

THE COMMISSION ON ADMINISTRATIVE JUSTICE
(Office of the Ombudsman)



Hata Mnyonge ana Haki

REPUBLIC OF KENYA
COMMISSION ON ADMINISTRATIVE JUSTICE
(OFFICE OF THE OMBUDSMAN)

ATI REVIEW APPLICATION NO. CAJ/ATI/M.HEA/012/91/25-MW

PATRICK MUSILU APPLICANT

VERSUS

**STATE DEPARTMENT FOR PUBLIC HEALTH
AND PROFESSIONAL STANDARDSRESPONDENT**

RULING

A. BACKGROUND

1. The Commission is established under *Article 59(4) of the Constitution* and the *Commission on Administrative Justice Act, 2011* with the mandate to address complaints of improper conduct in public administration, with authority to conduct investigations, issue summons to public officers and compel the production of documents. It also serves as the oversight institution on the implementation of the right to access information under the *Access to Information Act, 2016* (hereinafter referred to as the *ATI, Act 2016*).
2. The Commission, in exercising its review jurisdiction is guided by the Constitution, the *Commission on Administrative Justice Act, 2011*, the *ATI, Act 2016*, the *Fair Administrative Action Act, 2015*, and the *Public Service (Values & Principles) Act, 2015*.

B. FACTS OF THE REVIEW APPLICATION

3. Section 14(1) of the ATI Act, 2016 grants any requester of information the right to apply to the Commission for review of a decision by a public entity or private body. The review can be premised on any of the following issues: -
 - a. Refusal to grant access to the information applied for;**
 - b. Granting access to information in edited form;**
 - c. Purporting to grant access, but not actually granting the access in accordance with a request;**
 - d. Deferring provision of the access to information;**
 - e. Decisions on the imposition of a fee or the amount of the fee;**
 - f. Decisions on the remission of a prescribed application fee;**
 - g. Granting access to information only to a specified person; or**
 - h. Refusal to correct, update or annotate a record of personal information in accordance with an application made under section 13.**
4. In addition, the Commission may, pursuant to Section 14(3) ATI Act, 2016, on its own initiative or upon request by any person, review a decision by a public entity refusing to publish information that it is required to publish under the ATI Act, 2016.
5. The application for review before the Commission dated 2nd September 2025 was made pursuant to Section 14(1)(a) of the ATI Act 2016, to review the decision of the Respondent declining to grant access to various sets of information.
6. The Applicant specifically requested for the following: -
 - a. *“ The Statement issued by the Respondent in relation to the new antivenom medicine that George Omondi, Gichui*

Mwethera and Cecilia Ngari claimed to have invented in order to receive £3.4 million from Wellcome Trust;

- b. A copy of the Research protocol presented by Cecilia Ngari, George Omondi and Gichui Mwethera to Wellcome Trust in order to access funding;*
- c. How much of the £ 3.4 million had been received and how it was utilized;*
- d. How the decision to build animal plasma antivenom was arrived at without participation of stakeholders and the public through Parliament;*
- e. Whether the decision to commit Kshs. 2 billion of taxpayer's money to build an exponentially cold chain animal plasma antivenom over developing of a superior chemically synthesized made in Kenya antivenom was in public interest and whether the decision was arrived after a thorough comparative analysis of attributes of the two treatment regimens as per procurement law;*
- f. An explanation on the extent to which the Wellcome Trust grant of Ksh. 590 million in 2023 is directly linked to the awarding of the contract to build the animal plasma plant by ICP Costa Rica, LSTM AND British Company Micro Pharm; and*
- g. The budget for development of Cro Fab Antivenom at Institute of Primate Research for the year 2023-2024 and 2024-2025."(sic)*

7. Pursuant to Section 22(3)(a) of the ATI Act, 2016, which empowers the Commission to call for information or a report from a public entity or

private body regarding a complaint lodged before it, the Commission requested the Respondent to furnish its Institutional Report to enable the Commission make an appropriate determination on the present application.

