

**REPUBLIC OF KENYA**  
**COMMISSION ON ADMINISTRATIVE JUSTICE**  
**(OFFICE OF THE OMBUDSMAN)**  
**ATI REVIEW APPLICATION NO. CAJ/ATI/KHRC/083/2/2023-MW**

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**ALOICE OPIYO ONYANGO.....APPLICANT**

**VERSUS**

**KENYA HUMAN RIGHTS COMMISSION .....RESPONDENT**

**DETERMINATION**

**Factual Background**

1. The Commission on Administrative Justice (Office of the Ombudsman) (herein after referred as CAJ or the Commission) is established under Article 59(4) of the Constitution, and its constitutive Act; Commission on Administrative Justice Act, 2011 (CAJ Act) with the mandate to enforce administrative justice in the public sector by addressing all forms of maladministration. The Commission has a further mandate of oversight and enforcement of the right of access to information as guaranteed by Article 35 of the Constitution, through the Access to Information Act, 2016 (ATI Act).
2. The Commission's work is guided by the following laws: -
  - i) The Constitution;
  - ii) The Commission on Administrative Justice Act, 2011 and its Regulations of 2013;
  - iii) Access to Information Act, 2016;
  - iv) The Fair Administrative Action Act, 2015;
  - v) The Public Service (Values & Principles) Act, 2015.

3. Article 35 of the Constitution guarantees the right of every citizen 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.***

The importance of access to information to a country's citizenry is premised on the fact that all sovereign power belongs to the people and all State information is held by public entities in trust for the people. Article 1 of the Constitution expressly provides that all sovereign power belongs to the people and should only be exercised in accordance with the Constitution. It further provides that the power may be exercised directly by the people or through their democratically elected representatives. Access to information equips citizens with requisite knowledge about government policies, procedures and decisions thereby enabling them to have meaningful participation. In addition, informed citizens are able to scrutinize the actions and decisions of duty bearers thereby promoting the principles of good governance. This ultimately engenders open government, efficient delivery of services and rule of law. It further strengthens public trust in institutions thereby building back strong institutions for the public good and sustainable development.

#### **Facts of the Review Application**

4. The Commission on 10<sup>th</sup> January 2023 received a complaint by the Applicant dated 16<sup>th</sup> December 2022 requesting for review of a decision by the Respondent on his request for information. Upon analysis of the complaint, the Commission observed that the Applicant had not initiated any request for information to the Respondent and thus in a

letter Ref: CAJ/ATI/KHRC/083/2/23-MW dated 18<sup>th</sup> January 2023 advised the Applicant accordingly. The said letter was copied to the Respondent for information purpose.

5. On 7<sup>th</sup> February, 2023, the Applicant supplied to the Commission a copy of his letter dated 18<sup>th</sup> September 2022 addressed to the Respondent which forms the basis of his request for information to the Respondent. In the letter, the Applicant had requested for:-

- a. **A tabulation of his salary arrears;**

- b. **Minutes of the mediation meeting held on 6<sup>th</sup> October 2021 between himself and Sonysugar Company as well as a copy of report given to Sonysugar Managing Director at the conclusion of the mediation meeting.**

6. The Applicant stated to the Commission on 7<sup>th</sup> February 2023 that the aforesaid letter dated 18<sup>th</sup> September 2022 had not been responded to by the Respondent and thus was requesting for a review of the Respondent action under the ATI Act, 2016. However, the Applicant stated that he had abandoned the request for the set of information in (a) being '*a tabulation of salary arrears*. Thus, he instructed the Commission to review the Respondent's action on the sets of information requested in (b) being '*Minutes of the mediation meeting held on 6<sup>th</sup> October 2021 between himself and Sonysugar Company as well as a copy of report given to Sonysugar Managing Director at the conclusion of the mediation meeting.*'

7. Following these developments, the Commission wrote a letter Ref: CAJ/ATI/KHRC/083/2/23-MW dated 7<sup>th</sup> February 2023 to the Respondent requiring compliance with section 9(4) of ATI, 2016. The Commission states that no response was received from the Respondent either at the Commission or with the Applicant. Section 23(3)(a) of ATI Act, 2016 gives the Commission the power to call for information or report regarding a

complaint lodged with it from a public entity or private body. Further, section 23(3)(a)(i) provides that ....

***“if the information or report called for is not received within the time stipulated by the Commission, the Commission may proceed to inquire into the complaint without such information”.***

In the absence of a response from the Respondent, the Commission will proceed as guided by section 23(3)(a)(i) of ATI, 2016.

