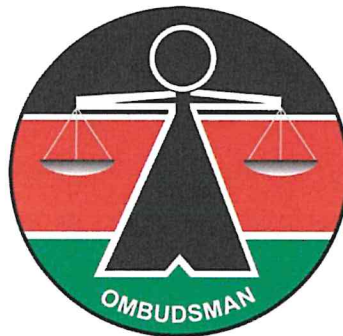


THE COMMISSION ON ADMINISTRATIVE JUSTICE

Office of the Ombudsman



Hata Mnyonge ana Haki

SURVEY ON THE STATUS OF PROACTIVE DISCLOSURE OF INFORMATION BY PUBLIC BODIES

31 JANUARY 2019




FOREWORD

Access to information is one of the fundamental tenets of our governance system. It is not only a fundamental right, but it also facilitates the realisation of other rights and freedoms thereby enhancing the quality of governance. Specifically, access to information empowers the public to effectively participate in governance, and promotes open and accountable governance. The implementation of the right of access to information bridges the gap between policy formulation and implementation, and builds trust in government by curbing maladministration, corruption and other malpractices that usually thrive in secrecy. This is critical in the delivery of public services, transparent and accountable governance, and sustainable development.

The enactment of the Access to Information Act in 2016 to operationalise the provisions of Article 35 of the Constitution was a milestone in the governance reform processes in Kenya. Notably, the Act confers enforcement and oversight functions on the Commission on Administrative Justice (Office of the Ombudsman). Pursuant to the foregoing, the Commission undertook a survey to determine the level of compliance by public entities at the national and county levels with the requirements of proactive disclosure under section 5 of the Act. The focus on proactive disclosure was necessitated by the need for active transparency and the legal requirement under the Act whereby public entities voluntarily and continually avail certain types of information without formal application or prompting by the public. Indeed, this requirement became effective from 21st September 2017.

Generally, the survey has revealed low levels of compliance with the requirements of proactive disclosure of information by public entities. In addition, it has revealed the existing gaps in the implementation of the Act



which would require appropriate interventions by the Commission and other stakeholders. We are confident that the findings and recommendations of the survey report will cause compliance and catalyse public debate on implementation of proactive disclosure of information in Kenya. We note that the release of the report has come at a time when there is public debate on open governance, including the Executive Order No. 2 of 2018 on public procurement which we believe will go a long way in complementing our efforts.

I am delighted to present this report to the public and call upon all stakeholders to partner with us in ensuring open governance through the implementation of the Act.

Signed this 31st Day of January 2019



**HON. FLORENCE KAJUJU, MBS
CHAIRPERSON OF THE COMMISSION &
SECRETARY GENERAL OF THE AFRICAN
OMBUDSMAN AND MEDIATORS ASSOCIATION**



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EXECUTIVE SUMMARY

This survey provides an overview on the status of proactive disclosure of information by public entities in Kenya as required under section 5 of the Access to Information Act, 2016 (the Act). The survey covered sampled public entities, including the 47 counties, 30 State Corporations, and 22 National Government Ministries, the Office of the President and the Office of the Attorney General. The survey data was informed by analysing information gathered through checking the sampled public entities' websites as well as their Public Procurement Information Portal (the Portal).

Chapter One makes an introduction of the survey. It captures the contextual background, statement of the problem and the objective. Chapter Two focuses on the research methodology by exploring the research design, scope of the survey, research instruments, data collection and data analysis and the coding system. Data analysis and findings are the subject of Three. It includes the parameters used in the survey which include information about a public entity (what we do and who we are); public entity's decision making procedures (how we make decisions); public entity's resource expenditure (how we spend resources); public entity's policies and procedures (our policies and procedures); and the public entity's public procurement information.

The survey found that that 97% of the surveyed state corporations fully disclosed information about themselves whereas 3% partially disclosed such information. Further, 47% of them disclosed information on how they make decisions, 23% partially disclosed while 30% had not disclosed. Additionally, only a paltry 3% fully disclosed information on how they use resources, 50% partially disclosed while 47% had not disclosed. In relation to the parameter of policies and procedures, 63% fully disclosed, 20% partially and 17% had not disclosed. Finally, on public



procurement information, 30% fully disclosed, 60% partially disclosed and 10% had not disclosed.

In relation to National Government Ministries, they had all complied with the requirement to share information about who they are and their respective mandates. On the parameter of 'how we make decisions', only a paltry 14% fully disclosed, 18% partially disclosed while 68% had not disclosed. Regarding resource expenditure, no Ministry had fully complied with this requirement. Only 27% had partially disclosed while a whopping 73% had not disclosed. On the parameter of disclosing their policies and procedures, 36% fully disclosed, 55% partially disclosed while 9% had not disclosed. In relation to public procurement, 23% fully disclosed, 54% partially disclosed while 23% had not disclosed.

In relation to County Governments, 72% fully disclosed information about themselves, their areas of jurisdiction and mandates, 23% partially disclosed while 4% had not disclosed. On the parameter of how they make decisions, only a paltry 2% fully disclosed, 23% partially disclosed while a staggering 75% had not disclosed. In relation to utilisation of public resources, no County Government fully disclosed, 77% partially disclosed while 23% had not disclosed. On the policies and procedures, only 19% fully disclosed, 47% partially disclosed while 34% had not disclosed. Regarding public procurement, 19% fully disclosed, 55% partially disclosed while 36% had not disclosed.

Overall, the level of compliance with proactive disclosure stood at 52%. Further, state corporations had the highest compliance rate at 64% followed by National Government Ministries at 50% while County Governments had the least compliance rate of 43%. In terms of the parameters, the most disclosed information was on who the entities are and their respective mandates at 92%; policies and procedures at 57%; public procurement of goods and services at



46%; how resources under their custody are utilised at 35% and the least disclosed information was on how decisions are made at 29%.

