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THE KWALE COUNTY ACCESS TO INFORMATION ACT, 2016

No. 14 of 2016

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Date of Commencement: 11th August, 2016

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2016

Kwale Access to Information

No. 14

THE KWALE COUNTY ACCESS TO INFORMATION ACT, 2016

AN Act of the County Assembly of Kwale to give effect to Article 35 of the constitution of Kenya, 2010; to provide for the right of citizens to access information held by the County Government and to confer on the commission on administrative justice the oversight and enforcement functions and powers, and for connected purposes.

ENACTED by the County Assembly of Kwale as follows—

PART I—PRELIMINARY

Short title

1. This Act may be cited as the Kwale County Access to Information Act, 2016.

Interpretation

2. In this Act—

“Commission” means the Commission on administrative justice established pursuant to sec 3 of the commission on Administrative Justice Act, 2011;

“County secretary” means a county secretary appointed under section 44 of the County Government Act, 2012;

“Gazette” means a *gazette* published by authority of the County Government or a supplement of such *Gazette*;

“County Information officer” means any officer of a public office in the county designated as such for purposes of this Act. Where no specific officer has been designated then the county secretary shall be the county information officer by operation of this Act;

“Member of the Executive committee” means the County executive committee member for Public Service and Administration department;

“Information” means all records held by the county government or private bodies regardless of the source, date or physical format in which the information appears or is held. Information also includes digital records or information that can be transmitted through a digital medium;

“National security” has the meaning attached to it under article 238(1) of the constitution of Kenya;

“Personal information” means information about an identifiable person, including—

- (a) Information relating to the race, gender, pregnancy, marital status, national, ethnic or social origin, color, age, physical,

psychological or mental health, wellbeing, disability, religion, conscience, belief, culture, language and birth of the person;

- (b) Information relating to the education or the medical, criminal or employment history of the person or information relating to financial transactions in which the person has been involved;
- (c) An identifying number, symbol or other particular assigned to the person;
- (d) The address, fingerprints or blood type of the person;
- (e) A persons opinion or views in relation to another person;
- (f) Correspondence sent by the person that is implicitly or explicitly of a private or confidential nature or further correspondence that would reveal the contents of the original correspondence;
- (g) Any information given in support or in relation to an award or grant proposed to be given to another person;

“Public entity” means—

- (a) The county government and its devolved units;
- (b) Any public office within the meaning of Article 260 of the constitution; or
- (c) Any entity performing function within a commission, office, agency or other body established under the constitution;

“Public officer” has the meaning assigned to it by article 260 of the constitution; and

“Public record” includes any writing containing information relating to the conduct of the public’s business, including but not limited to court records, mortgages and deed records, prepared, owned, used or retained by a public body regardless of physical form or characteristics.

Objectives of this Act

3. The objects of this Act are to—

- (a) Give effect to the citizens right of access to information as provided under Article 35 of the constitution;
- (b) Provide a framework for proactive disclosures by the county government, its devolved units and private bodies of information that they hold and the provision of information on request in line with the constitutional principles;
- (c) Provide a framework to facilitate access to information held by the County Government, its devolved units and private bodies in

order to ensure the protection of any right conferred by the constitution and any other law;

- (d) Create a right of access to information held by private bodies if those bodies are public contractors or if such bodies hold information required for the exercise or protection of any right protected by the constitution and the laws of Kenya;
- (e) Provide for the protection of persons who disclose information in the interest of the public and in good faith.

PART II—RIGHT TO INFORMATION

Right to information

- 4. (1) Every citizen has a legally enforceable right of access to—
 - (a) Information held by the county government and its devolved units;
 - (b) Information held by another person and required for the exercise or protection of any right or fundamental freedom.
- (2) The right of a citizen under subsection (1) to access information shall not be limited on the basis of—
 - (a) Any reason the person gives for seeking access as the right to access of information is independent of a person's interest; or
 - (b) The information officer's belief as to the reasons for seeking access to the information.
- (3) A person has the right to access information of the county government or private body expeditiously and affordably.
- (4) The county government or its officers shall not reject a request to access information except where the information relates to exempt information under this Act.
- (5) This Act shall be interpreted and applied on the basis of a duty to disclose. Non-disclosure shall be permitted only in exceptionally justifiable circumstances.
- (6) Nothing in this Act shall be construed or applied in a manner that negates or otherwise limits the requirement imposed under this Act or any other written law on a public entity or a private body to disclose information.
- (7) The right of access to information includes—
 - (a) both a right to request and receive information; and

- (b) an obligation on the part of the county government and its officials to disseminate essential information that the public is entitled to know including their core functions and key activities.

