



IN THE HIGH COURT OF KENYA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 278 OF 2011

BETWEEN

THE NAIROBI LAW MONTHLY COMPANY  
LTD.....PETITIONER

VERSUS

KENYA ELECTRICITY GENERATING COMPANY LTD.....1<sup>ST</sup>  
RESPONDENT  
EDWARD  
NJOROGE.....  
.....2<sup>ND</sup> RESPONDENT

**AMICUS CURIAE BRIEF**

**Of ARTICLE 19: Global Campaign for Free Expression**

ARTICLE 19  
Free Word Centre  
60 Farringdon Road  
London EC1R 3GA, UK  
Kenya  
Tel: +44 207 324 250  
Fax: +44 207 490 0566

ARTICLE 19 KENYA/EASTERN AFRICA  
ACS PLAZA, Lenana Road Nairobi  
Lenana Road  
Nairobi P.O. Box 2653 00100 - Nairobi,  
Tel.: +254 (20) 3862230/2  
Fax : +254 (20) 3862231

**May 2012**

## I. Introduction

1. The purpose of this submission is to provide the High Court of Kenya with additional information in respect of the claim raised by *The Nairobi Law Monthly Company Ltd* (hereinafter "the petitioner") on the refusal by *Kenya Electricity Generating Company* (hereinafter "the 1<sup>st</sup> respondent"), a substantially state owned company, and *Edward Njoroge* ("the 2<sup>nd</sup> respondent"), to furnish the petitioner with information requested pursuant to the right of access to information, guaranteed by Article 35 of the Constitution of Kenya.
2. ARTICLE 19, Global Campaign for Free Expression (hereinafter "ARTICLE 19") believes that the case raises important questions as to the scope of the constitutional guarantee for the right of access to information in Kenya and its application to companies that are wholly or substantially state-owned.
3. This submission identifies international legal standards on the right of access to information, by which Kenya is bound and which applicable to this case, attempting to contribute to the understanding and implementation of the right in the county. It draws upon international law on the right of access to information, principally Article 19 of the Universal Declaration on Human Rights (hereinafter "the UDHR") and Article 19 of the International Covenant on Civil and Political Rights (hereinafter "the ICCPR"), and regional standards, including the African Charter on Human and Peoples' Rights (the Charter)<sup>1</sup> and the Declaration of Principles on Freedom of Expression in Africa (the Declaration).<sup>2</sup> The brief also compares jurisprudence and best practice in respect of the regulation of state-owned companies and the exercise of the right of access to information. Finally, this brief refers frequently to other standards, including standard setting work of ARTICLE 19, such as *The Public's Right to Know, Principles on Freedom of Information Legislation*.<sup>3</sup> These standards have to be taken to account by the High

---

<sup>1</sup> African Commission on Human and Peoples' Rights, African [Banjul] Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986, available at [http://www.achpr.org/english/info/charter\\_en.html](http://www.achpr.org/english/info/charter_en.html).

<sup>2</sup> African Commission on Human and Peoples' Rights, Declaration of Principles on Freedom of Expression in Africa, adopted by Resolution of the Commission at the 32nd Ordinary Session, 2002, available at [http://www.achpr.org/english/doc\\_target/documentation.html?../declarations/declaration\\_freedom\\_exp\\_en.html](http://www.achpr.org/english/doc_target/documentation.html?../declarations/declaration_freedom_exp_en.html).

<sup>3</sup> The ARTICLE 19 Principles are the product of a long process of study, analysis and consultation overseen by ARTICLE 19 and drawing on extensive analysis of international law and best practices on freedom of information. The Principles were endorsed by Mr. Abid Hussain, the UN Special Rapporteur on Freedom of Opinion and Expression, in his report to the 2000 session of the United Nations Commission on Human Rights, and referred to by the Commission in its 2000 resolution on freedom of expression. They were also endorsed by Mr. Santiago Canton, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression in his 1999 Report, Volume III of the Report of the Inter-American Commission on Human Rights to the OAS; available at <http://www.article19.org/pdfs/standards/righttoknow.pdf>

Court when deciding on the petitioner's request.

4. Based on the international standards, the submission concludes that the public companies (either wholly or partially state-owned) have obligation to comply with right to information requests. The exclusion of these companies from the access to information regimes or limiting the scope of their disclosure duties would then amount to violation of the right to freedom of expression and information.

