

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/DCI/015/74/25-SC

SALOME NDUTA MAARAAPPLICANT

VERSUS

DIRECTORATE OF CRIMINAL INVESTIGATIONSRESPONDENT

RULING

A. BACKGROUND

1. The Commission on Administrative Justice (Office of the Ombudsman) (hereinafter referred to as "the Commission") is established under *Article 59(4) of the Constitution* and the *Commission on Administrative Justice Act, 2011*. The Commission is mandated to address maladministration in the public sector and promote administrative justice, transparency, and accountability in public administration. In addition, the Commission serves as the oversight and enforcement body for the right of access to information under *Article 35 of the Constitution*, as operationalized through the *ATI Act, 2016* (hereinafter referred to as *ATI Act, 2016*).
2. *Article 35 of the Constitution* guarantees every citizen the right to access:
 - i. Information held by the State; and
 - ii. Information held by another person and required for the exercise or protection of any right or fundamental freedom.

3. Access to information is the cornerstone of democratic governance and accountability. Public entities hold information in trust for the people of Kenya, and disclosure of such information enhances transparency in public administration, promotes responsible management of public resources, and enables citizens to meaningfully participate in governance.

B. FACTS OF THE REVIEW APPLICATION

4. The genesis of this matter lay with the Applicant lodging a complaint with the Respondent against George Jonathan Maara, alleging the fraudulent transfer of property known as Land Reference LIMURU/NGECHA/XXX. The Respondent conducted investigations into the matter and subsequently forwarded the investigation file together with recommendations to the Office of the Director of Public Prosecutions (ODPP) to review the evidence and provide appropriate advice.
5. The Applicant states that the Respondent informed her that, the ODPP, through a letter dated 14th July 2025, advised that the matter did not have any evidence to establish criminal culpability.
6. Thereafter, the Applicant, through her advocates, Mungai Kalande and Company Advocates, made requests for information to the Respondent through letters dated 28th July 2025 and 18th August 2025. The Respondent did not respond to either request.
7. Consequently, the law firm of Mungai Kalande & Co. Advocates acting on behalf of the Applicant, lodged the instant application for review before the Commission and on 18th September 2025 under *Section 14 (1) ATI Act, 2016*.
8. In her request letter to the Respondent and dated 28th July 2025, the Applicant requested for: -

- i. A copy of the letter dated 14th July 2025 from the Office of the Director of Public Prosecution indicating that there was no criminal culpability in relation to the Applicant's complaint;
 - ii. A confirmation of whether the Respondent had received certified copies of documents from Kiambu Lands Office which allowed transfer of the property in issue.
9. In the subsequent request to the Respondent dated 18th August 2025, the Applicant sought the following additional information:
- i. Clarification on whether the Respondent had recorded a written statement from the prime suspect, George Jonathan Maara and if so, a copy of the statement;
 - ii. Clarification on whether the Respondent had recorded a written statement from the Land Registrar who issued the title deed in the name of the prime suspect and if so, a copy of the statement;
 - iii. Copies of witness statements relied upon by the ODPP to reach a conclusion that there was no criminal culpability in the matter;
 - iv. A clarification on whether the Respondent obtained copies of documents from the Land Registrar Kiambu and if so, those copies to be supplied including:
 - a. The title deed in the name of the deceased, George Maara Mbugua;
 - b. The transfer duly executed by the deceased, George Maara Mbugua;
 - c. The spousal consent duly executed by Salome Nduta Maara;
 - d. The stamp duty payment receipt duly issued by KRA; and
 - e. The consent to transfer duly issued by the Land Control Board.
10. Following the filing of the instant application for review, dated 18th September 2025, the Commission wrote a letter dated 30th September 2025 notifying the Respondent of the application and required it to file an institutional report together with any relevant information within seven (7)

days, pursuant to *section 22(3)(a) of the ATI Act, 2016 and Regulation 25(1) of ATI General Regulations, 2023.*