Proactive disclosure

- 5. The county government shall—
 - (a) Facilitate access to information held by making public—
 - (i) The particulars of its organization, functions and duties;
 - (ii) The powers and duties of its officers and employees;
 - (iii) The procedures followed in the decision making process, including the channels of supervision and accountability.
 - (iv) The salary scales of its officers by grade;
 - (v) The norms set by it for the discharge of its functions;
 - (vi) Guidelines adhered to by the entity in its dealings with the public or with corporate bodies, including rules, regulations, instructions, manuals and records held by it or under its control or use by its employees in the discharge of their functions; and
 - (vii) A guide sufficient to enable any person intending to apply for information under this Act to identify the classes of information held by the entity, the subjects to which they relate and the location of any indexes to be inspected by any person;
 - (b) Publish all relevant facts and information relating to—
 - (i) Policies formulated by the county government;
 - (ii) Legislation formulated by the county assembly;
 - (iii) Decisions made by the county government that affect the public.
 - (c) Before initiating any project, or formulating any legislation, policy, scheme or programme publish or publicize to the public or to the persons likely to be affected by the project, legislation, policy, scheme or programme, the relevant facts available to it or to which it has reasonable access and which ought to be known to the public in the interest of devolution, public participation, natural justice and promotion of democracy.

- (d) Provide to any person the reasons for any decision taken by it in relation to that person;
- (e) Upon executing a contract, publish on its website, other media forms or a billboard at the county headquarters and in all sub-county offices the following particulars—
 - (i) The public works to be carried out, goods to be acquired or the contracted service;
 - (ii) The contractual sum;
 - (iii) The full names of the service provider, contractor or person to whom the contract has been awarded;
 - (iv) The period within which the contract shall be performed.
- (2) in providing information under subsection (1), the county government shall—
 - (a) take into consideration—
 - (i) The need to reach persons with disabilities;
 - (ii) The local language;
 - (iii) Literacy levels;
 - (iv) The mode of communication that reaches most people within that area.
 - (b) ensure that the information is easily accessible and available free of charge or at a reasonable cost taking into consideration the medium used for availing the information.

Limitation of the right to access of information

- 6.** (1) In accordance with the Constitution, the right to access information may be limited on the grounds that disclosure is likely to—
- (a) cause serious prejudice to the national security of Kenya;
 - (b) impede the due process of law or endanger the life of any person;
 - (c) involve the unwarranted invasion of the privacy of any person other than the applicant or the person on whose behalf a request has been made;
 - (d) infringe on the commercial interests, including intellectual property rights, of that entity or third party holding the information;

- (e) cause prejudice to the ability of the County Government to manage the county;
 - (f) significantly undermine the ability of the county government to give adequate and judicious consideration to a matter in which no final decision has been taken and which remains the subject of active consideration;
 - (g) prejudice the position of the County Government or private body in actual or contemplated legal proceedings.
- (2) for the purpose of subsection (1) (a), information relating to national security includes—
- (a) military strategy, doctrine, capability, capacity or deployment;
 - (b) information on foreign governments which has an implication on national security;
 - (c) intelligence activities, sources, capabilities methods or cryptology;
 - (d) information on foreign relations;
 - (e) information on scientific , technology or economic matters relating to national security ; and
 - (f) vulnerabilities or capabilities of the systems, installations, infrastructure, projects , plans, or protection services relating to national security.
- (3) subsections (1) (d) and (e) shall not apply where a request for information relates to the results of any product or environmental testing and the information concerned reveals a serious threat to public safety or the environment.
- (4) Despite subsection (1), a public entity or private body may be required to disclose information where public interest outweighs the protected interests.
- (5) In determining whether public interest outweighs the protected interests under subsection (4), a public entity or private body shall have regard to the constitutional principles on the need to—
- (a) Promote accountability of public entities to the public;
 - (b) Ensure that the utilization of public funds is subject to effective oversight.
 - (c) Promote informed debate on issue of public interest;

- (d) Keep the public adequately informed about the existence of any danger to the public health or safety to the environment; and
 - (e) Ensure that any statutory authority with regulatory responsibilities is adequately discharging its function.
- (6) Unless the county government proves the contrary, information is presumed not to be exempt if the information has been held by the county or its predecessors for a period exceeding ten years.