The findings show that public institutions are largely opaque in their operations. Further, County Governments have not performed well on proactive disclosure of information. In light of this, the Commission has made a number of recommendations to bridge the existing gaps. Notably, public institutions have been directed to immediately publish information on their decision making processes, financial statements and other relevant documents on expenditure of public resources, and any other information requiring proactive disclosure under the Act; disseminate information in appropriate formats and languages; and mainstream access to information in the induction of newly recruited staff. Moreover, County Assemblies have been implored to pass customized legislation on access to information to their circumstances in order to strengthen open governance at the county level; and the Head of Public Service urged to take appropriate administrative action against accounting officers who fail to comply with the proactive disclosure standards.



CHAPTER ONE

1.1 Contextual Background

It is now more than three years since the Act was enacted. The Act breathed into life Article 35 of the Constitution of Kenya 2010 which guarantees every citizen the right to information held by the State, and information held by another person required for the exercise or protection of any right or fundamental freedom. In essence, the Act provides a framework for citizens to access information, government to provide information, and for the Commission to provide oversight. Primarily, the Act is facilitative to public institutions in two ways. First, it guides them on how to proactively disclose information in their possession, and, secondly, on how to handle information requests from citizens.

For the last two years, the Commission put in place infrastructure to facilitate and promote implementation of the Act. In this regard, the Commission leveraged on Performance Contracting (under which it is responsible for the indicator “Resolution of Public Complaints”), to ensure appointment of Information Access Officers and capacity carried out building on obligations of public entities under the Act. So far, 3,580 public officers drawn from Ministries, Departments and Agencies as well as county governments have been trained. In the same vein, 44 county governments have appointed Information Access Officers.

In light of the foregoing, the Commission conducted a survey to establish the status of compliance with the provisions of the Act. Specifically, the survey focused on proactive disclosure as stipulated in section 5. As the enforcer of the Act, it was important for the Commission to determine levels of compliance with the said provisions.



1.2 Statement of the Problem

Public entities, including county governments, are required to actively disclose certain information and update it on a regular basis in line with the Act. Broad areas of proactive disclosure include details about an organisation and its work; decision making procedures; utilisation of resources; policies and procedures; a guide on information held by the institution; and information on contracts.

Despite these elaborate provisions, the Commission has observed that citizens continue to seek for information that should otherwise be availed without prompting. This is evident from complaints the Commission has received, and observations on social media. In addition, corruption cases have escalated in recent years bolstering the need to disclose information. Corruption thrives in secrecy, thus the import of access to information cannot be over-emphasised. Indeed, the issuance of Executive Order Number 2 of 2018 on the procurement of public goods, works and services was testament to the need to disclose information proactively. It should be noted that the Executive Order covers only a fraction of the areas requiring proactive disclosure.

1.3 Objective

The objective of the survey is to determine the level of compliance with the requirements of proactive disclosure under the Act, 2016.



CHAPTER TWO

RESEARCH METHODOLOGY

This chapter presents the methodology that was employed in the survey.

2.1 Research Design

Descriptive research design was used as it was most appropriate considering the survey was about fact gathering; it sought to obtain information that describes existing phenomena or situation.

2.2 Scope

The survey covered the 47 county governments, the 24 National Government Ministries and 30 state corporations selected purposively. In respect to time, the survey was carried out between January 15 and 23, 2019.

2.3 Research Instrument

A checklist - of five parameters that guide proactive disclosure as provided under section 5 of the Act, 2016 - was the basis of collecting quantitative and qualitative data from the websites of institutions surveyed and the Portal. The five parameters were: what we do and who we are; how we make decisions; how we spend resources; our policies and procedures; and public procurement information.

2.4 Data Collection

A desktop survey of websites from the selected sample and the Portal was carried out, and information on whether or not the institution whose website was being surveyed had satisfied each parameter recorded as at the time of the survey.



2.5 Data Analysis

The data was collated and analysed, and presented in narrative and in form of pie charts and graphs based on the five parameters. For purposes of data analysis, the entities were divided into three broad categories, namely: State Corporations, National Government Ministries, and County Government. The extent of disclosure was put in three levels and numerical values assigned as captured below.

| Level of Compliance | Numerical Value |
|----------------------------|------------------------|
| Fully disclosed | 2 |
| Partially disclosed | 1 |
| Not disclosed | 0 |

CHAPTER THREE

DATA ANALYSIS AND FINDINGS

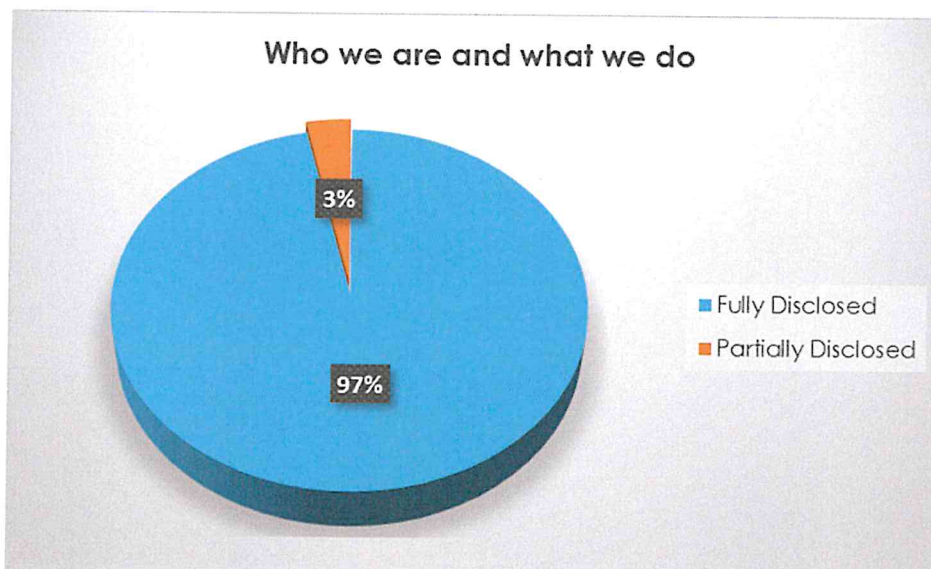
3.1 Introduction

This Chapter presents the data analysis and findings of the survey. The checklist on five parameters of proactive disclosure was examined and the data gathered presented with the aid of pie charts, percentages and graphs. The data is both quantitative and qualitative.