## II. Interest of ARTICLE 19

5. This amicus brief is respectfully submitted by ARTICLE 19, an established international human rights organisation, promoting the right to freedom of expression and the right to information worldwide. It takes its name and mandate from the Universal Declaration of Human Rights, which proclaims the right to freedom of expression, including the right to receive and impart information and ideas. ARTICLE 19 is headquartered in London and has its regional office for East Africa based in Nairobi.
6. ARTICLE 19 frequently submits legal opinions, written comments and *amicus curiae* briefs,<sup>4</sup> either directly or through the commissioning of expert opinions, to both international and national courts in cases which raise issues touching on the international guarantee of freedom of expression and freedom of information. ARTICLE 19's briefs, which are based on relevant international human rights law and comparative standards, aim to assist courts to elaborate the specific meaning of freedom of expression in the context of the particular case in a manner which best protects this fundamental human right.
7. The persons with responsibility for this amicus brief within ARTICLE 19 are: Barbora Bukovska, Senior Director for Law and Policy, at +44 20 7324 2500 or email [barbora@article19.org](mailto:barbora@article19.org); and Henry Maina, Director of ARTICLE 19 Kenya/East Africa at +254 (20) 3862230/2 or email: [henry@article19.org](mailto:henry@article19.org).

---

<sup>4</sup> For example, ARTICLE 19 acted as *amicus curiae* before the European Court of Human Rights in *Goodwin vs. United Kingdom* (23 March 1996, Application 16/1994/463/544), *Incal vs. Turkey* (9 June 1998, Application No. 22678/93), *Observer and Guardian vs. United Kingdom* (26 November 1991, Application No. 13585/88), *Wingrove vs. United Kingdom* (25 November 1996, Application No. 17419/90), *Kasabova vs. Bulgaria* (19 April 2011, Application No. 22385/03), *Sanoma Uitgevers B.V. v. the Netherlands* (14 September 2010, Application No. 38224/03), *KAOS GL v Turkey* (the judgement is pending, Application No. 4982/07), *Samodurov and Vasilovskaya v Russia* (the judgement is pending, Application Number 3007/06) or *Mouvement Raelien Suisse v. Switzerland* (*Grand Chamber Decision pending*, Application No. 16354/06); before the Inter-American Commission and Court in *Reyes and Others vs. Chile* (19 September 2006, Series C No. 151), *Ulloa and Rohrmoser vs Costa Rica* (3 December 2011, Case 12.367), *Gonzalez and Fries vs. Chile* (19 March 2009, Case No. 406/03), *Fontevicchia & D'Amico v. Argentina* (Case No. 12.524. Serie C No. 238, 29 November 2011), *Uzcátegui et al vs. Venezuela*. (pending, Case No. 12.661) or Luis Gonzálo 'Richard' Vélez Restrepo v Colombia (pending Case No. 12.658); or before the UN Human Rights Committee in *Mavlonov and Sa'di vs. Uzbekistan* (19 March 2009, Communication No. 1334/2004)13 as well as before a number of national courts, most recently in Rwanda, Indonesia, Thailand or Malaysia.

### **III. Summary of Facts**

8. In this brief, ARTICLE 19 relies upon and adopts the facts and procedural history as presented in the court submission. These materials were made available to ARTICLE 19 for the purposes of this submission by the Petitioner.
9. The petitioner is a company that publishes a monthly legal periodical. The 1<sup>st</sup> respondent is the largest electrical power generation company in Kenya, producing 80 percent of the electricity that is consumed in the country. It is substantially state-owned, with 70% of the shares held by the Government and the remaining 30% held publicly. The 2<sup>nd</sup> respondent is the Managing Director and Chief Executive Officer (CEO) of the 1<sup>st</sup> respondent.
10. In its October 2011 issue, the petitioner's periodical ran a story on the commercial dealings between the 1<sup>st</sup> and 2<sup>nd</sup> respondents and the Great Wall Drilling Company of China. The background was that the 1<sup>st</sup> respondent and the Great Wall Drilling Company of China had entered a contract for the drilling of 6 wells at the Olkaria IV geothermal field. They then subsequently agreed for the drilling of an additional 15 wells at the same site, an arrangement that the petitioner contends was not lawfully entered into.
11. Pursuant to the guarantee of the right of access to information in Article 35 of the Constitution of Kenya, the petitioner requested all internal communications, board minutes, confidential letters, reports and all documents relating to any contracts between the 1<sup>st</sup> and 2<sup>nd</sup> respondent and the Great Wall Drilling Company of China, as well as the Green Energy Group AS of Norway, and its local agent Symba Energy. The first request was made on 6 October 2011 and, upon receiving no reply, a second request was made on 12 October 2011.
12. In a letter dated 14 October 2011 the 1<sup>st</sup> and 2<sup>nd</sup> respondents refused to furnish the requested information, questioning which provision within Article 35 of the Constitution of Kenya was the basis for the right asserted by the petitioner. This refusal to provide the requested information is the basis of the petitioner's constitutional claim against the 1<sup>st</sup> and 2<sup>nd</sup> respondent now before the Court.
13. It is noted that the petitioner seeks the following forms of relief from the High Court: a declaration that the petitioner's fundamental rights under the Constitution of Kenya have been violated; a declaration that the petitioner is entitled to damages and compensation; an assessment by the court on the quantum of damages and compensation due; an injunction compelling the 1<sup>st</sup> and 2<sup>nd</sup> respondent to disclose the requested information; and general, exemplary and aggravated damages under Article 23(3) of the Constitution of Kenya.