8. The Respondent did not respond to the Commission's request. Section 22(3)(a)(i) of the *ATI Act, 2016* provides that, if the information or report requested is not furnished within the stipulated period, the Commission may proceed to inquire into and determine the complaint without such information or report. Accordingly, the Commission proceeds to make this determination on the basis of the material before it.

C. ISSUES FOR DETERMINATION

9. After a careful analysis of the Applicant's requests for information dated 21st August 2025 and 25th January 2025, together with the application for review dated 2nd September 2025, the Commission identifies the following issues for determination: -

- i. **Whether the Commission has jurisdiction to review the Respondent's decision or inaction;**
- ii. **Whether the Respondent holds the information requested by the Applicant;**
- iii. **Whether the requested information ought to be disclosed to the Applicant; and**
- iv. **What orders should issue.**

D. ANALYSIS OF FACTS, ISSUES AND FINDINGS

- i. **Whether the Commission has Jurisdiction to Review the Respondent's Decision or Inaction**
10. The Supreme Court in the matter of ***Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 others (2012) eKLR***, held that the

jurisdiction of a court or tribunal must be derived from the Constitution or legislation or both.

11. *Section 14 of the ATI Act, 2016*, explicitly confers on the Commission review jurisdiction over decisions of a public entity or private body relating to requests for information. Additionally, under *Section 21 of the ATI Act, 2016*, the Commission is conferred with the functions to *inter-alia* investigate, on its initiative or upon receipt of a complaint made by any person or group of persons for violations of the *ATI Act, 2016*, hear and determine complaints and review decisions arising from violations of the right of access to information.

12. *Section 2 of the ATI Act, 2016* defines a public entity as any public office, as described under *Article 260 of the Constitution*; or any entity performing a function within a Commission, office, agency or other body established under the Constitution.

13. The Respondent herein is a State Department within the Ministry of Health. The Executive Orders No. 1 of 2025 and 1 of 2023 which codifies organization of Government of the Republic of Kenya places the Respondent within the Ministry of Health which is part of the Executive Arm of the Government.

14. According to the information available on the Respondent's website <https://www.health.go.ke/state-departments>, its primary functions are to *inter-alia*, develop policies on public health and sanitation, oversee preventive and promotive health services and human resource development in order to safeguard public health and promote a healthier and safer society.

15. From the foregoing legal framework, the Commission finds that the Respondent is a public entity within the meaning of *Section 2 of the ATI*

Act, 2016 and that it has jurisdiction to review the Respondent's decision and conduct, relating to the Applicant's Request for Information.

ii. Whether the Respondent Holds the information Requested by the Applicant

16. Section 4 (1) of the ATI Act, 2016 provides that "...every citizen has the right of access to information held by ...". Similarly, Article 35 of the Constitution which guarantees the right of access to information utilizes the word 'held'. According to Oxford Advanced Learners Dictionary (9th Edition), the word 'held' is the past tense, past participle of the word 'hold'. Black's Law Dictionary (11th Edition) defines the word 'hold' as 'to possess by a lawful title' [also] 'to keep in custody or under an obligation'. Thus, the use of the word 'held' in both the Constitution and the ATI Act connotes that the information sought by the requester must be in the custody or control of the Respondent.

17. Section 17 of the ATI Act, 2016 requires public entities to keep and maintain records that are accurate, authentic, have integrity, are useable and in a manner that facilitates the right of access to information. Additionally, Sections 3(2) and 4(1) of the Public Archives and Documentation Service Act CAP 19 which is the overarching legislation on public records management, place an obligation on all public entities to create and preserve records.

18. The Respondent, being a public entity to which the foregoing legal framework applies, is therefore under a mandatory obligation to create and preserve records pertaining to its functions. As afore-stated, the Respondent did not furnish the Commission with its Institutional Report to confirm whether it holds or does not hold the information sought.