3.2 State Corporations

The survey examined the information on the websites of the 30 sampled state corporations, and also the corresponding information on the Portal based on the parameters. The findings are presented in Figure 1.1 below.

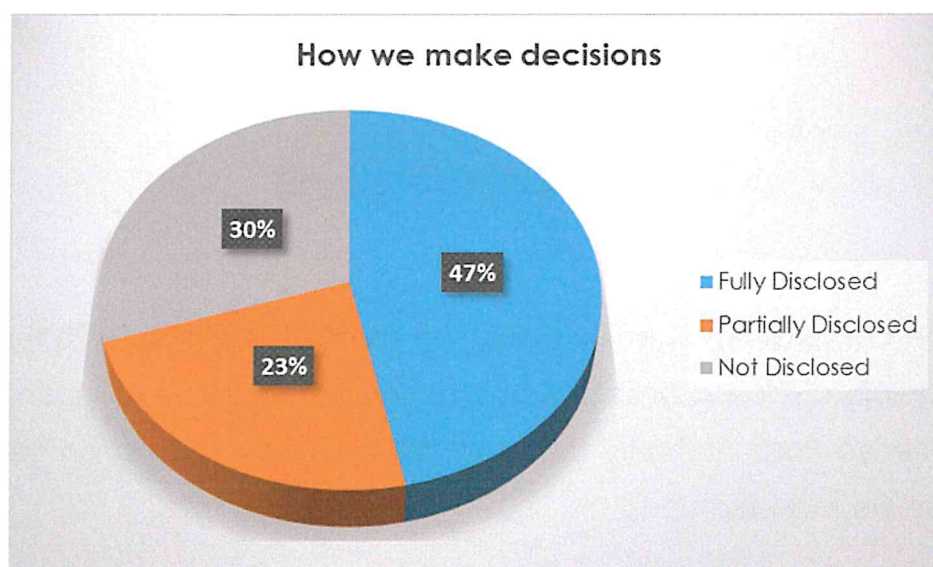
Figure 1.1: Who we are and what we do



On this parameter, 97% of the surveyed entities fully disclosed information whereas 3% partially disclosed. The high compliance rate could be due to the

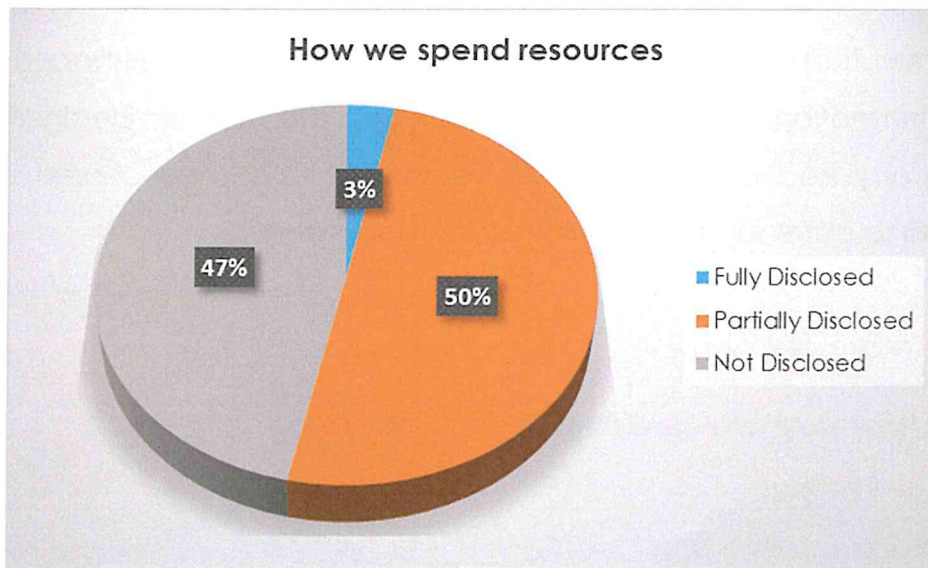
fact that the information required under this parameter is usually considered as basic since it is general information about an organisation and its mandate. It is worthwhile to note that some of the entities surveyed had enhanced accessibility of information held by them. Notably, the Kenya Electricity Transmission Company had uploaded audio versions of its service charter in English and Kiswahili to cater for persons with visual impairment.

Figure 1.2: How we make decisions



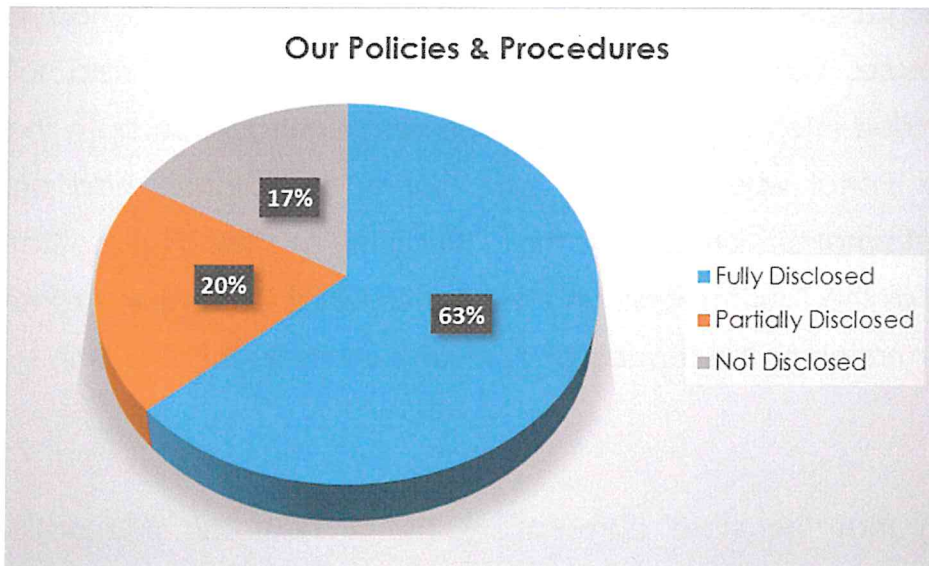
Whereas 47% of the state corporations had disclosed their decision making processes, 23% partially disclosed and 30% had not disclosed any information.