### **Issues for determination**

8. After a careful analysis of the request for information by the Applicant dated 18<sup>th</sup> September 2022 as well as other documents supplied by the Applicant in relation to his request for information, the Commission frames the following as the issues for determination in this review:
  - i. **Whether the Commission has jurisdiction under ATI Act to review a decision by Respondent Organization;**
  - ii. **Whether the Respondent had in its custody/possession the information requested by the Applicant;**
  - iii. **Whether the information requested by the Applicant and which was in the custody/possession of the Respondent should be disclosed to the Applicant;**
  - iv. **The orders which the Applicant is entitled to.**

**Whether the Commission has jurisdiction under ATI Act to review a decision by Respondent Organization**

9. It is quite clear that the ATI Act 2016 applies to all public entities based on the understanding that the State which is the duty bearer of the right of access to information exercises its functions through public entities. However, the application of the ATI Act, 2016 as far as private bodies are concerned is not express to all private bodies and has to be determined on a case-to-case basis. This stems from the definition of a private body in section 2 of the ATI Act, 2016 which defines private body as...

***“Private body’ means any private entity or non-state actor that -  
(a) receives public resources and benefits, utilizes public funds, engages in public functions, provides public services, has exclusive contracts to exploit natural resources (with regard to said funds, functions, services or resources); or  
(b) is in possession of information which is of significant public interest due to its relation to the protection of human rights, the environment or public health and safety, or to exposure of corruption or illegal actions or where the release of the information may assist in exercising or protecting any right;”***

According to the ATI Act, 2016, not all private bodies come under the scope of the Act. This is seen clearly from the definition of a ‘private body’ which places some private bodies under the realm of the ATI Act and others outside the Act. Further, the Commission wishes to guide that it is possible for a private body to fall within the realm of the Act through performance of a single transaction which fits in the definition under the Act. An example is a private body which executes a contract to exploit natural resources whereof through such a contract, some or all the

obligations of the ATI Act can apply to such a body. Accordingly, any private body to which the ATI Act applies becomes a **'relevant private body'** for purposes of the Act.

10. According to information available and obtained by CAJ from the Respondent's **website [https://www.khrc.or.ke/]**, the Respondent herein describes itself as a non-governmental organization founded in 1992 and registered in 1994. The Respondent campaigns to create a culture in Kenya where human rights and democratic culture are entrenched. It does this through monitoring, documenting and publicising human rights violations. The Respondent was registered in 1994 under the repealed Non-Governmental Organization Coordination Act. The Non-Governmental Organization Coordination Act defined Non-Governmental Organization under section 2 as ....

***“Private voluntary grouping of individuals or associations, not operated for profit or for other commercial purposes but which have organized themselves nationally or internationally for the benefit of the public at large and for the promotion of social welfare, development charity or research in the areas inclusive of, but not restricted to, health, relief, agriculture, education, industry and the supply of amenities and services;”***

11. The Commission notes that the Non-Governmental Organization Coordination Act was repealed by the Public Benefits Organizations Act, 2013 but the Act has not been operationalized. The foregoing notwithstanding, the Public Benefits Organizations Act, 2013 in its transition provisions in the fifth schedule states that...

***“Every non-governmental organization which on the appointed day is registered under the Non-Governmental Organizations Act (now repealed) shall, be deemed to be registered as a public***

**benefit organization under this Act and shall have up to one year from the appointed day to seek registration as a public benefit organization under this Act”**

12. Similarly, the Public Benefits Organizations Act, 2013 in section 5 defines a Public Benefit Organization as...

**“a voluntary membership or non-membership grouping of individuals or organizations, which is autonomous, non-partisan, non-profit making and which is—**  
**(a) organized and operated locally, nationally or internationally;**  
**(b) engages in public benefit activities in any of the areas set out in the Sixth Schedule; and**  
**(c) is registered as such by the Authority”**

Accordingly, the legal definition of a Public Benefits Organization under the Public Benefits Organizations Act, 2013 section 5(1)(b) as an Organization which **“engages in public benefit activities”** places Public Benefits Organizations within the definition of private bodies under section 2 of ATI 2016. Similarly, the Non-Governmental Organization Coordination Act in section 2 use of the words **“for the benefit of the public at large”** in defining a Non-Governmental Organization brings NGOs in Kenya within the realm of ATI Act. Hence, the Commission holds that the ATI Act, 2016 obligations apply to Non-Governmental Organizations in Kenya and their successors thereof; the Public Benefits Organizations. Consequently, the Commission holds that the Respondent is a **‘relevant private body’** under the ATI Act, 2016 and will thus exercise its review function over the decision by the Respondent.