PART III—ACCESS TO INFORMATION

Designation of County information officer

7. (1) The county secretary shall be the county information officer of the County for the purpose of the Act.
- (2) The county secretary may delegate the performance of his or her duties as the information officer under this Act to any other officer of the county government.

Request for access

8. (1) A person who intends to access information shall apply, in writing, either in English, Kiswahili or Braille to the county government to access the information.
- (2) An applicant shall, in making an application under subsection (1), provide such details and sufficient particulars as may be necessary to enable the information officer to understand the information sought in that application.
- (3) Despite subsection (1) an applicant who, by reason of illiteracy or disability, is unable to make a written application for access to information may make the application orally and the information officer to whom the application is made shall reduce the application in writing in the prescribed form and provide a copy to the applicant.

Form of Application

9. (1) A public entity may prescribe the form for making an application to access information under section 8.
- (2) In prescribing a form under subsection (1), a public entity shall ensure that the form shall not be such as to cause unreasonable delay in the processing of the application or impose an undue burden on an applicant in making the application.

(3) A public entity shall not reject an application to access information only on the basis that the applicant has failed to use the prescribed form.

Timeliness for processing requests

10. (1) A county information officer shall determine an application made under section 8 as soon as possible, but in any event, within twenty one days of receipt of the application.

(2) The county information officer may seek the assistance of any other public officer as he or she considers necessary for the proper discharge of his or her duties under this Act and such other public officers shall render the required assistance.

(3) Where the applicant does not receive a response to an application within the period specified in subsection (1), the application shall be deemed to have been rejected.

(4) An information officer who fails to respond to a request for information within the prescribed time commits an offence and is liable, on conviction, to a fine not exceeding one hundred thousand shillings or imprisonment for a term not exceeding six months, or both.

Transfer of application to other Bodies

11. (1) A county information officer may transfer an application or any part of it to the relevant public entity within five days from the date of receipt of the application, if the information requested is held by that other public entity.

(2) Where an information officer transfers an application under subsection (1), the officer shall inform the applicant of it immediately but in any event not later than seven days from the date of receipt of the application.

(3) A public officer of the public entity to which an application is transferred under subsection (1) shall determine the application within fifteen days from the date on which the application was transferred.

(4) A public officer who fails to respond to request to information under subsection (3) within the prescribed time commits an offence and is liable, on conviction to a fine not exceeding one hundred thousand shillings or imprisonment for a term not exceeding six months, or to both.

(5) The provisions of this section shall apply with such necessary modification to any application for access to information that is made to a private body under this Act.

Providing Information

12. (1) Where an information officer makes a decision to provide the information sought in the application, the officer shall send to the applicant a written response within twenty one working days from the date of his or her decision advising—

- (a) that the application has been granted;
- (b) the form in which the information shall be availed including in an edited copy where applicable;
- (c) the fees, if any ,further fees to be paid for access , together with computation done to arrive at the fees payable;
- (d) the method of payment of such fees ,if any;
- (e) the proposed process of access information once the payment is made and;
- (f) an appeal may be made to the commission in respect to the fees to be made or the form of access to be granted.

(2) An information officer shall in accordance with subsection (3) provide information to the applicant or permit the relevant inspection immediately but any in any event not later than two working days from the date of the receipt of payment.

(3) An information officer shall produce the information in the form which it is kept unless the applicant requests it to be made available in another form and if it is practicable to do so may be copied, reproduced and converted into a sound transmission in the expense of the applicant.

(4) The provisions of this section shall apply with such necessary modifications to a request that is made to a private body.

Fees

13. (1) The County Government or private body shall not levy a fee for the submissions for an application under this Act.

(2) The county government or a private body to which an access to the information has been made may charge a prescribed fee for the information and the fee may not exceed the actual cost of making the actual copies of information and applicable supplying them to the applicant.

Correction of information

14. (1) A public entity or a private body shall, at the request of an applicant, within a reasonable time at its own cost, correct, update or

annotate any personal information, relating to the applicant which is out of date, inaccurate or incomplete and the applicant shall —

- (a) State that it is a request to amend specific personal information relating to the applicant;
- (b) Specify the personal information that is to be amended indicating how such information is out of date, inaccurate or incomplete; and
- (c) Specify the remedy sought by the applicant.

PART IV — CONFERMENT ON THE COMMISSION OF OVERSIGHT, ENFORCEMENT FUNCTIONS AND POWERS

Role of the commission

15. (1) The commission shall oversee and be responsible for the enforcement of this Act.