#### **IV. International Standards on the Right to Access to Information**

14. This section outlines international legal standards on the right of access to information, focusing on their application in Kenya and lending particular emphasis to the scope of the right in respect of information held by companies that are wholly or partly state-owned.

##### ***Guarantees of the right of access to information***

15. International law, both treaty and custom, constitutes part of the domestic law of Kenya. Article 2(5) of the Constitution of Kenya provides that "[t]he general rules of international law shall form part of the law of Kenya." More specifically, paragraph (6) provides that "[a]ny treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution." The High Court of Kenya is therefore bound by the Constitution of Kenya to protect the right of access to information as it is guaranteed by international law.

16. Moreover, the right of access to information is singled out for protection in Article 35 of the Constitution of Kenya in the following terms:

(1) Every citizen has the right of access to - (a) information held by the state; and (b) information held by another person and required for the exercise or protection of any right or fundamental freedom.

(2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.

(3) The State shall publish and publicize any important information affecting the nation.

17. It is further noted that the Constitution of Kenya provides at Article 22 that

Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of rights has been denied, violated or infringed, or is threatened.

18. The Constitution therefore provides the basis for a cause of action; it is not required that Parliament additionally enact legislation to implement the rights enumerated in the Constitution.

19. Kenya was admitted to the United Nations on the 16 December 1963. 17 years previous at its first session, the UN General Assembly adopted Resolution 59(1), which stated that "freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which

the UN is consecrated.”<sup>5</sup> The right was enshrined in Article 19 of the UDHR, adopted in 1948, in the following terms:

Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

20. While the UDHR is not directly binding on States, parts of it, including Article 19, are widely regarded as having acquired legal force as customary international law.<sup>6</sup>

21. Article 19 of the ICCPR elaborates upon and gives legal force to the right of access to information, guaranteeing at paragraph (2) that:

Everyone shall have the right to freedom of expression; this right shall include *freedom to seek, receive and impart information* and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”

22. The UN Human Rights Committee, the treaty monitoring body established to oversee the implementation of the ICCPR, affirmed in General Comment No.34 the long-recognised principle that

Article 19, paragraph 2 embraces a right of access to information held by public bodies ... The designation of such bodies may also include other entities when such entities are carrying out public functions.<sup>7</sup>

General Comment No.34 also emphasises that Article 19 applies not only to political discourse and commentary on public affairs, but to “every form of idea and opinion capable of transmission to others”, including commercial information and even commercial advertising.<sup>8</sup>

23. Kenya acceded to the ICCPR on 1 May 1972 and is today among the treaty’s 167 parties, all of whom are bound to respect the guarantee for the right of access to information contained in Article 19 of the ICCPR.

24. The right of access to information is also guaranteed by a number of

---

<sup>5</sup> United Nations General Assembly Resolution 59(1), adopted 14 December 1948, available at: <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/033/10/IMG/NR003310.pdf?OpenElement>

<sup>6</sup> For judicial opinions on human rights guarantees in customary international law, see *Barcelona Traction, Light and Power Company Limited Case (Belgium v. Spain) (Second Phase)*, ICJ Rep. 1970 3 (International Court of Justice); *Namibia Opinion*, ICJ Rep. 1971 16, Separate Opinion, Judge Ammoun (International Court of Justice); *Filartiga v. Pena-Irala*, 630 F. 2d 876 (2d Cir. 1980). For an academic critique, see M.S. McDougal, H.D. Lasswell and L.C. Chen, *Human Rights and World Public Order*, (Yale University Press: 1980), pp. 273-74, 325-27. See also United Nations General Assembly Resolution 59 (1), 1946.

<sup>7</sup> General Comment No. 34, 21 July 2011, CCPR/C/GC/34, at para 18.

<sup>8</sup> *Ibid.*, at para 11.

regional instruments to which Kenya is a party. *The African Charter on Human and Peoples' Rights* (hereinafter "the ACHPR"), is a legally binding treaty, guarantees the right of access to information at Article 9 as follows:

1. Every individual shall have the right to receive information.
2. Every individual shall have the right to express and disseminate his opinions within the law.

25. The African Commission on Human and Peoples' Rights (the Commission) adopted an interpretative declaration on the content of Article 9 of the ACHPR, Principle IV of which outlines key principles underlying the right of access to information. It is noteworthy in this respect that the second paragraph explicitly states that this right is not limited to information held by public bodies.

1. Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.
2. The right to information shall be guaranteed by law in accordance with the following principles:
  - everyone has the right to access information held by public bodies;
  - **everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right;**
  - any refusal to disclose information shall be subject to appeal to an independent body and/or the courts;
  - public bodies shall be required, even in the absence of a request, actively to publish important information of significant public interest;
  - no one shall be subject to any sanction for releasing in good faith information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment save where the imposition of sanctions serves a legitimate interest and is necessary in a democratic society; and
  - secrecy laws shall be amended as necessary to comply with freedom of information principles.
3. Everyone has the right to access and update or otherwise correct their personal information, whether it is held by public or by private bodies.

