

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/KSM/ATI/CG/SYA/074/03/26 – LM

WESTERN KENYA SOCIAL JUSTICE CENTRES WORKING GROUPAPPLICANT

VERSUS

COUNTY GOVERNMENT OF SIAYARESPONDENT

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 of Kenya, 2010* 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 *Access to Information Act, 2016* (hereinafter referred to as *ATI Act, 2016*).
2. *Article 35 of the Constitution* guarantees every citizen the right to access:
 - a. Information held by the State; and

- b. Information held by another person and required for the exercise or protection of any right or fundamental freedom.
- 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 Commission received an Application for Review under *Section 14(1)* of the *ATI Act, 2016* from the Western Kenya Social Justice Centres Working Group indicating that it had submitted a request for information dated 23rd March 2026 to the Governor, County Government of Siaya. The request sought information and documentation relating to the proposed nuclear power plant project at Lwanda K'Otieno, Rarieda Constituency, Siaya County.
- 5. Specifically, the Applicant requested for; -
 - 1) Official confirmation from the County Government on whether Siaya County had been formally designated as the proposed site for Kenya's nuclear power plant including the specific status of the proposed location at Lwanda K'Otieno;
 - 2) Copies of correspondence, memoranda, agreements or consultations between the County Government and national government institution including the Ministry of Energy and Petroleum, the Nuclear Power and Energy Agency (NUPEA), the Kenya Nuclear Regulatory Authority

(KNRA), National Environment Management Authority (NEMA);

- 3) Copies of any environmental, social, economic and technical studies relating to the proposed nuclear facility affecting Siaya County, including Environmental Impact Assessments, Strategic Environmental and Social Assessments, site suitability assessments, risk assessments and emergency preparedness or disaster management plans;
- 4) Documentation indicating whether the proposed project is aligned with the Siaya County Integrated Development Plan (CIDP) 2023-2027, the Siaya County Spatial Plan and any existing or planned County Energy Plans as required under the National Energy Planning Framework;
- 5) Records of any public participation forums, stakeholders' consultation or community engagement processes conducted by the County Government regarding the proposed nuclear power project;
- 6) Information regarding any land acquisition plans, zoning changes, or planning approvals that may affect communities within Rarienda Constituency or surrounding areas;
- 7) Details of any county-level policy positions or resolution adopted by the County Government of Siaya regarding the proposed nuclear power programme.

6. The request for information was duly received by the County Government of Siaya on 26th March 2026 as evidenced by the stamped copy provided by the Applicant. No response was received within the timelines prescribed by section 9(1) of the *ATI Act, 2016* prompting this review application to be filed on 7th May 2026.

7. Upon receipt of the Application, the Commission pursuant to Section 22(3)(a) of the *ATI Act, 2016* and *Regulation 25 of the Access to Information (General) Regulations, 2023*, issued an Access to Information Notice dated 28th May 2026 to the Governor, County Government of Siaya. The Commission required the Respondent to provide a certified copy of the entries in its Access to Information Register relating to the Applicant's request together with an institutional report or any further information relevant to the determination of the Application.
8. The Respondent's did not provide a substantive response to the Commission's Notice, prompting issuance of Summons dated 22nd July 2026 to the Governor, County Government of Siaya, requiring his attendance before the Commission on 6th August 2026 for purposes of interview, questioning, disclosure of information and/or production of documents. The summons was received by the Office of the Governor, County Government of Siaya, on 24th July 2026.
9. In response to the Summons and the ATI Notice, the Governor, by a letter dated 29th July 2026, informed the Commission that, following inquiries and a review of the County Government's records, the Respondent did not possess or hold any correspondence, memoranda, agreements, minutes, reports, consultations or other records between the County Government and the National Government or any of its agencies, including the Ministry of Energy and Petroleum, the Nuclear Power and Energy Agency (NuPEA), the Kenya Nuclear Regulatory Authority (KNRA) and the National Environment Management Authority (NEMA), relating to the proposed nuclear power plant project.
10. The Respondent further stated that it had not undertaken, commissioned or received any environmental, social, economic, technical or feasibility

studies in respect of the proposed nuclear power plant or nuclear facility. Consequently, the Respondent stated that it did not hold any information, records or documents relating to the proposed nuclear power plant project pursuant to the Notice for Access to Information.

11. The Respondent maintained that it remained committed to the constitutional principles of transparency, accountability and the right of access to information under *Article 35 of the Constitution* and the *ATI Act, 2016*. However, it stated that the right of access extends to information held by or under the control of a public entity and that it could not produce documents that were not within its possession, custody or control. The Respondent consequently requested that the Summons dated 22nd July 2026 to be withdrawn.

12. Upon receipt of the Respondent's response, the Commission through a Notification of Response dated 3rd August 2026, furnished the Applicant with a copy of the response and sought its rejoinder if any. The Applicant did not issue any rejoinder prompting the Commission to render this decision.