**Whether the Respondent had in its custody/possession the information requested by the Applicant;**

13. The second issue to determine in this application for review is whether the Respondent has in custody the requested information. This is based on the provision in section 4 (1) of the ATI Act which stipulates 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 (9<sup>th</sup> Edition), the word ‘held’ is the past tense, past participle of the word ‘hold’. Black’s Law Dictionary (11<sup>th</sup> 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 present with the Respondent.
14. The Access to Information Act gives a clear procedure which must be followed once a request for information has been lodged with a public entity. The Commission wishes to clarify that the procedure on information disclosure applicable to public entities is equally applicable to ‘*relevant private bodies*’ including the Respondent herein. Section 9(1) of the Act provides that a decision on a request for information shall be made within twenty-one days after receipt on the request but where the information sought concerns the life or liberty of a person, such decision shall be made within 48 hours as provided by section 9(2) thereof.
15. Section 9(4) of the ATI Act, 2016 stipulates the different decisions which can be made by a public entity or relevant private body on a request for information. The section states that...

**“(4) As soon as the information access officer has made a decision as to whether to provide access to information, he or she shall immediately communicate the decision to the requester, indicating—**

**(a) whether or not the public entity or private body holds the information sought;**

**(b) whether the request for information is approved;**

**(c) if the request is declined the reasons for making that decision including the basis for deciding that the information sought is exempt, unless the reasons themselves would be exempt information; and**

**(d) if the request is declined, a statement about how the requester may appeal to the Commission.”**

Further, where the requester does not receive a response to a request within 21 days from the date the request was made, the request for information is deemed to have been rejected as provided by section 9(6) of the Act. In such a case, the requester has a right to apply to the Commission for a review of such action by the public entity or private body.

16. The Applicant in his request for information dated 18<sup>th</sup> September 2022 requested for: -

***Minutes of the mediation meeting held on 6<sup>th</sup> October 2021 between himself and Sonysugar Company as well as a copy of report given to Sonysugar Managing Director at the conclusion of the mediation meeting.***

The Applicant in his letter dated 18<sup>th</sup> September 2022 gave an account of a mediation meeting which took place on 6<sup>th</sup> October 2021 at the Respondent's Board Room. He has given names of the persons who

attended the mediation being Mr. Ligawa who was the acting Managing Director for Sonysugar, Mr. Maurice Omondi, legal officer Sonysugar, Mr. Jack Opiyo, Industrial Relations, Manager Sonysugar, Mr. Ramadhan Odero of Kituo cha Sheria, himself and Mr. Brian Olang, the Respondent's officer and who was the mediator. The Commission had an opportunity to examine other documents submitted by the Applicant. In a letter by the Respondent Referenced *KHRC/GEN/01/2021* dated 7<sup>th</sup> December 2021 to the managing Director, Sonysugar Company Limited, the Respondent states that...

***“Following our letter dated 29<sup>th</sup> October, 2021 and the meeting held on 6<sup>th</sup> October 2021, we would like you to confirm if you are still amenable to settling the matter through mediation.”***

17. From the account given by the Applicant coupled with the contents of the Respondent's letter Referenced *KHRC/GEN/01/2021* dated 7<sup>th</sup> December 2021 which confirms that a meeting happened on 6<sup>th</sup> October 2021, the Commission is in agreement with the Applicant that a mediation meeting took place on 6<sup>th</sup> October 2021 whereof the mediator thereof was the Respondent's officer. One of the roles of a mediator in any mediation proceedings is to create and maintain an accurate account of what transpired in the mediation meeting. As such, the Commission is convinced and holds that the requested information is within the Respondent's possession.

**Whether the information requested by the Applicant and which is in the custody/possession of the Respondent should be disclosed to the Applicant;**

18. The Commission observes that the information sought by the Applicant is information or records resulting from a mediation meeting held

between the Applicant and SonySugar Company on 6<sup>th</sup> October 2021 whereof the Respondent's officer was the mediator. Kariuki Muigua in his book *'Alternative Dispute Resolution and Access to Justice in Kenya'*, Glenwood Publishers Limited (2015) at page 24 defines mediation as...