26. Most recently, in September 2011, the Pan-African Conference on Access to Information adopted the African Platform on Access to Information (APAI),<sup>9</sup> a regional declaration indicating support for right to information principles, drafted by nine African groups working on freedom of expression, access to information and the media, including ARTICLE 19. The APAI elaborates on this right and sets out minimum standards for access to information at a national level. Importantly, principle 4 of the APAI elaborates upon the application of the freedom of information principles to private bodies:

---

<sup>9</sup> African Platform; available at: <http://www.article19.org/data/files/medialibrary/2740/APAI-FINAL.pdf>.

The obligations of [access to information] shall apply to all public bodies, as well as to private bodies that are owned or controlled by the government, utilise public funds, perform functions or provide services on behalf of public institutions, or have exclusive contracts to exploit natural resources (with regards to said funds, functions, services or resources), or which are in possession of information which is of significant public interest due to its relation to the protection of human rights, the environment or public health and safety, or to the exposure of corruption or illegal actions or where the release of the information may assist in exercising or protecting any right.<sup>10</sup>

27. The APAI also elaborates on the importance of the right of access to information in relation to the exploitation of natural resources:

Governments should proactively publish all information including policies, impact assessments, agreements, subsidies, licenses, permits and revenues relating to the exploitation of natural resources including the extractive industries, water, fisheries, and forests.

Private bodies which are exploiting natural resources should be required to publicly disclose the terms of such agreements and payments made to governments based on the principles developed by the Extractive Industries Transparency Initiative (EITI).<sup>11</sup>

28. The EITI promotes best practices of transparency and accountability in the extractive industries. EITI has found seven African states to be in compliance with its standards, these are: the Central African Republic, Ghana, Liberia, Mali, Mauritania, Niger, and Nigeria. Kenya has not applied for candidate status with the EITI.<sup>12</sup>

29. Although Kenya has not been involved with EITI, it is noteworthy that it was the first country to sign the United Nations Convention against Corruption (*hereinafter* "the Convention against Corruption")<sup>13</sup> on 9 December 2003. The Convention against Corruption lists its purposes in Article 1 as "to promote and strengthen measures to prevent and combat corruption more efficiently and effectively" and "to promote integrity, accountability and proper management of public affairs and public property." Article 13 recognises the effective implementation of the right of access to information as fundamental to these objectives, especially where that information concerns corruption.

---

<sup>10</sup> *Ibid*, at key principle 4.

<sup>11</sup> *Ibid*, "application of principles", at point 11.

<sup>12</sup> The EITI website is available at: <http://eiti.org/countries/compliant>

<sup>13</sup> The United Nations Convention against Corruption, adopted by the UN General Assembly in October 2003, signed in December 2003 and came into force on December 14, 2005; available at [http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026\\_E.pdf](http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf).

30. The African Union Convention on Preventing and Combating Corruption<sup>14</sup> similarly stresses the importance of the right of access to information at Article 9. Article 12(4) further provides that State Parties must undertake to

Ensure that the Media is given access to information in cases of corruption and related offences on condition that the dissemination of such information does not adversely affect the investigation process and the right to a fair trial.

31. Kenya is also a signatory to the AU Convention on Preventing and Combating Corruption,<sup>15</sup> which aims to fight corruption in both public and private sector. Article 11 of the AU Corruption Convention specifically obliges the states to adopt a variety of measures and establish mechanisms to prevent and combat corruption in the private sector.

### ***Content of the right to freedom of information***

32. A survey of international law and best practices shows that to be effective, freedom of information legislation should be based on a number of general principles. Most important is the principle of maximum openness: any information held by a public body should in principle be openly accessible, in recognition of the fact that public bodies hold information not for themselves but for the public good. Furthermore, access to information may be refused only in narrowly defined circumstances, when necessary to protect a legitimate interest. Finally, access procedures should be simple and easily accessible and persons who are refused access should have a means of challenging the refusal in court.

33. In his 2000 Annual Report to the UN Human Rights Commission, the UN Special Rapporteur endorsed ARTICLE 19's overview of the state of international law on freedom of information as published in ARTICLE 19's Principles and called on governments to revise their domestic laws to give effect to the right to freedom of information. He particularly directed States' attention to nine areas of importance:

[T]he Special Rapporteur directs the attention of Governments to a number of areas and urges them either to review existing legislation or adopt new legislation on access to information and ensure its conformity with these general principles. Among the considerations of importance are:

---

<sup>14</sup>

Available

at:

[http://www.africa-union.org/official\\_documents/Treaties\\_%20Conventions\\_%20Protocols/Convention%20on%20Combating%20Corruption.pdf](http://www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/Convention%20on%20Combating%20Corruption.pdf)

<sup>15</sup> The African Union Convention on Preventing and Combating Corruption, adopted by the heads of state at the African Union Summit held in Maputo on 11 July 2003; available at available at [http://www.africaunion.org/official\\_documents/Treaties\\_%20Conventions\\_%20Protocols/Convention%20on%20Combating%20Corruption.pdf](http://www.africaunion.org/official_documents/Treaties_%20Conventions_%20Protocols/Convention%20on%20Combating%20Corruption.pdf). Kenya signed the Convention on 17 December 2003 and ratified it on 3 February 2007.