11. The Respondent filed its institutional report to the Commission through a letter dated 22nd October 2025 and reiterated that the ODPP had directed that the criminal complaint be closed without further police action on the basis that the dispute was civil in nature. The Respondent further contended that it was not in possession of the requested documents and advised that the applicant should seek the documents from the Ministry of Lands, which it maintained was the custodian of the records in question.
12. Upon consideration of the said response, the Commission, through a letter dated 28th October 2025 recommended that the Applicant submit a request for the documents to the Ministry of Lands as advised by the Respondent. However, in a rejoinder dated 30th October 2025, the Applicant insisted that witness statements sought were in the Respondent's custody and as such, she was entitled to access them.
13. The Commission subsequently forwarded the rejoinder to the Respondent through a letter dated 26th November 2025, inviting it to file its final remarks within seven (7) days.
14. The Respondent did not file its final remarks within the stipulated time prompting the Commission to issue summons dated 12th February 2026 requiring the Respondent's attendance on 23rd February 2026. Prior to the scheduled appearance, the Respondent filed its final remarks through a letter dated 20th February 2026.
15. In its final remarks, the Respondent set out the circumstances surrounding the investigation and the reasons for its objection to disclosure of information. The Respondent explained that the letter advising that the case be closed, was addressed solely to the Director of Criminal Investigations and suggested that, if the Applicant required a copy of the

letter, she should seek it directly from the ODPP as its maker. The Respondent further stated that the Applicant was subsequently informed of the outcome of the investigations through a letter dated 25th July 2025.

16. Regarding the other documents sought, the Respondent raised concerns as to the reasons for which the investigative material was being sought. It referred to correspondence from Mungai Kalande & Company Advocates dated 17th August 2023, in which the advocates had indicated that a green card obtained by investigators from the Kiambu Lands Office was required for use in a pending High Court matter concerning the same subject.

17. The Respondent contended that, in light of the pending civil proceedings and the provisions of *Section 193A of the Criminal Procedure Code* permitting concurrent civil and criminal proceedings, the circumstances suggested that the criminal complaint filed with them may have been pursued for purposes of obtaining documentary evidence for use in the civil proceedings. It therefore objected to the disclosure of documents obtained by its investigators during the criminal investigations for use in the pending civil matter.

18. In support of its objection to disclosure, the Respondent relied on *Article 24 of the Constitution* and *Section 6(1)(a) as read with Section 6(2)(j) of the ATI Act, 2016*, relating to limitation of the right of access to information on grounds of national security. It further relied on *Section 47(3)(d)(i) of the National Police Service Act*, which it contended limits access to information to the extent necessary to protect the Service from demands to furnish persons with information, and *Section 6(5) of the ATI Act, 2016*, concerning information reasonably accessible by other means.

19. The Respondent also questioned the good faith of the Applicant in pursuing the request and referred to what it considered to be inappropriate language and insinuations contained in some of the correspondence addressed to the Directorate. It stated that the matter had also been referred to the Independent Policing Oversight Authority (IPOA) in an effort to obtain the documents sought.

20. The Respondent ultimately maintained that disclosure of the investigative documents for use in the pending civil proceedings was likely to result in the investigating officers being called as witnesses in those proceedings, thereby drawing the Directorate into the civil dispute and potentially compromising the neutrality of the Police in civil matters. It therefore urged the Commission to bring the matter to a close and to advise the Applicant on the appropriate channel for obtaining documents from their source or maker.

21. The parties having filed their respective positions, the Commission is satisfied that the issues raised are primarily legal in nature and are capable of determination on the basis of the material placed before it. Accordingly, pursuant to *Section 23(3)(b) of the ATI Act, 2016* the Commission proceeds to issue this ruling based on the responses and documents filed by parties herein, as well as the legal framework governing access to information.

C. ISSUES FOR DETERMINATION

22. Having carefully reviewed and analyzed this matter, the Commission frames the following issues for determination in the Application:

- I. Whether the Commission has jurisdiction to review the Respondent's decision under the ATI Act, 2016;**
- II. Whether the information requested by the Applicant is held by the Respondent;**

- III. **Whether the Applicant can exercise the right of Access to Investigative Information held by the Respondent; and**
- IV. **Whether the nature of information sought falls within the categories subject to disclosure under the ATI Act, 2016.**

D. ANALYSIS OF FACTS, ISSUES AND FINDINGS

I. Whether the Commission has Jurisdiction to Review the Respondent's Decision under the ATI Act, 2016

23. In *Ben Kasisi T/A Voice of Bungoma CSO Network v. Bungoma County Government*, the Commission affirmed that it has jurisdiction under the ATI Act, 2016 to review decisions of public entities refusing or failing to grant access to information as requested by citizens.