Figure 1.3: How we spend resources .



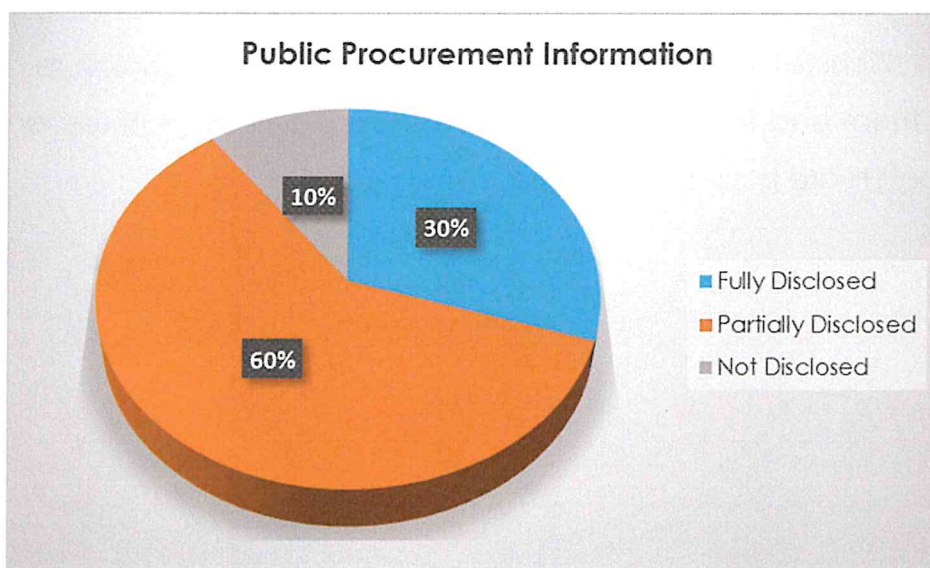
Only 3% of the state corporations (1 entity out of the sample) complied with this parameter, 50% partially disclosed while 47% had not disclosed. It is worth noting that it is only the Kenya Ports Authority that had disclosed information on the salary scales of its senior management.


Figure 1.4: Our policies and procedures



In relation to this parameter, 63% of state corporations fully disclosed the information on their policies and procedures, 20% partially disclosed while 17% had not disclosed.

Figure 1.5: Public procurement information





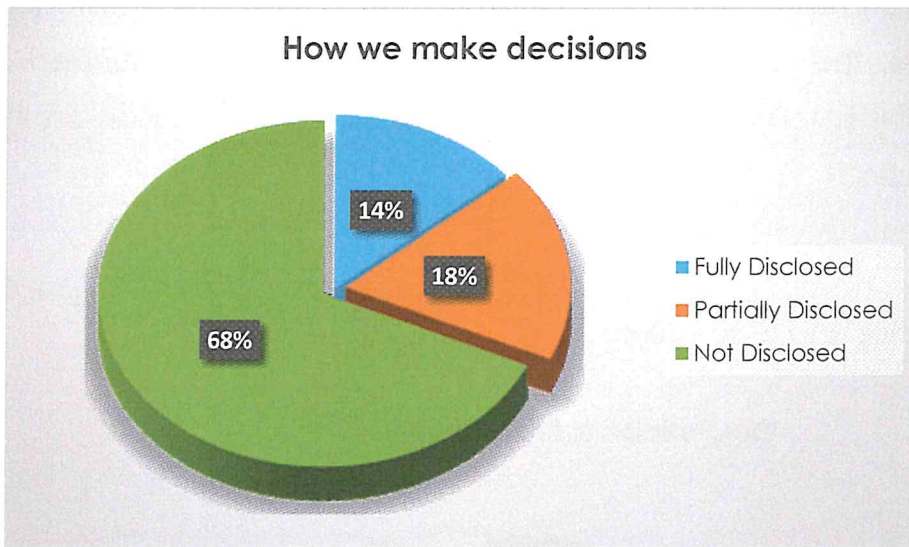
In relation to this parameter, 30% of state corporations had fully disclosed the information on their procurement, 60% had partially disclosed while 10% had not made any disclosure. The findings revealed that entities which had fully complied had availed information of the tenders and contracts on both their websites and the Portal whereas those with partial compliance had only provided such information on either their websites or the Portal. State corporations such as the Tourism Fund and the Kenya Seed Company had not disclosed any information of the tenders or contracts on their websites or in the Portal.

It is worth noting that the state corporations mostly disclosed information regarding the advertised tenders in comparison with those awarded. For instance, Kenya Power disclosed 198 advertised tenders for 2018, but disclosed only 44 awarded contracts for the same year.