- Public bodies have an obligation to disclose information and every member of the public has a corresponding right to receive information; "information" includes all records held by a public body, regardless of the form in which it is stored;
- Freedom of information implies that public bodies publish and disseminate widely documents of significant public interest, for example, operational information about how the public body functions and the content of any decision or policy affecting the public;
- As a minimum, the law on freedom of information should make provision for public education and the dissemination of information regarding the right to have access to information; the law should also provide for a number of mechanisms to address the problem of a culture of secrecy within Government;
- A refusal to disclose information may not be based on the aim to protect Governments from embarrassment or the exposure of wrongdoing; a complete list of the legitimate aims which may justify non-disclosure should be provided in the law and exceptions should be narrowly drawn so as to avoid including material which does not harm the legitimate interest;
- All public bodies should be required to establish open, accessible internal systems for ensuring the public's right to receive information; the law should provide for strict time limits for the processing of requests for information and require that any refusals be accompanied by substantive written reasons for the refusal(s);
- The cost of gaining access to information held by public bodies should not be so high as to deter potential applicants and negate the intent of the law itself;
- The law should establish a presumption that all meetings of governing bodies are open to the public;
- The law should require that other legislation be interpreted, as far as possible, in a manner consistent with its provisions; the regime for exceptions provided for in the freedom of information law should be comprehensive and other laws should not be permitted to extend it;
- Individuals should be protected from any legal, administrative or employment-related sanctions for releasing information on wrongdoing, viz. the commission of a criminal offence or dishonesty, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty or serious failures in the administration of a public body.

This constitutes strong and persuasive guidance to States on the content of freedom of information legislation.

### ***Limitations on the right to access to information***

34. Under international human rights standards, the exercise of the right to freedom of information is subject to certain restrictions. Individual requests for information from public authorities must be met unless the public body can demonstrate that the refusal falls within a limited scope of legitimate exceptions. Namely, freedom of information may be subject to restrictions when those restrictions meet the requirements stipulated in Article 19(3) of the ICCPR:

The exercise of the rights [to freedom of expression and information] may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- a. For respect of the rights or reputations of others;
- b. For the protection of national security or of public order (ordre public), or of public health or morals.

35. The requirements of Article 19(3) translate into a three-part test, whereby a public body must disclose any information which it holds and is asked for, unless:

- The information concerns a legitimate, protected interest listed in the law;
- Disclosure threatens substantial harm to that interest; and
- The harm to the protected interest is greater than the public's interest in having the information.<sup>16</sup>

Each part of the three part test is further elaborated below in the Analysis section.

#### *Legitimate protected interest*

36. Freedom of information laws must contain an exhaustive list of all legitimate interests on which a refusal of disclosure can be based. This list should be limited to matters such as law enforcement, the protection of personal information, national security, certain commercial interests, public or individual safety and protecting the effectiveness and integrity of government decision-making processes.<sup>17</sup>

37. Exceptions should be narrowly drawn to avoid capturing information, the disclosure of which would not harm a legitimate interest. Furthermore, exceptions should be based on content, rather than on the type of document sought. In addition, exceptions should, where relevant, be time-limited. For example, the justification for classifying information on the basis of national security may well disappear after a specific national security threat subsides.<sup>18</sup>

---

<sup>16</sup> ARTICLE 19's Principles, *supra* note 3, Principle 4.

<sup>17</sup> See for example Articles 38-45 of the Draft African Model Law for African Union Member States

<sup>18</sup> ARTICLE 19's Principles, *supra* note 3, Principle 4.

*Substantial harm*

38. Once it has been established that the information falls within the scope of a listed legitimate aim, it must be established that disclosure of the information would cause substantial harm to that legitimate aim. Therefore this part of the test holds that simply because the information falls within the scope of a listed legitimate interest, does not mean non-disclosure is justified. Otherwise a class exception would be created that would seriously undermine the free flow of information to the public. Instead, the public body must demonstrate that the disclosure of the information would cause substantial harm to the protected interest.<sup>19</sup>

*Harm Outweighs Public Interest Benefit in Disclosure*

39. The third part of the test requires the information holder to consider whether, even if disclosure of information causes serious harm to a protected interest, there is nevertheless a wider public interest in disclosure. For instance, in relation to national security, disclosure of information exposing instances of bribery and corrupt practices may concurrently undermine defence interests. However, the disclosure may lead to eradicating corruption and therefore strengthen national security in the long-term. In such cases, information should be disclosed notwithstanding that it may cause harm in the short term.<sup>20</sup>

40. If applied properly, the three part test would rule out all blanket exclusions and class exceptions as well as any provisions whose real aim may be to protect the government from harassment or exposure, to prevent the exposure of wrongdoing, to avoid the concealment of information from the public or to preclude entrenching a particular ideology.