19. A careful analysis of the nature of information sought by the Applicant in items (a), (b) and (c) shows that the information majorly relates to interactions between Wellcome Trust, the Respondent and third parties. The question that follows therefore is who has custody of the information sought.
20. According to the information available on the website <https://wellcome.org/>, Wellcome Trust is an independent global charitable foundation established in the United Kingdom in 1936 to support scientific research aimed at improving human health. It's mission is to advance science in addressing urgent health challenges by funding both curiosity-driven research and research focused on specific health issues.
21. On the other hand, the Respondent is charged with policy development and direction on public health and sanitation, preventive and promotive health services and human resource development to safeguard public health and promote a healthier and safer society.
22. The Commission accordingly notes that Wellcome Trust is an international charitable foundation that supports scientific and health research globally through various funding mechanisms. The Applicant's request refers to funding allegedly provided by Wellcome Trust in support of anti-venom research and related public health programs in Kenya.
23. Section 47(4) of the *PFM Act, 2012* provides that funds received in the form of grants or donations shall only be spent in accordance with *Articles 221 and 223 of the Constitution*. Further *Regulation 74 of the Public Finance Management (National Government) Regulations, 2015*, provides that all monies received by way of grants or donations shall constitute **public monies** and shall be paid into the Consolidated Fund.

24. The Constitutional foundation for matters relating to public funding is anchored in *Article 201* of the Constitution, which sets out the principles of public finance. The Article provides for openness and accountability in financial matters, prudent and responsible use of public resources, and public participation in financial decision-making. These principles guide the management, utilization, and oversight of public funds and inform the interpretation and application of statutory obligations relating to financial transparency and accountability.
25. The Applicant seeks information relating to the receipt, utilization and administration of funds allegedly received from Wellcome Trust, as well as information relating to public expenditure, procurement processes, budgetary allocations and policy decisions concerning antivenom development. Such information directly relates to the constitutional principles of transparency and accountability in the management of public resources.
26. The Commission further notes that the *PFM Act, 2012* establishes a framework for the receipt, administration and accountability of grants received by public entities.
27. Specifically, *Section 47(1)b) of the PFM Act, 2012*, defines a grant as *"financial or other assistance by a development partner which is not repayable and under which public money is paid to or used by a grant recipient; which is intended to finance or facilitate the development of projects or delivery of services or otherwise assist the grant recipient to achieve goals that are consistent with the policy objectives of the national government and under which the grant recipient is required to act in accordance with any terms or conditions specified in a grant agreement."*

28. Additionally, *Section 47(1) (c) of the PFM Act, 2012* defines *grant recipient* as “the national government or a national government entity authorized to control or spend money under the PFMA or an incorporated or unincorporated body not otherwise authorized to control or spend money under the PFM Act, 2012.”
29. From the foregoing, the Commission finds that the Respondent being a State Department within the Ministry of Health falls under the definition of a grant receipt for the funding allegedly provided by Wellcome Trust in support of anti-venom research and related public health programs in Kenya.
30. Accordingly, where a public entity receives or administers grant funding, records relating to the receipt, management, allocation and expenditure of such funds constitute public records that ought to be maintained in accordance with the Constitution and the applicable provisions of the *PFM Act, 2012*.
31. In addition, *Section 68(2)(b) and (c) of the PFM Act, 2012* requires an accounting officer to ensure that proper financial and accounting records are kept and adequately preserved. These obligations exist to facilitate accountability, audit and oversight of public resources.
32. The Commission further notes that information relating to procurement processes and expenditure of public resources must be documented and preserved in accordance with the *Public Procurement and Asset Disposal Act, 2015 (PPADA)*. *Section 68(1) of PPADA* requires an accounting officer maintain records relating to procurement proceedings and contracts for the prescribed statutory period.
33. In view of the Constitutional principles under *Article 201*, the record-keeping obligations under the *PFM Act, 2012* and *PPADA* and in the

absence of any evidence from the Respondent that it does not possess the requested information, the Commission finds that the Respondent holds, or has access to, records relating to the funding, utilization of funds, procurement processes, budgetary allocations and decisions that form the subject of the Applicant's request.