3.3 National Government Ministries

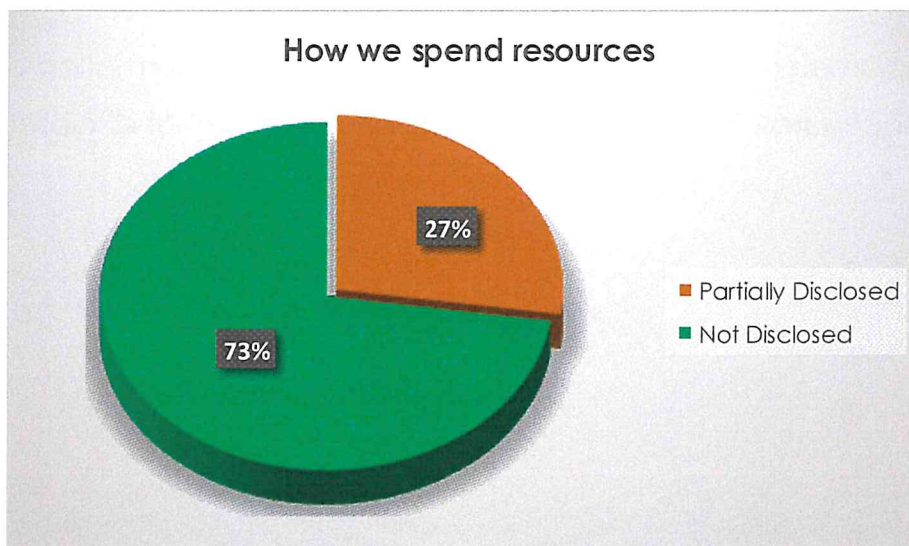
National Government Ministries - including the Office of the Attorney General and the Presidency - were surveyed to determine their level of compliance with the requirements of proactive disclosure of information under the Act. Generally, it was found that all Ministries had complied with the requirement of disclosure of information about them and their respective mandates. The findings in respect of the other parameters are presented below:

Figure 1.6: How we make decisions



It was found that only 14% of the Ministries fully disclosed their decision making processes and procedures. Further, 18% partially disclosed while 68% had not disclosed.

Figure 1.7: How we spend resources



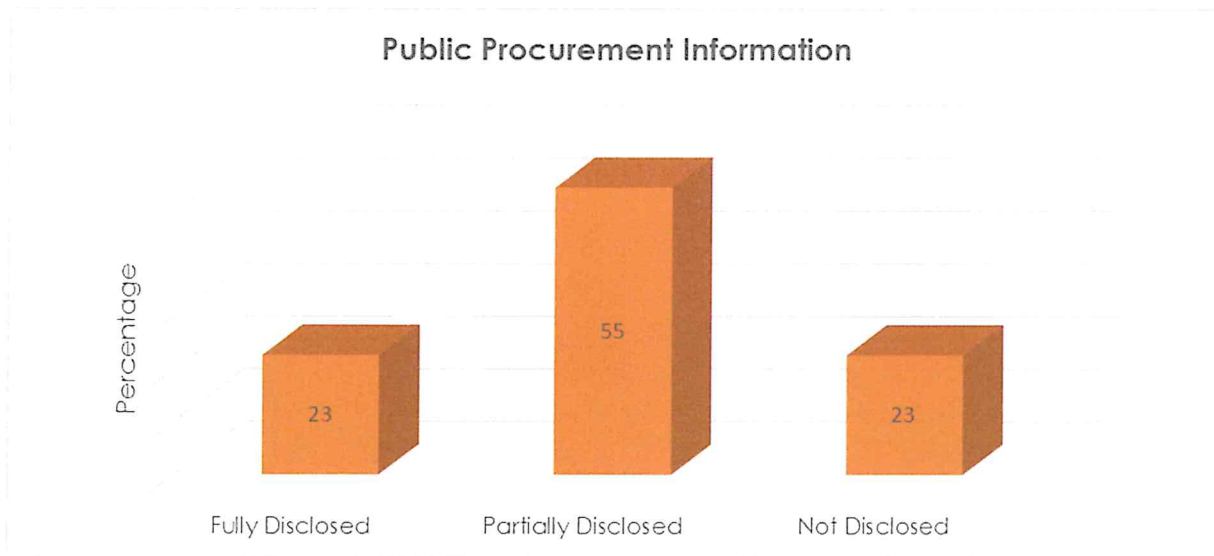
No Ministry had fully complied with this parameter. Only 27% partially disclosed while a whopping 73% had not disclosed. It is worth noting that even in instances of partial disclosure, the information published related to projects funded or planned by the Ministries. Further, no Ministry had disclosed information on the salaries of their officers.

Figure 1.8: Our policies and procedures



In relation to this parameter, 36% of the Ministries fully disclosed information on their policies and procedures, 55% partially disclosed while 9% had not disclosed.

Figure 1.9: Public Procurement Information

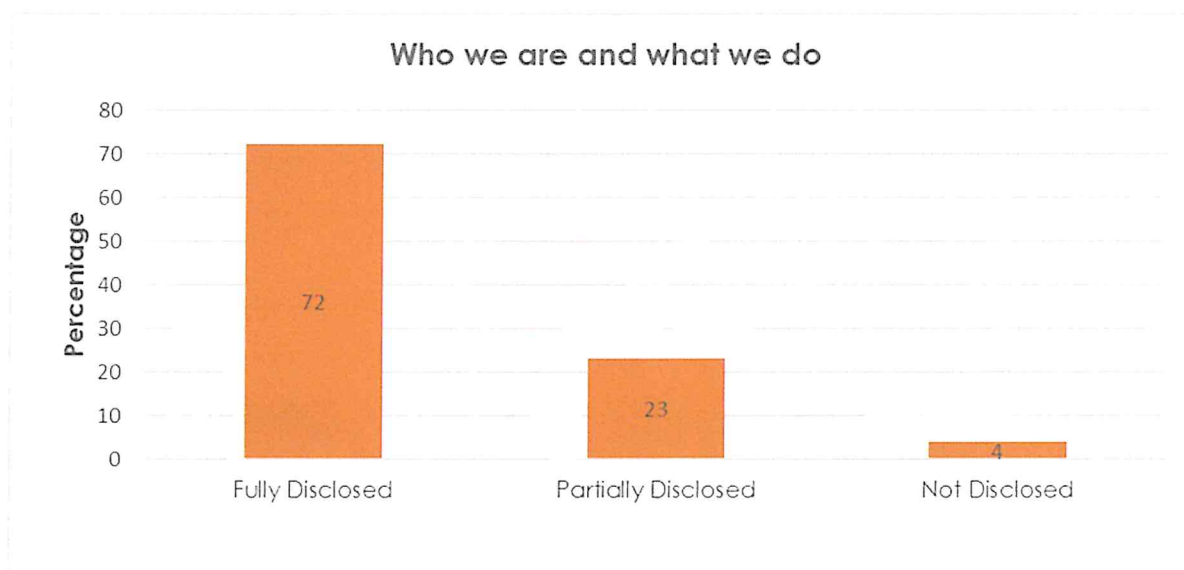


In respect to public procurement information, 23% of the Ministries had fully disclosed, 54% partially disclosed while 23% had not disclosed.