## **V. Review of the present case**

41. ARTICLE 19 submits that these principles and the established three-part test should be applied by the High Court in the review of the petitioner's request.

***Access to information held by public companies***

42. In the present case, the petitioner's request for information of public companies (copies of internal communications, board minutes, letters, reports and all documents relating to any contracts between the 1<sup>st</sup> and 2<sup>nd</sup> respondent and the Great Wall Drilling Company of China, the Green Energy Group AS of Norway, and its local agent Symba Energy) were refused. ARTICLE 19 comments that the respondents should follow up the regime for access to information set by above mentioned standards since the 1<sup>st</sup> respondent is a company under the control of the state (the state is a major shareholder of the company). The 1<sup>st</sup> respondent was incorporated on 1 February 1954 under the Companies Act (Cap 486) of the Laws of Kenya.

---

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*

It was converted into a public company with limited liability pursuant to a special resolution passed on 27 July 1955. Subsequently, on 19 January 1998, the 1<sup>st</sup> respondent changed its name to Kenya Electricity Generating Company Limited, following the reforms implemented by Government of Kenya in the energy sector. Prior to the initial public offering, the 1<sup>st</sup> respondent was 100% owned by the Government, till the Government sold 30% of its share capital in May 2006. The 1<sup>st</sup> respondent has to comply with the State Corporations Act (Cap. 446 of the Laws of Kenya) that defines "a company incorporated under the Companies Act owned or controlled by GoK or a State Corporation" as a State Corporation – the 1<sup>st</sup> respondent is deemed to remain a State Corporation and is subject to the provisions of this Act. This includes the control of certain powers of the 1<sup>st</sup> respondent by the Minister responsible for the state corporation (i.e. Minister of Energy) and the Treasury.

43. ARTICLE 19 also notes that the recognition that state owned companies (either wholly or partially) fall under the access to information regimes is supported by a number of domestic laws, which obliged state-owned companies to provide the information similar to those requested by the petitioner. For example:<sup>21</sup>

- In Uganda, the Access to Information Act, 2005, also applies to all information and records of "statutory corporations."<sup>22</sup>
- In Angola, the *Law on Access to Documents held by Public Authorities*<sup>23</sup> is also applicable on "statutory societies and other entities that exercise public authority in terms of the law."
- The Freedom of Information Act, 2010 of Liberia<sup>24</sup> also provides for access to information held by private entities exercising public functions.
- In Bulgaria "legal entities which are funded from the consolidated budget" should respond to requests for information, "to the extent of that funding;"
- In the UK, publicly-owned corporations are among the public bodies defined in the freedom of information law as having the responsibility to provide information;

---

<sup>21</sup>The information on FOI law, except where specifically indicated, is derived from Freedom of Information A Comparative Legal Survey, Second Edition, Revised and Updated, UNESCO: Paris, 2008, available at: [http://portal.unesco.org/ci/en/files/26159/12054862803freedom\\_information\\_en.pdf/freedom\\_information\\_en.pdf](http://portal.unesco.org/ci/en/files/26159/12054862803freedom_information_en.pdf/freedom_information_en.pdf).

<sup>22</sup> The Access to Information Act, 2005; available at [http://www.freedominfo.org/documents/uganda\\_ati\\_act\\_2005.pdf](http://www.freedominfo.org/documents/uganda_ati_act_2005.pdf).

<sup>23</sup> The Law on Access to Documents held by Public Authorities, No. 11/02 of 16 August 2002; available at <http://www.rti-rating.org/pdf/Angola%20Law.pdf>.

<sup>24</sup> Freedom of Information Act, 2010; available at <http://www.liberianembassyus.org/uploads/documents/Liberia%20Freedom%20of%20Information%20Act%202010x.pdf>.

- In Armenia the Access to Information law applies to the activities of all organizations financed from the state budget;
- In Estonia, companies of which the state or local government is a participant are deemed to be equivalent to holders of information with respect to information concerning the use of funds allocated from the state or local government budget;<sup>25</sup>
- In Bosnia and Herzegovina, every body that is either owned or controlled by a public authority is subject to disclosure;<sup>26</sup>
- In the Republic of Macedonia; "information holders" under the freedom of information law refer among others to public enterprises, and to legal and natural persons performing public competencies and activities of public interest determined by law;<sup>27</sup>
- Every citizen of Georgia has the right to have access to the information on him (her) existing in state (treasury) enterprises;<sup>28</sup>
- In Serbia, legal persons founded by or funded wholly or predominantly by a state body are obliged to disclose information;<sup>29</sup>
- As of 2009, in Sweden all state-owned companies are required to produce annual sustainability reports including information about their finances and business activities, and to publish the reports online;<sup>30</sup>
- In Kyrgyzstan, state bodies defined in the FOI law also include bodies financed from the State budget. Similarly, in India the definition of a "public body" in the national freedom of information law includes "any body owned, controlled or substantially financed by government, including a non-governmental organization;"
- Another broad definition of public bodies has been adopted in Israel, where the 1998 FOI law provides for broad access to records held by government-owned corporations.