iii. Whether the Requested Information Ought to be Disclosed by the Respondent

34. *Article 35 of the Constitution guarantees every citizen the right of access to information held by the State. The term 'citizen' is defined by Section 2 of the ATI Act, 2016, to mean "any individual who has Kenyan citizenship, and any private entity that is controlled by one or more Kenyan citizens."* The Commission takes judicial notice that the Applicant in this review is a citizen of Kenya meeting the citizenship criteria under *Article 35 of the Constitution and Section 4 of the ATI Act, 2016* thus entitled to access the information held by the Respondent.

35. The right of access to information is however not absolute. *Article 24 of the Constitution, 2010* provides that a right or fundamental freedom in the Bill of Rights shall not be limited except by law. *Section 6 (1) of the ATI Act* restricts disclosure of information in respect of specific categories of information whose release is likely to: -

(a) Undermine the national security of Kenya;

(b) Impede the due process of the law;

(c) Endanger the safety, health or life of any person;

(d) Involve the unwarranted invasion of the privacy of an individual other than the applicant or the person on whose behalf an application has, with proper authority, been made;

- (e) Substantially prejudice the commercial interests, including intellectual property rights, of that entity or third party from whom information was obtained;***
- (f) Cause substantial harm to the ability of the Government to manage the economy of Kenya;***
- (g) Significantly undermine a public or private entity's ability to give adequate and judicious consideration to a matter concerning which no final decision has been taken and which remains the subject of active consideration;***
- (h) Damage a public entity's position in any actual or contemplated legal proceeding; or***
- (i) Infringe professional confidentiality as recognized in law or by the rules of a registered association of a profession."***

36. In the instant case, the Respondent did not place before the Commission any evidence or submissions to demonstrate that the requested information falls within any of the statutory exemptions listed in section 6(1) of the ATI Act, 2016.

37. Nonetheless, the Commission has carefully evaluated the nature of the requested sets of information and noted that the request under item (b) relating to a copy of the research protocol presented by Cecilia Ngari, George Omondi and Gichui Mwethera to Wellcome Trust may contain information subject to exemptions under Section 6(1)(e) of the ATI Act, 2016.

38. Section 6(1)(e) of the ATI Act, 2016 exempts from disclosure information whose release would reveal a trade secret or would be likely to prejudice the commercial or financial interests of a third party.

39. The Courts have recognized the importance of protecting confidential commercial information from disclosure. In **MEA Limited v Competition Authority of Kenya & Another**, Constitutional and Human Rights Division **Petition No. 99 of 2016**, the High Court restrained the Competition Authority from disclosing documents lawfully obtained from the petitioner, finding that those documents contained commercially sensitive information whose disclosure would cause irreparable harm.
40. From the foregoing analysis, the Commission is convinced that the research protocol which the Applicant seeks, is information whose disclosure could prejudice the commercial interests and intellectual property rights of third parties and therefore falls within the exemption clause. Hence, the Commission finds that the requested information in No. (b) should not be disclosed to the Applicant.
41. As previously stated, where public entities including the Respondent receive and utilize funds from development partners, including grants falling within the framework of the PFMA, there exists a legitimate public interest in ensuring transparency regarding the receipt, allocation and expenditure of such funds. Disclosure promotes accountability and enables public oversight of whether the funds are utilized for the purposes for which they were intended.
42. The Commission further finds that information relating to budgetary allocations, expenditure of public funds, procurement decisions and implementation of publicly funded projects falls within the category of information that public entities are expected to proactively disclose under section 5 of the ATI Act, 2016 and *Regulation 10 of the Access to Information (General) Regulations*, 2023.
43. The Commission is further guided by the decision of the Court of Appeal in **Attorney General v Khelef Khalifa, Commission on Administrative**

Justice & Others, Civil Appeal No. E085 of 2022 which affirmed that access to information held by the State and public bodies is integral to promoting transparent and accountable government and observed, with approval, that *“access to information held by the state or public bodies is important to promoting transparent and accountable government, and people's enjoyment of their rights under the Bill of Rights depends on such transparent and accountable government.”*

44. The Commission finds the above reasoning particularly applicable in the present matter where the requested information concerns grant funding, expenditure of public resources, procurement decisions, budgetary allocations and implementation of public health programmes financed through public and donor resources.