C. ISSUES FOR DETERMINATION

13. Having considered the request for information dated 23rd March 2026, the Application for Review dated 7th May 2026 and the Respondent's response dated 29th July 2026, the Commission frames the following as the issues for determination in this Application: -

- i. Whether the Commission has jurisdiction to review the Respondent's decision under the *ATI Act, 2016*;
- ii. Whether the Applicant is entitled to the information sought;

- iii. Whether the information requested is held by the Respondent;
- iv. Whether the information held by the Respondent is subject to disclosure to the Applicant.

D. ANALYSIS OF FACTS, ISSUES AND FINDINGS

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

14. Section 14(1)(a) of the ATI Act, 2016, empowers the Commission to review decisions of public entities refusing or failing to grant access to information requested by citizens. The ATI Act, 2016, applies to all public entities based on the understanding that the State is the duty bearer of the right of access to information and exercises its functions through public entities. Section 2 of the ATI Act, 2016, defines a public entity as...

“(a) any public office, as defined in Article 260 of the Constitution; or

(b) any entity performing a function within a commission, office, agency or other body established under the Constitution.”

15. The Respondent in the present Application is the County Government of Siaya, a devolved unit of government established under *Article 176 of the Constitution of Kenya and the County Government Act, 2012*. As a County Government, the Respondent is a public entity within the meaning of *Section 2 of the ATI Act, 2016* and is therefore bound by the obligations imposed under *Article 35 of the Constitution and the ATI Act, 2016*.

16. From the foregoing, 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 Applicant is entitled to the information sought

17. 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."***

18. The Applicant is the Western Kenya Social Justice Centres Working Group, a Kenyan civil society network represented by its Convenor, Mr. Collins Kodhek, a Kenyan citizen. The Commission is satisfied that the Applicant falls within the definition of a citizen for purposes of the *ATI Act, 2016*.

19. This position was affirmed by the High Court in ***Katiba Institute v President's Delivery Unit (Constitutional Petition 468 of 2017) [2017] KEHC 2183 (KLR)***, where the Court held that a juristic person whose directors are Kenyan citizens qualifies as a 'citizen' and is therefore entitled to exercise the right of access to information under Article 35 of the Constitution and Section 4 of the *ATI, Act 2016*.

20. Accordingly, the Commission finds and holds that the Applicant is entitled to invoke the right of access to information guaranteed under Article 35 of the Constitution and the Access to Information Act, 2016.

iii. Whether the Information Requested is Held by the Respondent

21. Section 4(1) of the *ATI Act, 2016* provides for citizens the right of access to 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....”

22. Similarly, Article 35 of the Constitution which guarantees the right of access to information utilizes the word **‘held’**. According to the Oxford Advanced Learners Dictionary (9th Edition), the word ‘held’ is the past tense and 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’**.

23. The use of the word ‘held’ in both the *Constitution* and the *ATI Act, 2016*, connotes that the Respondent must be in possession of the information sought by the requester. Thus, the obligation to provide such information cannot be invoked if the Respondent demonstrates that it does not have such information.

24. As such, it would be a sufficient and lawful response to a request for information for a public entity to indicate that a particular set of information requested is not within its possession, but such a response should be based on a correct and truthful account by the entity.

25. The Commission notes that where a public entity asserts that it does not hold information sought by an Applicant, the assertion must be considered against the circumstances of the particular request. A public

entity should undertake reasonable inquiries and searches of its records and provide a truthful and adequate response as to whether the information exists and is within its possession, custody or control.

26. In the present matter, the Respondent expressly stated, through the Governor's letter dated 29th July 2026, that following inquiries and a review of the County Government's records, it did not possess or hold correspondence, memoranda, agreements, minutes, reports, consultations or other records between the County Government and the National Government or its agencies relating to the proposed nuclear power plant project.

27. The Respondent further stated that it had not undertaken, commissioned or received any environmental, social, economic, technical or feasibility studies in respect of the proposed nuclear power plant or nuclear facility.

28. The Commission has considered this response alongside the nature of the information sought. The Respondent's position is not merely that it declines to disclose the information. Rather, it expressly stated that the information and records sought are not within its possession, custody or control.

29. The Commission noted that the requested sets of information relate to the proposed establishment of nuclear plant in Siaya County. The Commission undertook detailed research on the proposed nuclear power project in Siaya County and took note that the project is spearheaded by institutions at the national Government including the Ministry of Energy and Petroleum and the Nuclear Power and Energy Agency (NuPEA).

30. Section 54 of the *Energy Act, 2019* establishes NuPEA as the institution with the mandate of implementing nuclear energy programme and promotion of the development of nuclear electricity generation in Kenya. The Agency is further required to carry out research, development and dissemination activities in the energy and nuclear power sector.

31. Section 56(2) of the *Energy Act, 2019* stipulates NuPEA's specific functions to include making proposals on nuclear power policies and legislation, public education and awareness, implementation of approved roadmap for a nuclear power programme; develop human resource capacity, identify appropriate sites for construction of nuclear power plants and their related amenities, identify a suitable operator for nuclear power plants, promote nuclear power research, undertake any energy technology development related activities as directed by the Cabinet Secretary among other functions.

32. It is quite clear from the foregoing that the lead institution for nuclear power development and implementation is NuPEA. In fact, the Applicant in the request for information dated 23rd March 2026, at paragraph 4 observed that ...