---

<sup>25</sup> See Estonia's Public Information Act, available at <http://www.legislationline.org/topics/country/33/topic/3>.

<sup>26</sup> See B&H's Public Information Act, available at <http://www.legislationline.org/topics/country/40/topic/3>.

<sup>27</sup> See Republic of Macedonia's Law on Free Access to Information of Public Character, available at <http://www.legislationline.org/topics/country/31/topic/3>.

<sup>28</sup> See Georgia's Law on Freedom of Information, available at <http://www.legislationline.org/topics/country/29/topic/3>.

<sup>29</sup> See Serbia's Law on Free Access to Information of Public Importance, available at <http://www.legislationline.org/topics/country/5/topic/3>.

<sup>30</sup> See Guidelines on external reporting by state-owned companies, available on the Internet at <http://www.sweden.gov.se/content/1/c6/09/41/25/56b7ebd4.pdf>.

- Likewise, in Jamaica, any government corporation in which the government or an agency thereof has a 50% or greater interest is subject to the country's access to information regime.
  - Australia's Open Government Information Bill 2009 extends open government to include state-owned corporations within its remit;<sup>31</sup>
  - In the USA the term "agency", which refers to the public bodies under an obligation to disclose, includes, among others, "any Government corporation" and "Government controlled corporation."
44. Additionally, the same conclusion can be reached based on the review of a comparative jurisprudence. For example:
- In several recent cases, the European Court of Human Rights (*hereinafter* "European Court") determined that refusals by public bodies to grant access to information of public interest constituted an interference with applicants' right to freedom of expression. For example, in the case *Sdružení Jihočeské Matky vs. the Czech Republic*, the European Court examined the application by an ecological NGO whose request for access to documents and plans concerning a nuclear power station was denied by the Czech authorities.<sup>32</sup>
  - In the case, *Hungarian Civil Liberties Union vs. Hungary*, the ECtHR examined the denial by the Hungarian Constitutional Court of a request by the Hungarian Civil Liberties Union to access a complaint for abstract review of amendments to the Criminal Code concerning certain drug-related offences.<sup>33</sup> In both case the European Court deemed the denial as an interference with the applicants' right to receive information as guaranteed by the European Convention.
  - In the South African case, *Mittal Steel South Africa Ltd (Formerly ISCOR Ltd) v. Hlatshwayo*<sup>34</sup> the Supreme Court of Appeal for South Africa considered whether the company Mittal Steel South Africa Ltd (*hereinafter* "Mittal") was a public body for the purposes of the Promotion of Access to Information Act 2 of 2000 (*hereinafter* "the PAIA"). Mittal had at one time been a state-owned company (then named Iscor) that was then privatized. The requester - a "determined student," sought the records as a part of his academic study of state corporations in the 'old' South Africa. In a well-reasoned judgment, Judge Conradie observed that nowadays when the privatization of public

---

<sup>31</sup> Available on the Internet at: [http://www.dpc.nsw.gov.au/\\_\\_\\_data/assets/file/0020/45137/OGI\\_Bill.pdf](http://www.dpc.nsw.gov.au/___data/assets/file/0020/45137/OGI_Bill.pdf)

<sup>32</sup> See *Sdružení Jihočeské Matky vs. the Czech Republic*, Decision of 10 July 2006, no. 19101/03.

<sup>33</sup> See *Hungarian Civil Liberties Union vs. Hungary*, Judgment of 14 April 2009, No.37374/05.

<sup>34</sup> See *Mittal Steel South Africa Ltd (Formerly ISCOR Ltd) v. Hlatshwayo* [2006] SCA 94 (RSA)

services and utilities is a common practice, private bodies may perform what is traditionally considered as a public function without being subject to control from the government's side and despite this may still be classified as public bodies. In finding that Iscor not only was under the control of the state at the time but was performing a public function in providing South African industry with a supply of government-regulated steel, the SCA made clear that the term "public bodies" within the meaning of the PAIA included previously public bodies that had been privatized.

- Moreover, in *Transnet Ltd and Another v SA Metal Machinery Co (PTY) Ltd*,<sup>35</sup> the Supreme Court of Appeal of South Africa delivered another progressive decision on the extent of an exemption from the freedom of information regime. The case concerned the disclosure of the price and composition of a winning bid for a contract with a state-owned transportation company. The Court held that the confidentiality clause in the tender at issue does not carry through after award of tender as a matter of interpreting PAIA s 37(1) (a). Further, the Court held that the pricing schedule used in the submitted tender would not probably cause harm in terms of PAIA s 36 (1) (c)).
- In Brazil case, *Labor Party and other members of the State Legislature v. Government of the State of Paraná*,<sup>36</sup> the Superior Court of Justice ruled that the requested agreements concluded between the state and private company were not confidential and should have been disclosed to the public. The case concerned the request of the Labor Party and some parliamentarians of the State of Parana in 1997 for access to documents regarding the agreements concluded between the State of Parana and Renault do Brasil Automoveis S/A. These agreements concerned the benefits offered by the government for the installation of the company's facilities in the state capital, Curitiba. The Superior Court of Justice decided that access to the requested documents should be granted and they should not be classified as confidential under the existing legislation. According to the Court the disclosure was necessary in order to ensure the transparency of agreements executed by the public authorities. As the Court noted there was public interests in having access to the requested agreements.