24. The Respondent in this matter is the Directorate of Criminal Investigations, established as part of the National Security organs under *Articles 239 and 247 of the Constitution* and *Section 28 of the National Police Service Act*. The Respondent by dint of *Section 35 of the National Police Service Act* is charged with the mandate to *inter alia* collect and provide criminal intelligence, undertake investigations into serious crimes, maintain law and order, detect and prevent crimes, among other duties.

25. The Respondent is therefore a public entity and consequently a duty bearer under *Article 35 of the Constitution* with an obligation to facilitate access to information held by it. Accordingly, the Commission finds and holds that it has jurisdiction to review the Respondent's decision, action or inaction under the *ATI Act, 2016*

II. Whether the Information Requested is Held by the Respondent

26. *Section 4(1) of the ATI Act, 2016* guarantees citizens the right to access information held by public entities by providing that “...every citizen has the right of access to information held by

a. *the State; and*

b. *another person where that information is required for the exercise or protection of any right or fundamental freedom...."*

27. 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'**.

28. The use of the word 'held' in both the Constitution and the ATI Act, 2016, connotes that the information sought by the requester must be present with the Respondent.

29. Section 17 of the ATI Act, 2016 provides for management of records requiring all public entities to keep and maintain records that are accurate, authentic, have integrity and are usable in a manner that facilitates the right of access to information. Similarly, Section 35 (f) of the National Police Service Act which is the Respondent's constitutive law mandates the Respondent to maintain criminal records and other records relating to investigations undertaken in the discharge of its mandate.

30. The Respondent, through its letter dated 22nd October 2025, contended that it was not in possession of the requested documents on the basis that the Ministry of Lands was the custodian of those documents. The Commission is, however, of the view that the Respondent's position conflates the concepts of custody or control of information with ownership or original authorship of the documents. The right of access to information under the ATI Act, 2016 extends to information that is held by or under the control of a public entity, irrespective of whether the entity originally created or authored the information.

31. The Commission notes that the information sought by the applicant comprises documents obtained in the course of criminal investigations, including records originating from the Ministry of Lands, witness statements, and the communication from the ODPP conveying its decision on the investigation file submitted by the Respondent.
32. The Commission is of the view that the documents authored by and obtained from the Ministry of Lands would ordinarily be found within the Respondent's criminal investigation file as required by law. Such documents constitute evidentiary material gathered in the course of substantive investigations on the complaint of alleged fraudulent property transaction such as the one lodged by the Applicant.
33. With regard to the ODPP's letter dated 14th July 2025, the Commission is satisfied that the Respondent is in possession of the document since that is the instrument through which the decision not to prosecute the Applicant's complaint was communicated to it. Additionally, the Respondent's reference to the letter, including its date and substance, leaves no doubt that the document is held by, or is under the control of the Respondent.
34. Accordingly, and based on the foregoing analysis, the Commission finds and holds that the requested information and records are held by, or are under the control of the Respondent for purposes of the *ATI Act, 2016*.

III. Whether the Applicant can Exercise the right of Access to Investigative Information held by the Respondent

35. *Article 35 of the Constitution* guarantees every citizen the right of access to information held by the State. *Section 4(1) of the ATI Act 2016*, operationalizes this right by providing that every citizen has the right to access information held by public entities. The term '*citizen*' is defined under *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."**

36. The Respondent did not raise any objection to the Applicant's request based on her citizenship status. Nevertheless, the Commission notes that the Applicant, Salome Nduta Maara is a citizen of Kenya meeting the citizenship criteria under *Article 35* of the Constitution and *Section 4* of the *ATI Act, 2016*.

37. Accordingly, the Commission finds and holds that the Applicant is entitled to invoke the constitutional and statutory right of access to information held by the Respondent.

