

**Our Ref: CAJ/LJM/3/5/VOL.III**

16<sup>th</sup> December 2013

**Hon. Abdikadir Hussein Mohamed**

Senior Advisor to the President  
Constitution and Legislative Affairs  
State House  
P. O. Box 50430 - 00100

**NAIROBI**

Dear

**RE: ACCESS TO INFORMATION BILL, 2013 AND DATA PROTECTION BILL, 2013**

Kindly receive warmest compliments from the Commission on Administrative Justice (Office of the Ombudsman). The Commission is a Constitutional Commission established under Article 59(4) and Chapter Fifteen of the Constitution, and the Commission of Administrative Justice Act, 2011.

The Commission is empowered to, among other things, investigate any conduct in state affairs or any act or omission in public administration in any sphere of Government, and complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct. Further, the Commission has a quasi-judicial mandate to deal with maladministration through conciliation, mediation and negotiation where appropriate.

In the conduct of its functions, the Commission has powers to conduct investigations on its own initiative or on a complaint made by a member of the public, issue summons and require that statements be given under oath, adjudicate on matters relating to administrative justice, obtain relevant information from any person or Governmental authorities and to compel the production of such information.

We make reference to the above captioned matters, the Access to Information Bill, 2013, and the Data Protection Bill, 2013, both of which propose the Commission as the oversight and enforcement agency. We wish to inform you that the Commission has analyzed the two Bills and are satisfied with their contents, which reflect the outcome of the stakeholders' deliberations organized by the Commission for the Implementation of the Constitution of which the Commission on Administrative Justice was part. In this regard, we wish to restate our position regarding the oversight and enforcement of the two proposed laws.

Access to information is one of the hallmarks of the good governance worldwide. It 'opens up' the government thereby enhancing transparency, accountability and trust in public administration. It also fosters better understanding of Government decision making, enhances public participation in public affairs and improves Government's efficiency and service delivery. It is for this reason that Article 35 of the Constitution of Kenya expressly provides for the right of access to information.

Given the importance of this right, it is important to provide for an effective oversight and enforcement framework that ensures compliance with the law and realization of the right. In other words, an effective oversight and enforcement mechanism is one of the key pillars of access to information law, without which such legislation would have no meaningful impact on the people's lives. Based on the foregoing, the oversight and enforcement of access to information, including data protection, is increasingly being bestowed in quasi-judicial bodies such as the Ombudsman. The choice of these bodies has been informed by the need for an independent and impartial body to oversee the Government's compliance with the legislation.

#### **I. Role of the Ombudsman in enforcing the right to Access to Information**

The Ombudsman is increasingly being designed as the oversight body for the access to information legislation. Indeed, the Ombudsman presently oversee the implementation of such laws in over a third of the countries worldwide. The suitability of the Ombudsman to provide oversight stems from its independence, impartiality and placement within the governance structure in any country where it exists. Further, the enforcement and oversight by the Ombudsman is

boosted by its functions and powers, which largely reflect parameters under access to information legislation. The Ombudsman is endowed with forceful tools of complaints handling (investigation and resolution) that enable it to establish factual information necessary for determining complaints relating to compliance with the legislation on access to information and data protection. Some of these tools include the power to issue subpoenas, compel testimony and order the production of documents.

In addition, the Ombudsman has been endowed with post-investigation powers such as adjudication (in some jurisdictions), use of alternative dispute resolution methods and moral suasion, which is key to enforcement of access to information legislation. Further, the oversight by the Ombudsman is not as time consuming, complicated, costly, inaccessible or intimidating for the public as compared with other enforcement mechanisms.

## **II. Commission on Administrative Justice and enforcement of the proposed Access to Information and Data Protection laws**

As aforesaid, the Commission on Administrative Justice has been proposed as the body to oversee and enforce the proposed laws on access to information and data protection. The position is generally based on the afore-mentioned grounds and specifically on the following:

- i) The oversight and enforcement responsibilities largely reflect the functions of the Commission under the Commission on Administrative Justice Act, 2011. This is due to the fact that the nature of reports that can be made under the proposed laws are essentially acts of maladministration and fit well within the functions of Article 59(2)(h-k) of the Constitution and Section 8 of the CAJ Act. In this regard, the investigation by the Commission would be the most germane in handling complaints relating to access to information and data protection. Indeed, the proposed laws provide for conduct of inquiries and investigations of complaints by the oversight body, both of which are currently being undertaken by the Commission on a daily basis in addressing complaints of maladministration in the public sector.

- ii) The likely complaints of delay, deferral and deletion of information, and unresponsiveness by public institutions essentially amount to 'administrative action' within the meaning of Section 2(1) of the CAJ Act for which the Commission is responsible. Under the Section, administrative justice has been defined to mean any action relating to matters of administration and includes:-
- a) a decision made or an act carried out in the public service;
  - b) a failure to act in discharge of a public duty required of an officer in public service;
  - c) the making of a recommendation to a Cabinet Secretary; or
  - d) an action taken pursuant to a recommendation made to a Cabinet Secretary.

Accordingly, the Commission may assume jurisdiction for any action taken in relation to the proposed laws as long as the impugned action relates to maladministration in the public sector.

- iii) The Commission is already bestowed with powers under the CAJ Act such as the power to issue summons and require that statements be given under oath, obtain relevant information from any person or Governmental authorities and to compel the production of such information. Such powers are similar to those under the proposed laws and will, therefore, go a long way in ensuring effective oversight and enforcement of the laws.
- iv) The proposed laws aim at improving public administration by creating a culture of transparency and accountability. This largely reflects the function of the Commission under Section 8(h) which requires the Commission to perform activities aimed at improving public administration. In this regard, the Commission will be performing its functions by overseeing and enforcing the proposed laws.
- v) The rights of access to information and protection of personal information form part of the Bill of Rights under Chapter Four of the Constitution, the implementation of which falls on the Kenya National Human Rights and Equality Commission established under Article 59(1) of the Constitution. The Commission on Administrative Justice, being one of the Commissions

under this part {established as a result of the restructuring of KNHREC pursuant to Article 59(4)}, is better placed to oversee the implementation of the rights, given the nature of its mandate under the Constitution and the CAJ Act.

- vi) The adjudication on matters relating to violations of the right of access to information, including recommendation of payment of compensation and other lawful remedies, is similar to the adjudicative function of the Commission under the CAJ Act.
  
- vii) The Commission has an existing infrastructure which could be used in the oversight and enforcement of the proposed laws. The existing infrastructure includes complaints handling, public education and awareness creation, statutory reporting mechanisms, alternative dispute resolution methods, physical and technical infrastructure and staff among others. The designation of the Commission as the enforcement body would, therefore, remove any duplicity and optimize use of resources in the implementation of the proposed laws. The Commission would use existing activities in the public sector such as Performance Contracting to enhance compliance with the proposed laws.

On the basis of the foregoing, the Commission should be the agency to oversee and enforce the two proposed laws. This will be in line with the Commission's mandate of enforcing administrative justice in the public sector in Kenya by addressing maladministration through effective complaints handling and alternative dispute resolution. Kindly find copies of the final Access to Information Bill, 2013 and Data Protection Bill, 2013 herewith enclosed for your reference and further action.

We thank you for your continued support and assure you of our highest regards.

Yours sincerely,

**CMMR. OTIENDE AMOLLO, EBS**  
**CHAIRPERSON OF THE COMMISSION**