45. The Court of Appeal additionally reaffirmed the general presumption in favour of disclosure of State-held information, holding that “in the absence of countervailing public interest, State-held information should be disclosed” and that the right of access to information ought to be construed liberally in favour of disclosure.

46. Consequently, and noting that the Respondent has not demonstrated the applicability of any exemption under section 6 of the *ATI Act, 2016* the Commission finds that the information sought in items (a), (c), (d), (e), (f) and (g) should be disclosed to the Applicant in furtherance of the constitutional principles of transparency, accountability and prudent management of public resources under *Articles 10, 35 and 201* of the Constitution.

E. FINAL ORDERS

47. Having made a careful analysis of all the facts and information provided in this Review Application and pursuant to Powers granted by Section

23(2)(a) of the Access to Information Act 2016 and Regulation 25(8) of the Access to Information (General) Regulations, 2023, the Commission hereby **ORDERS**:

1. **THAT** the Principal Secretary, State Department for Public Health and Professional Standards should facilitate access to information and records relating to the request for information made by Patrick Musilu in his two requests dated 21st August 2025 and 25th January 2025, namely:
 - a. The statement issued by the Respondent in relation to the new antivenom medicine that George Omondi, Gichui Mwethera and Cecilia Ngari claimed to have invented in order to receive £3.4 million from Wellcome Trust;
 - b. How much of the £ 3.4 million was received and how it was utilized;
 - c. Whether the decision to build animal plasma antivenom was arrived at with or without participation of stakeholders and the public through Parliament;
 - d. Whether the decision to commit Kshs. 2 billion of taxpayer's money to build an exponentially cold chain animal plasma antivenom over developing of a superior chemically synthesized made in Kenya antivenom was in public interest and whether the decision was arrived after a thorough comparative analysis of attributes of the two treatment regimens as per procurement law;
 - e. An explanation on the extent to which the Wellcome Trust grant of Ksh. 590 million in 2023 was directly linked to the

awarding of the contract to build animal plasma plant by ICP Costa Rica, LSTM AND British Company Micro Pharm; and

- f. The budget for the development of Cro Fab Antivenom at Institute of Primate Research for the Financial Years 2023/2024 and 2024/2025.
2. **THAT** the information sought by the Applicant under item no. (b) of the request for information, namely '*A copy of the Research protocol presented by Cecilia Ngari, George Omondi and Gichui Mwethera to Wellcome Trust in order to access funding*' falls within the exempted information set out under section 6(1) (e) of the ATI Act, 2016 and should therefore not be disclosed.
3. **THAT** the Respondent proactively discloses all information relating to budgetary allocations, expenditure of public funds, procurement decisions and implementation of publicly funded projects on its institutional website or through other suitable media.
4. **THAT** compliance with the above Orders be within **twenty-one (21)** days from the date hereof.
5. **THAT** in the event of non-compliance with the foregoing orders, the Commission shall recommend criminal prosecution of the Principal Secretary, State Department for Public Health and Professional Standards pursuant to Section 28 of the Access to Information Act, 2016.

Dated, Signed and **Issued** at **Nairobi** this...**3rd** day of**JULY**.....2026



DOROTHY JEMATOR
ACCESS TO INFORMATION COMMISSIONER

TAKE NOTICE THAT:

Section 23(3) of the Access to Information Act, 2016 provides that ***“A person who is not satisfied 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.”***

Section 23 (5) of the Access to Information Act, 2016 provides that ***“If no appeal is filed under subsection (3), the party in favour 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 to the like effect.”***