant to do their work; it is not like they don't know how to do it, but they want kitu kidogo (bribe). They want you to give like maybe 500 Kenya Shillings (USD 5) so that they do their work."

Additionally, some public officers, even when contacted by the Commission to provide information refuse to do so.

"Sometimes we deal with certain individuals or government operatives and it is very difficult to get a response to complaints or they completely don't respond. There is this thing where the higher you rank, the bossier you are. Just for example, you receive a complaint about the Office of the President or the Office of the Deputy President, or dealing with departments in Parliament. You can imagine the amount of trouble you will go through. You have the power to enforce but depending on the person you are dealing with; the enforcement can be difficult."

Because the Commission is not a law enforcement body like the courts, it can only make recommendations but will be required to go to court for orders to be given and then enforced by the police. This lack of enforcement power means that at times the public officers may flaunt its orders and ignore repeated requests to provide information or resolve a complaint. As a representative at the Huduma centre at the General Post Office (GPO) put it:

"For example, if you give a fine for 500,000 Kenya Shillings for disobeying the Commission's order, to me that is not sufficient because 500,000 Kenya Shillings to somebody who is able to pay even 5 million is an inconvenience not a deterrent. The enforcement part of it should be so hefty that someone is scared not to interfere with the work of the Commission."

5.3 Extent to which access to public information has influenced open governance in Kenya

The implementation of access to information laws in Kenya has had an impact on the advancement of open government. However, it is difficult to ascertain the extent of the impact because there are no monitoring and evaluation procedures in Kenya. Nonetheless, this study aggregated data from the Open Government Partnership as reviewed by the Independent Reporting Mechanism (IRM). The independent review of the commitment is done at the end of the action plan cycle. Therefore, review data was available only for action plans started between 2012–2016. Within this period, Kenya made 20 commitments, of which 6 were linked to access to information policies. From the summary provided in Table 2, it is clear that the substantial implementation of access to information law had a major contribution to open government, thus improving transparency in the country. It is also clear that the level of implementation of the commitment had a direct impact on how effective they were in contributing to open government. Two of the commitments were not started, two had limited implementation, and only two were substantially implemented. Of the two substantially implemented, enhancing the right to information had a major contribution to opening the government, while the development of climate policies at national and sub-national levels only had a marginal contribution. The current National Action Plan 4 is yet to complete its action cycle, which ends in 2023 before it can be evaluated. However, the OGP notes that of the eight commitments made, four (open contracting, public participation and legislative openness, access to information, and access to justice) are promising and have the potential to offer improvements to open governance in the country (OGP, 2022).

Table 2 Impact of Access policy to information on open governance in Kenya (2012–2016)

S/No	Commitment	Year	Potential impact	Level of implementation as assessed by Independent Reporting Mechanism (IRM)	Did it impact open government?
1	Open budgets; increase public participation in budgetary processes	2012	Transformative	Not started	No data
2	Open data portal	2012	Transformative	Limited	No verifiable data
3	Improving transparency in the electoral process	2012	Transformative	Limited	No verifiable data
4.	Enhance Right to Information	2016	Transformative	Substantial	Major contribution to open government
5	Create transparent public procurement processes	2016	Transformative	Not started	No verifiable data
6	More transparency on the development of climate policies at national and sub-national levels	2016	Moderate	Substantial	Marginal contribution to open government

6 Conclusion

From the findings of the study, the authors conclude that access to public information is vital for the advancement of open governance. It is also evident that despite the challenges currently plaguing the implementation of the Access to Information Act (2016) in Kenya, it has had a major contribution towards the advancement of open government in the country. However, despite these achievements and significant efforts made by the CAJ in its implementation, there is a need for further improvement. If fully implemented, the Access to Information Act (2016) will catalyse transparency and accountability in government and have a transformative impact on open government in the country.

7 Recommendations

From the findings of this study, the authors make the following recommendations:

- a) The government should create a monitoring mechanism for the evaluation of critical milestones for open government rather than relying solely on external evaluators. This will enable the government to self-evaluate and make adjustments to better achieve the commitments made towards open government.
- b) The government needs to increase funding to the CAJ to enable it to deliver its mandate effectively. For instance, increased funding will enable the Commission to conduct a robust public awareness campaign about the Act.
- c) The CAJ should leverage its partnerships with NGOs such as USAID, Kenyan Human Rights Commission, and Transparency International to aid it with the campaign for better awareness of the Act and support its implementation in the country.
- d) The Commission should increase or expand the personnel-base in the public sector who deal with information access. County executives who were appointed to act as information access officers are not exclusively information access officers, but also hold other executive positions. The job of the county information access officer should be a dedicated office to facilitate efficiency in service provision.
- e) Government institutions should invest in efficient and automated records management systems that would reduce the time spent searching for and finding information to meet information requests. It will also create high-quality information and data sets that can then be proactively shared on Kenya's open data portal, thus enhancing open government.
- f) The government, through the CAJ, should partner with academic and research institutions to create awareness on the Kenya data portal so as to encourage the use of the data for research and innovation as well as encourage the sharing of data on the portal by government and research institutions.

8 Contributions of this study

This is the first and only paper so far to comprehensively assess the implementation of Kenya's Access to Information Act (2016). It is also the first paper to link the Act and its implementation to open governance in the country. Therefore, it contributes valuable insights into the extent to which the Act and its implementation contribute to open governance in the country. The conclusions and recommendations may be used by other scholars to investigate diverse issues on public access to information, open governance and sustainable development in Kenya and beyond.

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