### ***Limitations on the petitioner's right***

45. As noted above, under international standards, restrictions of the right to freedom of expression must be assessed against the free part test. ARTICLE 19 submits that the refusal of the 1<sup>st</sup> and 2<sup>nd</sup> respondent to provide the information to the petitioner must fall under one of the permissible restrictions recognized in Article 19 para 2. This list should be limited to matters such as law enforcement, the protection of personal information, national security, certain commercial interests, public or

---

<sup>35</sup> See *Transnet Ltd and Another v SA Metal Machinery Co (PTY) Ltd* [2006] (6) SA 285 (SCA)

<sup>36</sup> See Recurso Ordinário em MS No. 10131 PR (1998/0062760-0).

individual safety and protecting the effectiveness and integrity of government decision-making processes. Moreover, the restrictions must be narrowly interpreted and requires that state authorities convincingly establish that any restriction on freedom of expression pursue one of the legitimate aims.

46. Even if it was established that the requested information falls under one of the permissible restrictions, ARTICLE 19 points out that the denial of the access to information must be "necessary in a democratic society" means that there must be a "pressing social need" for the restriction. The 1<sup>st</sup> respondent (the state owned company) bears the burden of showing that the disclosure of the information would cause substantial harm to that legitimate aim. The reasons given to justify the restriction must be "relevant and sufficient", and the restriction must be proportionate to the aim pursued.
47. ARTICLE 19 submits that the assessment, whether the reasons given by the respondents on the refusal to provide information are necessary, should take account of the principle of maximum transparency of all information. As noted above, the principle of maximum disclosure establishes a presumption that all information held by public bodies (including state owned companies) should be subject to disclosure, and that this presumption may be overcome only in very limited circumstances. This principle encapsulates the basic rationale underlying the very concept of freedom of information. It is reiterated that for purposes of disclosure of information, the definition of 'public body' should include all branches and levels of government, elected bodies, bodies which operate under a statutory mandate, nationalised industries and public corporations, non-departmental bodies or quangos (quasi non-governmental organisations), judicial bodies, and private bodies which carry out public functions (such as maintaining roads or operating rail lines).<sup>37</sup> In addition, under international standards, the disclosure of the information can be withheld if it would cause substantial harm to the protected interest. However, even if there was such a possibility of substantial harm established, it might be possible that there is a wider societal interest in disclosure. In such cases, information should be disclosed notwithstanding that it may cause harm in the short term.
48. In this case, it might be argued that the information requested falls under certain commercial interests that might be withheld from disclosure and that the disclosure would cause substantial harm that is not in public interest. However, ARTICLE 19 notes that under international freedom of information principles, such exceptions should be considered, formulated and/or applied only with regard to the terms of the aim and not based on a simple "confidentiality" approach. It is important to note however that such application should be compatible with the public interest and the need for public scrutiny of procurement processes. Judicial decisions with regard to the disclosure of commercial information are determined

---

<sup>37</sup>See ARTICLE 19 Principles on Freedom of Information Legislation, *ibid.* **Error! Reference source not found..**

on a case by case basis taking into consideration factors such as: the nature and level of competition, circumstances and purposes for which the information was submitted to a public authority, stage of commercial transaction or activity among others. These and all considerations are subjected to the public interest override which in freedom of information principles, holds that information should be disclosed in any circumstance that the benefits of disclosure outweigh the harm of disclosure. In this case, ARTICLE 19 suggests that the High Court assess the importance of the information disclosure requested in the light of fighting corruption.

## VI. Conclusions

49. As outlined in this submission, international and regional standards on freedom of information impose strict criteria on any limitations to this right to ensure its widest enjoyment and fulfilment of its purpose. ARTICLE 19 respectfully requests the Honourable High Court (Constitutional and Human Rights Division) to take these standards into account and consider whether the right of information of the Petitioner has been legitimately limited.

50. This is the opinion of ARTICLE 19, prepared by the undersigned, and is subject to the decision of this Honourable Court.

Dated: 18 May 2012

Respectfully submitted,

For ARTICLE 19, Global Campaign for Freedom of Expression

.....  
Barbora Bukovska  
Senior Director for Law and Policy  
Kenya/  
ARTICLE 19

.....  
Henry Maina  
Director, ARTICLE 19  
Eastern Africa