“We note with concern that the proposed nuclear power programme has been advances at the national level under the National Energy Policy 2025-2034 and through preparatory studies conducted by Nuclear Power and Energy Agency.”

33. This means that the Applicant from the onset was clear that the requested sets of information were held by other institutions including NuPEA and not the Respondent in this review application.

34. The Commission carefully evaluated the nature of information requested by the Applicant and is of the considered view that the requested sets relate to NuPEA's mandate.
35. Perhaps the Applicant needed to have an understanding on whether the Respondent has been involved in the project discussions, formulation or initial preparations, which ordinarily is expected to occur being the County where the project is proposed to be implemented in. This prompted a careful examination on the nature of the information requested vis-à-vis the Respondent's obligations in the *Constitution* and the *County Governments Act, 2012*.
36. The Commission is cognizant that the Respondent has a statutory planning and public participation responsibilities. The *County Governments Act* at sections 87 to 92 requires county processes and programmes to incorporate public participation. Sections 92 to 95 of the Act stipulates the centrality of county communication and involvement of citizens in County processes. Further, section 96 of the Act provides for access to information relevant to policy, programs and projects formulation and implementation.
37. However, the foregoing legal requirements apply to projects, programmes and activities being run, implemented and spearheaded by the County Governments. There are no corresponding legal requirements to the respondent for programs run by other institutions at the National Government level. As such, the existence of these statutory requirement does not automatically prove that specific information requested by the Applicant was created, received or is presently held by the Respondent in relation to the proposed nuclear power project. This is particularly important bearing in mind the present scenario where the nuclear power project is being implemented by another Institution.

38. Accordingly, the Commission agrees with the Respondent's position articulated in its response letter dated 29th July 2026 and holds that the information requested by the Applicant is not held by the Respondent.

iv. Whether the Information Held by the Respondent is Subject to Disclosure to the Applicant

39. Sections 14 and 22 of the ATI Act, 2016 empowers the Commission to conduct investigations and necessary inquiries for the proper determination of the application. The Commission's review process is therefore inquisitorial in character and permits it, where necessary, to establish relevant facts in order to determine an application substantively.

40. In the present case, the Commission conducted an information audit and was able to establish that Strategic Environmental and Social Assessment (SESA) information relating to Kenya's Nuclear Power Programme had been proactively disclosed by NuPEA and was publicly accessible through its official website repository.

41. Section 6(5) of the ATI Act, 2016 provides that ***"A public entity is not obliged to supply information to a requester if that information is reasonably accessible by other means."***

42. Thus, the Commission finds that the information requested in number 3(b) of the Applicant's request for information dated 23rd March 2026 has been proactively disclosed and is publicly accessible to the Applicant through NuPEA's website.

43. Separately, the Commission held in issue number (iii) herein above that the Respondent in this review does not hold the information requested by the Applicant. Consequently, the question on whether the applicant can be granted access information to the information requested by the Respondent becomes moot and the Commission will not delve into it. Nevertheless, the Applicant may exercise the right of access to information by requesting any remaining information from NuPEA or any other institution which holds such information.
44. Before finalizing this ruling, the Commission emphasizes that all public entities including the Respondent herein have a Constitutional and statutory obligation to facilitate access to information in a timely and transparent manner as provided by the *ATI Act, 2016*. This obligation includes the duty to provide a response to the request even in cases where access is limited or information is not held by the public entity as provided under the *ATI Act 2016*.
45. In cases where the public entity is not in possession of the requested information, public entities have a further obligation under *section 10* of the *ATI Act, 2016* to transfer the request for information, or a part thereof to another public entity if the first has knowledge that the information is held by the other public entity. The Respondent in this review had an obligation to inform the Applicant in writing that it was not in possession of the requested information and further transfer the request thereof to NuPEA within five days after its receipt as provided by *section 10 (1)* of the *ATI Act, 2016*.
46. *Section 4* of the *Fair Administrative Action Act 2015* guarantees every person the right to administrative action that is expeditious, efficient, lawful and reasonable. Public entities, including the Respondent herein, are expected to comply strictly with statutory timelines unless sufficient

justification is provided within the framework of the law. Failure by public officers to respond to lawful requests for information undermines transparency, accountability and public confidence in governance.

E. FINAL ORDERS

47. 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) of the *ATI Act, 2016* and Regulation 25(10) of the *Access to Information (General) Regulations, 2023*, **DECIDES:**

1. **THAT** the information requested by the Applicant in the letter dated 23rd March 2026 is not held by the Respondent and thus the review application dated 7th May 2026 is hereby dismissed.
2. **THAT** the Applicant is at liberty to request access to information relating to the proposed nuclear power plant project from any public entity having possession, custody or control of the information or records needed, in accordance with Article 35 of the *Constitution* and section 8 of the *ATI Act, 2016*.
3. **THAT** this Application is hereby determined in the foregoing terms and closed accordingly.

Dated, Signed and **Issued** at **Nairobi** this...9TH day of**SEPTEMBER**....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.”***