(2) In the performance of its functions under this Act, the commission shall be guided by national values and principles prescribed under this constitution.

Functions of the commission

16. (1) In addition to the functions assigned to the commission under the constitution and the Commission on administrative Justice Act, the functions of the commission shall be to —

- (a) Investigate, on its own initiative or upon a complaint made by any person or group of persons, the violation of the provisions of this Act.
- (b) Request reports from the county government with respect to the implementation of this Act.
- (c) Assess and evaluate the use and disclosure of information and protection of personal data.
- (d) Work with the county government to promote the right of access to information.
- (e) Hear and determine complaints and review decisions arising from the breach of this Act;
- (f) Perform other such functions as the commission may consider necessary for the promotion of the right of access to information and data protection.

(2) The decisions of the commission shall be binding on the County Government.

Inquiry into complaints

17. (1) A person who intends to lodge a complaint under this Act shall do so orally or in writing to the secretary or such other person as may be duly authorized by the commission for that purpose.

(2) A complaint lodged under this subsection (1), the commission may—

- (a) call for information or a report regarding the complaint from the public entity or any other body within such reasonable time as may be specified by the commission;

Provided that—

- (i) If the information or report is not received within the time stipulated by the commission, the commission may proceed to inquire into the complaint without such information or report and;
 - (ii) if on receipt of the information or report the commission is satisfied either that no further action is required or that the required action has been initiated by the public entity, the commission shall, inform the complainant in writing accordingly and take no further action; or
- (b) initiate such inquiry as it considers necessary, taking into consideration the nature of the complaint.

Powers of the commission

18. (1) The commission may, if satisfied that there has been a breach of the provisions of this Act, make an order for—

- (a) the release of any information withheld unlawfully;
- (b) a recommendation for the payment of compensation; or
- (c) any other lawful remedy or redress.

(2) A person who is dissatisfied with an order made by the commission under subsection (2) may appeal to the High court within twenty-one days from the date the order was made.

(3) An order of commission under subsection (2) may be filed in the High Court by any party there-to and in such manner that the commission may, in regulations made in consultations with the chief justice prescribe

and such party shall give written notice of the filing of the order to all other parties within thirty days of the date of filing the order.

(4) If no appeal is made under subsection (3), the party in favor of whom the order is made by the commission may apply *ex-parte* by summons for leave to enforce such order as a decree and the order may be executed in the same manner as an order of the High court.

(5) A person who—

- (a) fails to attend before the commission in accordance with any summons or order issued under subsection (1) (a);
- (b) Knowingly gives any misleading statement or information to the commission; or
- (c) obstructs or causes a disturbance in the course of any proceedings before the commission.

commits an offence and shall, on conviction, be liable to a fine not exceeding three hundred thousand shillings or to imprisonment for a term not exceeding six months or both.

Powers relating to Investigation

19. (1) For the purposes of conducting an investigation in relation to an inquiry, the Commission may—

- (a) utilize the services of any public officer or investigation agency of the Government; and
- (b) pay such expenses as may be incurred by the public officer or agency or the services rendered.

PART V—REVIEW OF DECISIONS BY THE COMMISSION

Review of the decisions

20. (1) An applicant may apply in writing to the commission for the review of any of the following decisions made by the public entity or private body in relation to a request for access of the information—

- (a) a decision refusing to grant access to the information applied for;
- (b) a decision granting access to the information;
- (c) a decision purporting to grant access but not actually granting the access in accordance with an application;
- (d) a decision to defer the provision of access to the information;
- (e) a decision to impose a fee or the amount of fees payable;
- (f) a decision relating to remission of the prescribed fee;

- (g) a decision to grant access to information only to a specified person; or
- (h) a decision refusing to correct, update or annotate a record of personal Information in accordance with an application made under section 15;

(2) An application under subsection (1) shall be made to the commission within thirty days, or such further period as the commission may allow from the date in which the date is notified to the applicant.

(3) The commission may, on its own initiative or upon request by any person review a decision by the county government or private body by the commission under section (1).

(4) The procedure for the lodging a complaint with the commission under section 24 shall apply to the submission of any applicant for the review of decision of a public entity or private body by the commission under subsection (1)

Notice to interested party

21. In reviewing a decision of a public body or private entity under this Act, the commission may, where necessary, issue a notice to third party whom the information relates unless the necessary steps to locate the third party have been unsuccessful.