38. *Article 50(9)* of the Constitution required Parliament to enact legislation to provide for the protection, rights and welfare of victims of offences in Kenya. To this extent, Parliament enacted the *Victims Protection Act, Cap. 79A Laws of Kenya* to operationalize *Article 50(9)* of the Constitution.

39. The *Victims Protection Act* in *Section 2 (1)* defines a victim as “...any natural person who suffers injury, loss or damage as a consequence of an offence.” Whereas the complaint lodged by the Applicant did not proceed to court when the ODPP indicated that there was no evidence to establish criminal culpability, it is quite clear that *Section 2(2)* of the *Victims Protection Act* includes cases which have not been reported, investigated or taken to court. The section states that...

“In this Act, a person is a victim regardless of—

(a) whether the crime perpetrated against the person has been reported to the police;

(b) whether the perpetrator of the crime has been identified, apprehended, prosecuted or convicted; and

(c) the familial relationships between the perpetrator of the crime and the victim.”

40. Based on the facts of this review application, the Commission is satisfied that the Applicant falls within the definition of a victim under *Section 2* of the *Victims Protection Act*. She is therefore entitled to the rights, protections and safeguards provided by the *Constitution* and the *Victim Protection Act*.

41. Further, *Section 3* of the *Victim Protection Act* sets out the objects of the Act, which include:

“(b) protect the dignity of victims through—

(i) provision of better information, support services, reparations and compensation from the offender, in accordance with this Act;

(ii)

(iii)

(v)”

42. Further, *Section 19* of the *Victim Protection Act* expressly provides for the right of a victim to receive information relating to the proceedings and the administration of justice. This statutory protection complements the constitutional right of access to information under *Article 35* and underscores the obligation of public authorities to provide victims with appropriate information concerning complaints and proceedings affecting them, subject to the law.

43. The *Victim Protection Act* further seeks to ensure that victims are treated with dignity and respect throughout the justice process and are provided with adequate information and appropriate protection from secondary victimization. These protections are relevant to the present application, particularly given that the Applicant was the complainant who initiated the investigations and sought information concerning the outcome and manner in which her complaint was dealt with. The right to receive such information, however, remains subject to the applicable law governing access to information and any lawful limitations on disclosure.

44. The Commission is therefore satisfied that the Applicant has a legitimate interest in receiving information concerning the investigation undertaken pursuant to her complaint and the manner in which the complaint was dealt with. This interest complements, rather than replaces, her constitutional right of access to information under *Article 35* and the statutory right under *Section 4* of the *ATI Act, 2016*.
45. The fact that the investigation did not result in prosecution does not, in itself, extinguish the Applicant's right to receive information concerning the outcome of the process or information held by the Respondent concerning her complaint. However, that right, like the general right of access to information under *Article 35*, remains subject to any lawful limitation on disclosure established under the Constitution or the *ATI Act, 2016*.
46. In its response to the Commission dated 20th February 2026, the Respondent stated, in part, that the complaint before the Commission was not made in good faith. The Respondent further indicated that **"...the scheme by the Applicant should be tamed and an advisory be rendered on the proper channel to get document (sic) from the source and or makers of the said documents."**
47. The Commission observes that the Respondent's concerns regarding the Applicant's alleged motive or lack of good faith does not, in itself, constitute a lawful basis for declining access to information. *Section 4(2)* of the *ATI Act, 2016* expressly provides that the right of access to information is not affected by the reason given by a person for seeking access or by the public entity's belief as to that person's reasons for seeking access. Accordingly, the Respondent could not lawfully decline the Applicant's request merely on the basis of an assumption as to her motive for seeking the information.

48. The Commission therefore finds that there is no general legal bar to the Applicant exercising her right of access to information held by the Respondent merely because such information was obtained or generated in the course of criminal investigations. Whether the particular information sought may lawfully be withheld must be determined by reference to the specific exemptions and limitations provided by law.

49. In this regard, the Respondent relied on, among other provisions, *Article 24 of the Constitution*, *Section 6 of the ATI Act, 2016* and *Section 47(3)(d)(i) of the National Police Service Act*. The applicability and sufficiency of those provisions as grounds for withholding the information sought are considered under the next issue for determination.