***"...a voluntary, informal, consensual, strictly confidential and non-binding conflict management process, in which a neutral third party helps the parties to reach a negotiated settlement."***

19. The Commission notes that there is no law addressing mediation process in Kenya but Parliament is in the process of developing e legislation on mediation and Alternative Disputes Resolution. That notwithstanding, and as observed by Kariuki (supra), the Commission is of the view that one of key principles of mediation and which is a catalyst to the success of any mediation is the principle of confidentiality. Simon Roberts and Michael Palmer in their book *'Dispute Process; ADR and the Primary Forms of Decision-Making'*, Cambridge University Press, (2008), at page 213 observes that...

***"Confidentiality is integral to the relationship between mediator and the parties...is one of the four fundamental and universal characteristics of mediation. It is the cornerstone of the relationship of trust that must exist between the mediator and the parties, and of the free and frank disclosure that is necessary if obstacles to settlement are to be overcome."***

Further, Simon Roberts et al (supra) indicates that confidentiality in mediation is applicable to third parties access to mediation information by stating that confidentiality...

***“...is crucial to the voluntariness of participation of the parties, and to the impartiality of the mediator. The parties must not feel that they might be disadvantaged by any disclosure that may be used in legal proceedings, or in any other way. They need to know that they have nothing to lose by resulting to mediation.”***

However, the same authors (Simon Roberts and Michael Palmer – supra) indicate in page 213 that confidentiality in mediation is not absolute as it is always subject to the requirement that the law of the land shall be complied.

20. In the instant review, the Applicant who requested to access the minutes and a report of the mediation meeting held on 6<sup>th</sup> October 2021 was a party to the mediation. As such, the Applicant has knowledge of how the mediation was conducted and the outcome of the mediation meeting. In fact, paragraphs 3 and 4 of page 2 of his request letter dated 18<sup>th</sup> September 2022 give a full account of what transpired in the mediation meeting from the time he got into the boardroom up to the time the meeting ended. According to the Applicant's letter, no agreement was arrived at in the mediation meeting. In paragraph 9 of page 2 of the Applicant's request, the Applicant states that the Ag. Managing Director of Sonysugar Company in a letter Ref: SNSC/MD/463/21 dated 29<sup>th</sup> December 2021 indicated that his dispute had been amicably resolved in the mediation meeting of 6<sup>th</sup> October 2021. Thus, the Commission observes that what the Applicant is interested in through his request to the Respondent is a record of the mediation meeting to confirm the official outcome of the mediated meeting.

21. The question which arises in this review is whether the Applicant is entitled to minutes of the mediation meeting noting the foregoing principle of confidentiality. Whereas the confidentiality principle in mediations is appreciated, the Commission observes that the same cannot be

maintained if the parties thereof adopt different positions on the outcome of a mediation meeting. Where one party insists that a resolution was reached and the other party insists that no agreement was reached, then, the Commission is of the view that the mediator thereof should disclose the official record of the meeting to allow certainty on the matter. The foregoing is informed on the understanding that the outcome of a mediation can be separated as a distinct set of information from other information or documents shared in the mediation proceedings and thus maintaining the delicate balance between disclosure and protection of confidential information. This position is seen for instance in the practice obtaining under the *Mediation (Pilot Project) Rules, 2015* by the Judiciary under the Civil Procedure Act where rule 13 requires the mediator at the conclusion of a mediation to file a report with the Deputy Mediation Registrar and supply a copy to the parties within 10 days.

22. However, the Commission observes that where such a record holds other information which according to the mediator should be protected under the confidentiality principle, then disclosure of the official outcome of the mediated meeting should be made in a manner that allows such protection. One of the ways in which this can be done is through a separate report or letter signed by the mediator to the parties communicating the official outcome thereof, other than disclosing the actual record of the mediated meeting.

**The Orders which the Applicant is entitled to;**

23. Having made a careful analysis of all the facts and information provided in this Review Application, the Commission, pursuant to the powers granted by section 23(2)(a) of the Access to Information Act, 2016 makes the following **ORDERS: -**

1. **THAT** the Respondent through its Executive Director should facilitate access to minutes of the mediation meeting held on 6<sup>th</sup> October 2021 between the Applicant and Sonysugar Company as guided in paragraph 21 and 22 herein before.
2. **THAT** compliance with No.1 be within **seven (7) days** from date hereof.

**Dated, Signed** and **Delivered** at **Nairobi** this.....**27<sup>th</sup>**.... day of.... **March**.....2023

**LUCY NDUNGU, EBS**  
**ACCESS TO INFORMATION COMMISSIONER**