Protection of person making disclosure

22. (1) A person shall not be penalized in relation to any employment, voluntary work, contract, membership of an organization or the holding of an office, for disclosing or agreeing to disclose the information which the person obtained in confidence and in the course of his duties if that disclosure is made in the public interest.

(2) For the purpose of subsection (1) a disclosure shall be deemed to be made in the public interest if it is made to a law enforcement agency or to an appropriate public entity.

(3) A person shall not disclose information under subsection (1) unless he or she has reasonable grounds to believe the information to be true.

(4) A person who provides false information with the intent of causing injury to the reputation of, any loss or harm to another person commits an offence and is liable on conviction, to a fine not exceeding three hundred thousand shillings or to a term not exceeding two year imprisonment or both.

(5) The disclosure of information under subsection (1) includes information relating to—

- (a) a breach of the law, including a violation of human rights ;
- (b) mismanagement of funds ;
- (c) conflict of interest;
- (d) corruption;
- (e) abuse of public office
- (f) a threat posed to public health, safety and the environment.

(6) For the purpose of subsection (1), a person is penalized if that person is dismissed, discriminated against, made the subject of a reprisal or other forms of adverse treatment or denied any allowance, appointment, promotion or advantage that would otherwise accrue him or her or any other personnel action provided under the law relating to the protection of informers, and the imposition of any of such penalties in contravention of this section shall be actionable as a tort.

(7) A term of any settlement arising from a claim under this Act, insofar as it purports to impose an obligation of confidentiality on any part to the settlement in respect of information which is accurate and which was, or was proposed to be closed shall be unenforceable.

(8) In any proceedings for an offence for the breach of a provision relating to the disclosure of the information it shall be a defence to show that—

- (a) in the circumstances , the disclosure was in the public interest; and
- (b) where the offence is alleged to have been committed by a public officer or government contractor and involves the disclosure of the information obtained by the person in the person's position as such as the defendant had, before making the disclosure, complied with the provision of the subsection (3)

Management of records

23. (1) In this section “record” means document or other source of information compiled, recorded or stored in written form or any other form and includes the electronic record.

(2) A public entity shall—

- (a) keep and maintain records that are accurate authentic, contain up-to date information and are usable ;and

- (b) keep and maintain its records in a manner in which facilitates the right information as provided for this Act
- (3) A public entity complies with the requirements of its subsection (2) if it—
 - (a) creates and preserves such records as are necessary procedures , transactions and other activities it undertakes pertinent to the implementation of its mandate
 - (b) maintains the records in its custody, including those held in electronic form in good order and condition ;and
 - (c) within a period of two years from the commencement of this Act computerizes its records and information management system in order to efficient access to the information.

Offences

24. (1) where an application to access information has been made to the county government under this Act and the applicant would have been entitled subject to any terms, to the provision of the information in accordance with that section, a person to whom this section applies commits an offence if he or she alters, defaces, blocks, erases, destroys or conceals any record held by the public entity, with the intention of preventing the disclosure by that entity of all ,or any part of the information provision of which the applicant would have been entitled.

(2) Subsection (1) applies to the public entity and to any person who is employed by, is an officer, or is subject to the direction of, the public entity.

(3) A person who commits an offence under subsection (1) shall be, liable on conviction, to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding two years, or both.

Defamatory matter in information released

25. Where information provided by a public entity or private body to an applicant under section 13 was supplied to the public entity or the private body by a third person, the publication to the applicant of any defamatory matter contained in the information shall be privileged unless the publication is shown to have been made with malice.

PART VI—MISCELLANEOUS PROVISIONS

Regulations

26. (1) The County executive committee member may make regulations with the approval of the County Assembly, prescribing

anything required to be prescribed or generally for better carrying out the provisions of this Act.

(2) Regulations may provide for—

- (a) the manner in which applications under this Act shall be made
- (b) the form in which information requested under this Act shall be supplied;
- (c) the making of an application for personal information by the representatives of the person to the person to whom the information relates;
- (d) the procedure for the making of an application by a complainant for the review by the commission of a decision made by the county government.
- (e) compensation to be sought by an individual who has suffered damages as a result of the holding of inaccurate information about the individuals personal affairs by the county government;
- (f) such matters as contemplated by or necessary for giving full effect to this Act and for its due administration.

(3) The principles and standards set out under the interpretation and statutory instrument Act, 2013 in relation to subsidiary legislation shall apply to the regulations made under this Act.

Annual reports

27. The county assembly may demand for the submission of an annual report to it and may at any time require the submission of a special report to the County Assembly on any matter related to the provisions of this Act.