3.4 County Governments

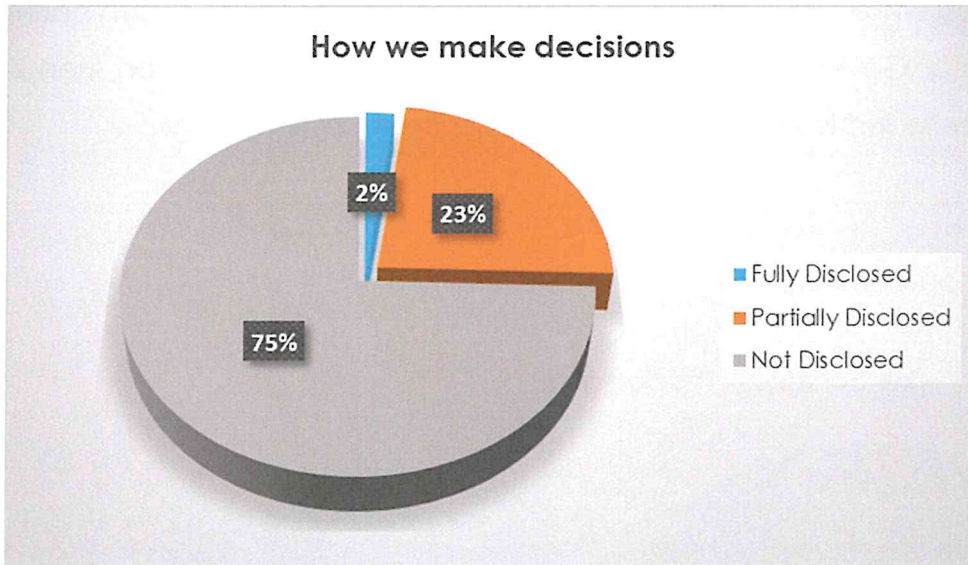
The survey covered all the 47 county governments. At the time of the survey, however, the websites of Nairobi City and Elgeyo-Marakwet County Governments were not available. The findings are presented below.

Figure 2.0: Who we are and what we do



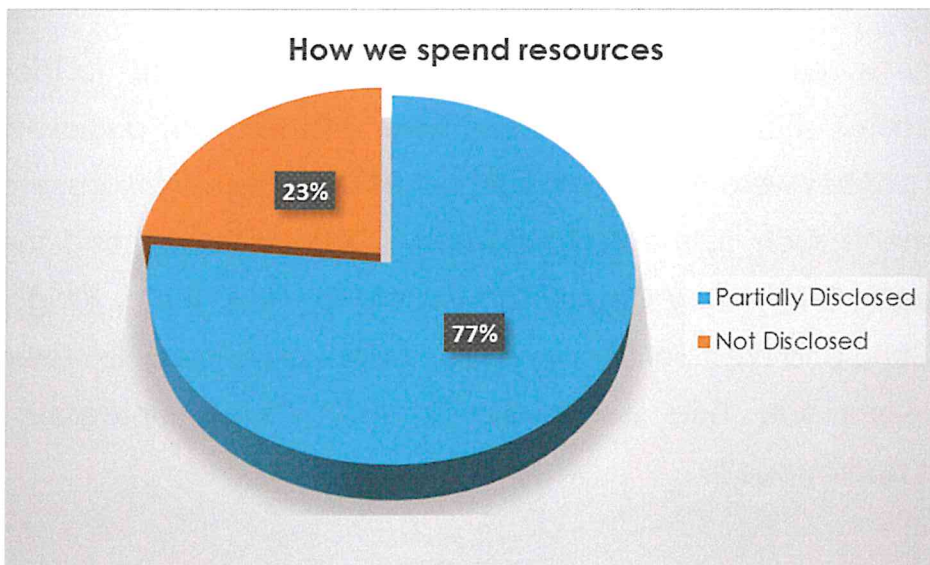
Just like in other two categories, majority of County Governments, 72%, had fully disclosed information under this parameter, 23% partially disclosed while 4% had not disclosed. It is worth noting that Laikipia County Government has an embedded Google Translation Link on its website that enables the public to access information in Kiswahili. Another notable observation is that of Kirinyaga County Government that has an online complaints platform embedded on its website.

Figure 2.1: How we make decisions



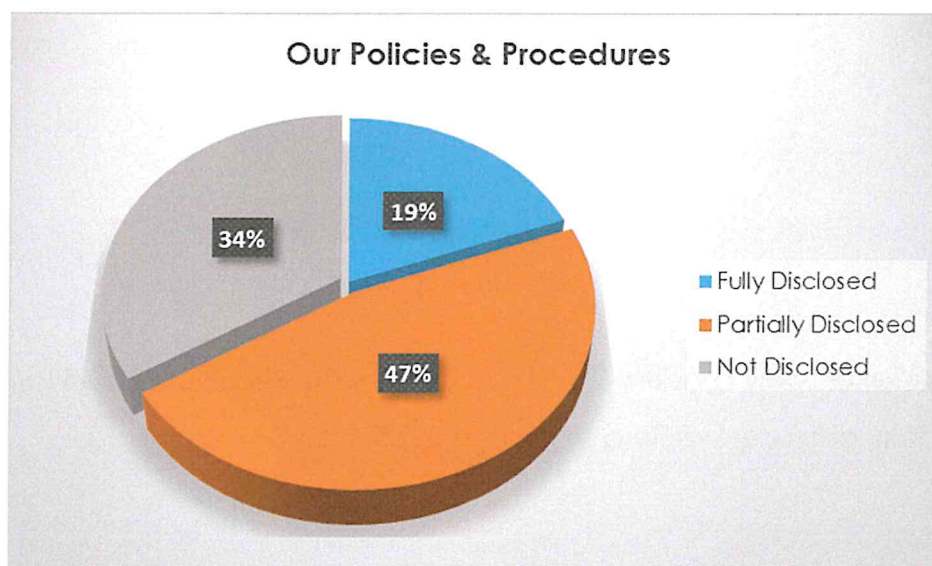
Regarding this parameter, only a paltry 2% of the County Governments had fully disclosed, 23% partially disclosed while a staggering 75% had not disclosed.