50. Accordingly, the Commission finds that the Applicant is entitled to exercise her constitutional and statutory right of access to information held by the Respondent, including information arising from investigations undertaken pursuant to her complaint, subject to any lawful limitation established under the applicable legal framework. The Commission will therefore proceed to consider whether the Respondent has established a lawful basis for limiting the Applicant's access to the information sought.

IV. Whether the nature of information sought falls within the categories subject to disclosure under the ATI Act, 2016.

51. The Commission now considers whether the information sought by the Applicant falls within the categories of information subject to disclosure under the Access to Information Act, 2016, having regard to the reasons advanced by the Respondent for declining access.

52. The right of access to information is not absolute. *Section 6 (1) of the ATI Act 2016* restricts disclosure of information in respect of specific categories of information whose disclosure 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."**

53. Section 4(4) of the *ATI Act, 2016* further provides that the Act shall be interpreted and applied on the basis of a duty to disclose information and that non-disclosure shall only be permitted to the extent provided for under Section 6. It follows that a public entity seeking to withhold information bears the responsibility of demonstrating the specific statutory basis for non-disclosure and the factual circumstances that bring the information within the exemption relied upon.

54. In the present matter, the Respondent principally relied on the national security exemption obtaining in *Article 24* of the *Constitution* and *Section*

6(2)(j) of the *ATI Act, 2016* to decline access to the requested information. Further, the Respondent relied on *Section 47(3)(d)(i)* of the *National Police Service Act* to deny access to the requested information. Further reliance was made to *Section 6(5)* of the *ATI Act 2016* which shields public entities from being required to provide information accessible by other means. The Respondent's position, as set out in its final remarks, was that the information sought was obtained or generated in the course of criminal investigations and that its disclosure would facilitate the use of investigative material in pending civil proceedings. The Respondent was further concerned that such disclosure could result in investigating officers being drawn into the civil dispute and could expose the Police to allegations of using public resources to advance the position of one of the parties.

55. The Commission has carefully considered these grounds. With respect to *Section 47(3)(d)(i)* of the *National Police Service Act*, the Commission observes that the provision falls within *Section 47*, which concerns the 'Limitation of rights and fundamental freedoms of members of the National Police Service'. It does not constitute a general statutory restriction upon the right of a civilian to access information held by the Police under Article 35 of the Constitution and the *ATI Act, 2016*.

56. The Commission therefore finds that *Section 47(3)(d)(i)* of the *National Police Service Act* does not provide a lawful basis upon which the Respondent could decline the Applicant's request for information.

57. The Respondent also relied on *Section 6(1)(a)* as read with *Section 6(2)(j)* of the *ATI Act, 2016*. *Section 6(2)(j)* provides that, for purposes of *Subsection (1)(a)*, information relating to national security includes information that should be provided to a State organ, independent office or constitutional commission when conducting investigations, examinations, audits or reviews in the performance of its functions.

58. The Honorable Court in ***Katiba Institute v Presidents Delivery Unit & 3 others*** [2017] eKLR at paragraph 47 stated that...

“It is trite law that where a party alleges, like the respondents have done, that information sought affects state security, it is the duty of that person to show to the satisfaction of the Court that indeed that is the case. It is not enough for a party to merely allege without showing how, that disclosure of information will affect state security.”

59. In ***Khalifa & another v Principal Secretary, Ministry of Transport & 4 others*** [2022] eKLR, the Court held at paragraph 88 that...

“Any restriction on information that a government seeks to justify on grounds of national security must have the genuine purpose and demonstrable effect of protecting a legitimate national security interest. To establish that a restriction on access to information is necessary to protect a legitimate national security interest, a government must demonstrate that: (a) the expression or information at issue poses a serious threat to a legitimate national security interest; (b) the restriction imposed is the least restrictive means possible for protecting that interest; and (c) the restriction is compatible with democratic principles.”

60. Further, in Paragraph 88, the Court went ahead to hold that...

“A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government. In particular, a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of

wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest.”

61. In the present case, the Commission is not persuaded that the Respondent established the applicability of *Section 6(1)(a)* as read with *Section 6(2)(j)* of the *Access to Information Act, 2016* in relation to the information requested by the Applicant. The Respondent's explanation that the use of documents obtained during investigations in subsequent civil proceedings would amount to an illegality bears no nexus to the national security exemption relied upon.