2.2: How we spend resources



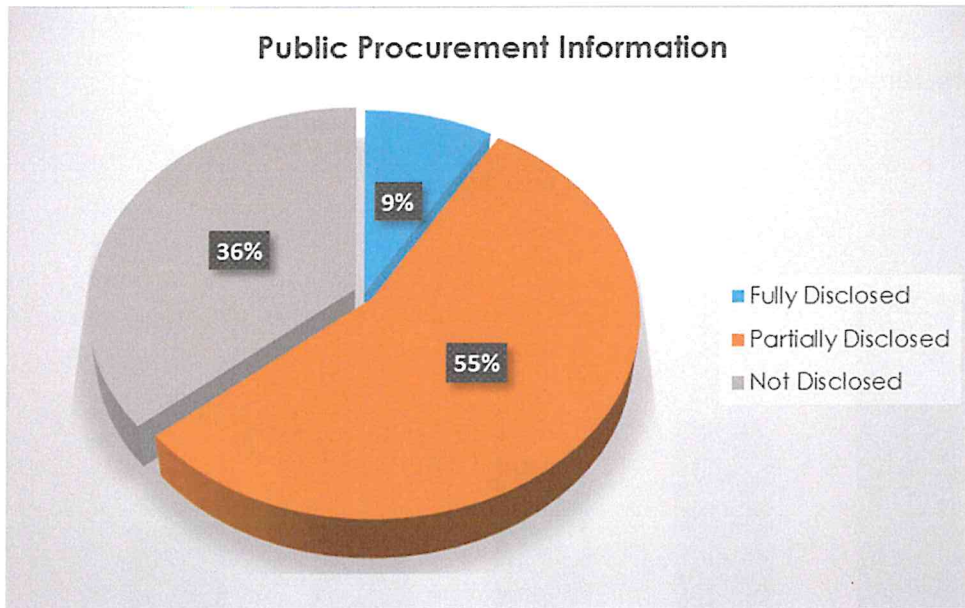
Under this parameter, no County Government fully disclosed information. 77% partially disclosed while 23% had not disclosed any information. It is worth noting that some County Governments had published their budgets in citizen friendly versions. These included Nyamira, Nakuru, Laikipia, Baringo and Vihiga.

2.3: Our policies and procedures



Only 19% of County Governments fully disclosed information in regards to their policies and procedures, 47% partially disclosed while 34% had not disclosed. The most disclosed policies were the County Integrated Development Plans and fiscal policy documents such as the Budget Review Outlook Papers and the Fiscal Strategy Papers. Only a few County Governments – Kisii, Busia, Vihiga, Kakamega, Uasin Gishu and West Pokot - provided additional policies. However, some County Governments had not published their County Integrated Development Plans and budgets.