62. The Commission therefore finds that the Respondent misapplied the national security exemption in declining the Applicant's request. The Respondent was required to identify the specific information sought, demonstrate the national security interest implicated by its disclosure and establish that the limitation was necessary and proportionate to the protection of that interest. This was not demonstrated.

63. With particular regard to the documents obtained from the Kiambu Lands Office, the Commission further notes that the fact that the documents originated from another public entity does not, in itself, provide a lawful basis for the Respondent to deny access where the documents were obtained and retained in the course of its investigations. Where a public entity receives a request for information which it does not hold but knows to be held by another public entity, *Section 10* of the *ATI Act, 2016* requires the request, or the relevant part thereof, to be transferred to that other entity. The Respondent therefore ought to have dealt with that aspect of the Applicant's request in accordance with *Section 10* of the *ATI Act, 2016*.

64. The Commission has also considered the Respondent's contention that the Applicant's request was made for purposes of obtaining documents for use in pending civil proceedings. Firstly, *Section 4(2)* of the *ATI Act, 2016*

expressly provides that the right of access to information is not affected by the reason given by a person for seeking access or by a public entity's belief as to that person's reasons for seeking access. The Respondent could therefore not lawfully decline the request merely because it believed that the information would be used in the pending proceedings.

65. However, the Commission has since established that indeed the subject matter giving rise to the Applicant's complaint was the subject matter of civil proceedings in *ELC Case No. E020 of 2022* before the Chief Magistrates Environment and Land Court at Limuru. The Applicant was dissatisfied with the decision in the lower court and filed an Appeal in *ELC LA No. E019 of 2023* pending before the High Court at Thika. George J Maara is named as the Respondent in the lower court matter and the Appeal at the High Court.

66. The existence of these proceedings is material to the determination of the present application, particularly because the information sought comprises investigative documents, witness statements and other material obtained or generated during the investigations which relates directly to the subject matter of those proceedings.

67. The Commission considers that the particular nature of the information sought and the existence of pending judicial proceedings require the Commission to exercise caution in determining the appropriate relief. In particular, the Commission notes that one George J Maara, the Defendant in the court proceedings is not a party to the Request for information before the Commission.

68. The Commission must therefore consider whether directing production of such material through the present proceedings would prejudice George J Maara's interests or otherwise interfere with the proper determination of matters pending before court.

69. Section 22 of the Civil Procedure Act, provides:

"Subject to such conditions and limitations as may be prescribed, the court may, at any time, either of its own motion or on the application of any party—

(a) make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts, and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence;

(b) issue summonses to persons whose attendance is required either to give evidence or to produce documents or such other objects as aforesaid;

(c) order any fact to be proved by affidavit."

70. The import of Section 22 is that the court seized of a civil dispute has express statutory powers to regulate the disclosure and production of material relevant to the determination of the dispute. These powers extend beyond discovery in the narrow sense and include inspection and production of documents, as well as the power to summon persons to produce documents or other material objects. The provision therefore establishes the court as the appropriate forum for determining whether documents relevant to a pending civil dispute should be disclosed or produced, and the manner and extent of such production.

71. This framework is complemented under *Order 11* of the *Civil Procedure Rules, 2010*, which provides for case management and pre-trial processes in civil proceedings. The framework contemplates, among other matters, directions relating to discovery, production and inspection of documents and other matters concerning the evidence to be relied upon at trial. The court is consequently empowered to give appropriate directions concerning the disclosure and production of documents necessary for the

fair and efficient determination of the dispute. This is particularly relevant where the information sought is directly connected to proceedings already before a court, as the court is best placed to determine the relevance, scope and manner of disclosure and production of such material.

72. In the present matter, directing production through the ATI review process, without the participation of George J. Maara, could affect the interests of a party who has not been afforded an opportunity to make representations on the disclosure or intended use of the material. The Commission must therefore have regard to the procedural rights of all parties to the pending proceedings and avoid making orders that may effectively determine issues concerning the production or use of evidence outside the proceedings in which those issues properly arise.