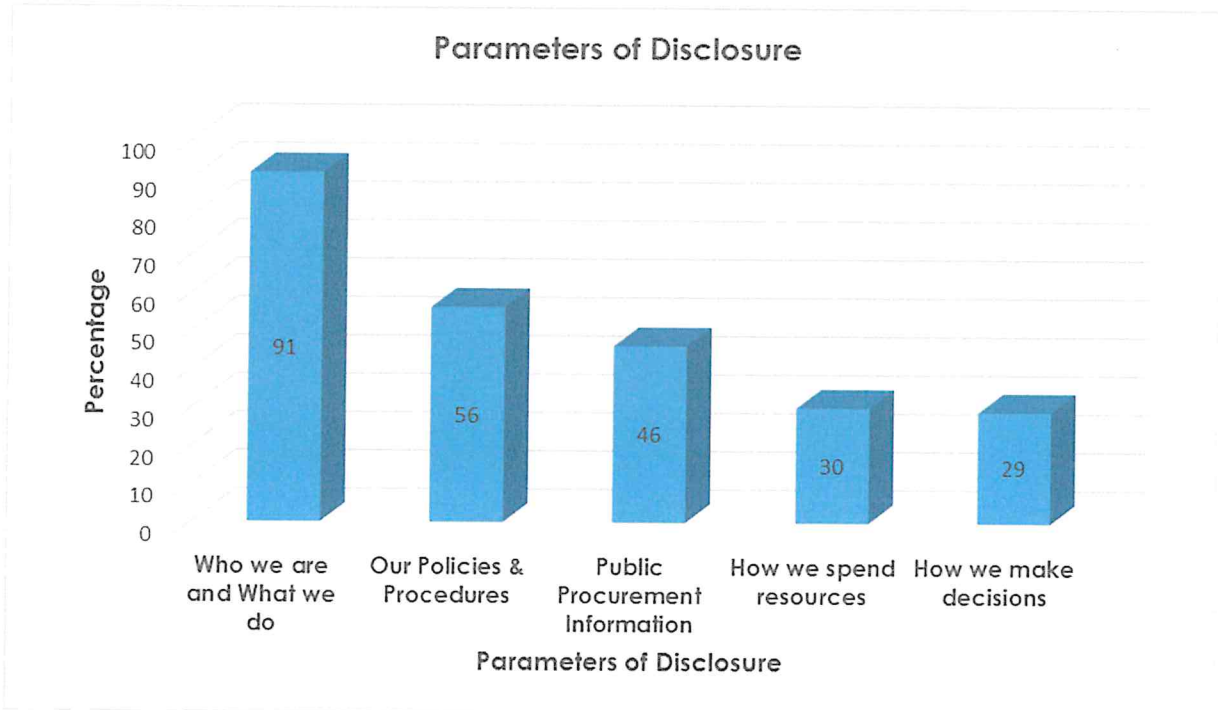
2.4: Public procurement information



Only a paltry 9% of County Governments had fully disclosed information on their contracts, 55% partially disclosed while 36% had not disclosed. Whereas most of the websites had information on tender advertisements, they did not avail further details of the tenders awarded, contractors, contract sums and timeframes for execution. Makueni and Nandi County Governments, however, had provided detailed and readily accessible procurement information. They also had an easy, at-one-glance breakdown of information on the County budget and allocations for each project. Nyamira, Migori, and Laikipia County Governments had published their procurement plans.

3.5 Overall Compliance Levels with Proactive Disclosure of Information

Figure 2.5 Parameters of disclosure



Overall, the level of compliance with section 5 of the Act on proactive disclosure by public entities stood at 52%; implying that there is 48% non-compliance. The most disclosed information was about the entities and their respective mandates which stood at 91%. This was followed by disclosure on policies and procedures at 56%; 46% on disclosure of procurement of goods, services and works; 30% on how resources under their custody were utilised; and the least disclosed information was on how decisions were made, which stood at 29%.

On individual public entities, the Kenya Ports Authority and the Kenya Revenue Authority were found to be most proactive in disclosing information. Kenya Ports

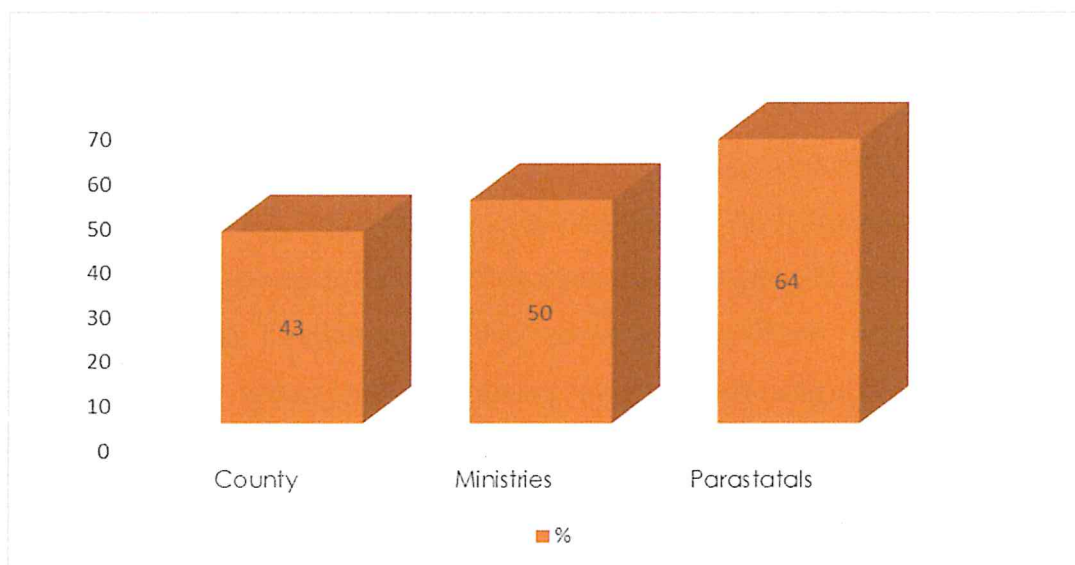
Authority was the only public entity that published information on the salaries of its senior management, although this was not exhaustive.

It is worthwhile to note that the majority of public entities which disclosed no or the least information on their websites at the time of the survey were County Governments. These were Elgeyo Marakwet (0%, website not available), Nairobi City (10% availed tender information on the Portal), Wajir (10%), Garissa (10%), Kisumu (20%), Murang'a (20%), and Mandera (20%). These County Governments were closely followed by the Ministry of Defence at 30%.

3.6 Comparative Analysis

Among the three broad categories, State Corporations had the highest compliance rate at 64% on average; followed by Ministries at 50% while Counties had the least compliance rate at 43%. The findings are presented in figure 2.6 below.

Figure 2.6: Comparison of compliance





CHAPTER FOUR


CONCLUSIONS AND RECOMMENDATIONS

1.1 Conclusions

- i) There is a relatively high level of non-compliance (48%) with the requirements of proactive disclosure of information by public entities.
- ii) Institutions are largely opaque in relation to disclosure of information on their decision making processes. Only 29% disclosed.
- iii) The parameter of disclosure that was rated highest was disclosure of information about the public institution and what they do (mandate) which had a rating of 92%
- iv) County Governments are the worst performers in disclosing information to the public.

1.2 Recommendations

- i) Financial statements and relevant documentation on expenditure of public resources, including information on salaries should be immediately uploaded on websites of public institutions and publicised in any other relevant media. If fully embraced, this has the potential of ensuring increased accountability where citizens can hold public officers to account on un-explained or un-accountable wealth.
- ii) Public entities should immediately inform members of the public on their decision making processes and procedures and any other relevant information that requires proactive disclosure.
- iii) Information disseminated on websites should, as far as practicable, be in a format and language that can easily be understood.

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- iv) Induction programmes of newly recruited public officers should contain information on access to information in order to enhance transparency, accountability and efficiency in service delivery.
 - v) County Assemblies should, in accordance with the County Governments Act, pass legislation on access to information to customise the Access to Information Act to their specific circumstances and needs which will boost open government.
 - vi) The Head of Public Service and any other relevant authority should take administrative action against Accounting Officers who fail to disclose information proactively as required by the access to information laws and any other government policy.
 - vii) The National and County Governments should prioritise digitisation of their records in order to enhance access to information.