73. This consideration is also relevant under *Section 6(1)(b)* of the *ATI Act, 2016*, which permits limitation of the right of access where disclosure would undermine the due process of law. The existence of pending proceedings does not, in itself, render information exempt from disclosure. However, where the information sought is directly connected to matters pending before a court, the Commission must have regard to the need to preserve the integrity of the judicial process and the procedural rights of all parties.

74. In the present matter, the Respondent contended that some of the documents sought by the Applicant, including documents obtained from the Lands Office, such as the green Card, in the course of its investigations, were intended for use in the pending civil proceedings. The Commission considers that the fact that such documents are held by the Respondent does not, by itself, make them documents that may properly be obtained through the ATI process for purposes of prosecuting or defending an ongoing civil claim. Where documents are sought for use as evidence in proceedings already before a court, questions concerning their disclosure,

relevance and production are properly subject to the procedural control of that court.

75. In its final remarks, the Respondent further submitted that if the requested documents were supplied to the Applicant for use in the pending civil proceedings, the investigating officers involved in the matter were likely to be called as witnesses, thereby drawing the Directorate into the dispute and potentially compromising its neutrality in a private civil matter. The Respondent contended that this would interfere with the Directorate's constitutional and statutory mandate and risk placing it in a position of conflict in the discharge of its functions.

76. The Commission considers that this concern is relevant to the manner in which the documents should be obtained and used. An investigative agency should, in the discharge of its constitutional and statutory functions, maintain institutional neutrality in private civil disputes. However, the possibility that investigating officers may subsequently be called as witnesses, or that the Directorate may be drawn into the proceedings, does not, in itself, constitute a statutory exemption from disclosure under *Section 6 of the ATI Act, 2016*. The Respondent was required to demonstrate the specific legal basis upon which disclosure could be limited.

77. Nevertheless, where documents obtained or generated in the course of an investigation are sought for purposes of advancing a dispute already pending before a court, directing their production through the ATI review process may circumvent the procedural mechanisms through which the court controls the disclosure, production and use of evidence in the proceedings. It may also have the effect of unnecessarily drawing the Respondent and its investigating officers into the determination of a private dispute.

78. The Commission therefore considers that it would be inappropriate, and potentially prejudicial to the interests of parties whose rights may be affected, to determine through an ATI review application, questions concerning the disclosure and production of investigative material directly connected to a dispute pending before a court. Such a determination would risk the Commission addressing, outside the pending proceedings, questions concerning the relevance, necessity, scope and manner of production of documents which are properly matters for the trial court.

79. In the circumstances, the Commission finds that directing disclosure of the documents through the present process would interfere with the established procedural framework governing the conduct of pending proceedings and consequently, impede the due process of law within the meaning of *Section 6(1)(b) of the ATI Act, 2016*.

80. Accordingly, to forestall the likelihood that disclosure of information by a public entity or relevant private body may impede the due process of law in the context of court proceedings, an applicant seeking information to assist in preparing a case or pleadings should, where practicable, seek the relevant information before instituting proceedings. While the Commission may, in the exercise of its review jurisdiction, compel disclosure where no applicable exemption arises, its power to do so is ousted once proceedings concerning the subject matter of the information sought have been instituted, particularly where disclosure would interfere with or circumvent the procedural mechanisms governing those proceedings.

81. Consequently, although the Respondent did not adequately substantiate the exemptions they relied upon, the Commission finds that, given the connection of the documents to the pending proceedings, and the procedural mechanisms available for their disclosure and production before court, disclosure through the present ATI review process is likely to

impede the due process of the law within the meaning of Section 6(1)(b) of the ATI Act, 2016. The Applicant remains at liberty to seek disclosure through the court seized of the proceedings.

FINAL ORDERS

82. Having made a careful analysis of all the facts and information provided in this review application, the Commission, pursuant to the powers granted by Sections 22(3)(a) and 23(2)c of the ATI Act, 2016 and Regulation 25(10) of the Access to Information (General) Regulations, 2023, hereby dismisses the Review Application dated 18th September 2025.

Dated, Signed and **Issued** at **Nairobi** this...**28th** day of ...**AUGUST**.....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 ATI 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.”***