

**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/JUD/001/737/26-LM.**

**FRED APIMA OBITA .....APPLICANT**

**VERSUS**

**THE DEPUTY REGISTRAR,  
EMPLOYMENT AND LABOUR RELATIONS COURT,  
KISUMU..... RESPONDENT**

**RULING**

**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 charged with the twin mandate of enforcing administrative justice in the public sector by addressing all forms of maladministration and oversight and enforcement of the right of access to information under the Access to Information Act, 2016 (hereinafter referred to as the "the Act").
2. 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 right of access to information under Article 35 of the Constitution is grounded in the principle that all sovereign power belongs to the people as provided under Article 1, and is exercised in accordance with the national values and principles of governance set out in Article 10.

Public institutions, therefore, hold information in trust for the people. Access to such information enables citizens to participate meaningfully in governance, promotes transparency and accountability, and strengthens the rule of law.

### **FACTS OF THE REVIEW APPLICATION**

3. This matter arises from an application for review brought pursuant to Section 14(1)(a) of the Act. The Applicant, by a request dated 2<sup>nd</sup> March 2026, sought to be furnished with a certified, true, complete and verbatim transcript of proceedings in **Kisumu ELRC Cause No. E053 of 2024 FRED APIMA OBITA .vs. TSC & KISIICOUNTY DIRECTOR AND SIX OTHERS.**
4. By a response dated 25<sup>th</sup> March 2026, the Deputy Registrar, Employment and Labour Relations Court, Kisumu, informed the Applicant that they do not maintain verbatim recordings of proceedings. The Respondent further advised that only typed and certified copies of proceedings are available upon formal request and payment of the prescribed fees.
5. Dissatisfied with the response, the Applicant lodged the present application for review to the Commission vide letter dated 27<sup>th</sup> March 2026 pursuant to *Section 14(1)(a)* of the Act, 2016.

Having considered the request, the response, and the application for review, the Commission proceeds to determine the matter pursuant to Section 22(3) of the Act.

## **ISSUES FOR DETERMINATION**

6. The Commission identifies the following issues for determination in this application:
  - i. ***Whether the Commission has jurisdiction to review the Respondent's decision;***
  - ii. ***Whether the Respondent holds the requested information in the format requested by the Applicant;***
  - iii. ***Whether the Applicant is entitled to access such requested information in the format requested only, or whether his right to information can be upheld by access in other formats, and***
  - iv. ***The orders to be issued in this application.***

## **ANALYSIS OF FACTS, ISSUES AND FINDINGS**

- i. **Whether the Commission has jurisdiction to review the Respondent's decision;**
7. Section 14(1)(a) of the ATI Act expressly empowers the Commission to review decisions of a public entity or private body declining to grant access to requested information. Further, Sections 20, 21(f), 21(2) and 21(3) of the Act, confer upon the Commission with the oversight and enforcement powers to hear and determine complaints arising from violations of the right of access to information, and issue decisions under the Act which decisions are binding on the national and county governments as well as relevant private bodies.
8. The applicability of the ATI Act extends to public entities, which are defined under Section 2 of the Act to include any public office as contemplated under Article 260 of the Constitution, or any entity performing a public function within a body established under the Constitution. Section 2 of the ATI Act provides as follows:-

**“(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.”**

9. The Respondent, holds the office of a public body performing constitutional and statutory functions. Consequently, for purposes of the Act, 2016, which applies to public entities, it bears the legal obligation in respect of the right of access to information.

10. The Commission finds and holds that it has jurisdiction to review the decision, action or inaction of the Respondent in the present application.

**ii. Whether the Respondent holds the requested information in the requested format.**

11. 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....”**

12. 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’**.

13. The Respondent indicated that it does not maintain verbatim recordings and that the available records consist of typed and certified copies of proceedings. Section 17 of the Act obligates public entities to maintain records to facilitate access to information. However, this obligation does not require entities to maintain records in every conceivable format. This position was affirmed in **Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company & 2 others [2013] eKLR**, where the Court in paragraph 56 held that:

*“The right of access to information [...] does not extend to requiring a public body to create information which it does not have.”*

Similarly, the Supreme Court of India in **Central Board of Secondary Education & another v Aditya Bandopadhyay & others (2011) 8 SCC 497**, in paragraph 35, the **Court** stated that:

***“The Act provides access to all information that is available and existing [...] but does not cast an obligation upon the public authority to collect or collate such non-available information and then furnish it to an applicant.”***

14. The Commission has further considered whether the proceedings were conducted virtually and whether electronic or verbatim recordings may exist. In the absence of evidence demonstrating that such recordings were created and are held by the Respondent, the Commission is unable to find that such records exist.

**iii. Whether the Applicant is entitled to access such requested information in the format requested only, or whether his right to information can be upheld by access in other formats.**

15. Pursuant to Section 9 of the Act, 2016, a public entity is required to consider and respond to a request for access to information by either granting access or providing lawful reasons where access cannot be granted. In the present case, the Respondent, in its response, explained the nature of the records it holds and informed the Applicant of the available alternative, namely typed and certified copies of proceedings, including the applicable procedure for accessing the same.

16. The Commission notes that the Applicant sought to be furnished with a certified, true, complete and verbatim transcript of proceedings in *Kisumu ELRC Cause No. E053 of 2024*. Section 11(3) of the Act provides that information shall be supplied in the form in which it is held, unless the applicant requests that it be made available in another format and it is practicable to do so. The Section 11(3) states as follows:-

*"Any information[...] shall be produced forthwith **at the place it is kept for inspection in the form in which it is held** unless the applicant requests that it be made available in another form and, **if it is practicable to do so**, such information **may** be copied, reproduced or used for conversion to a sound transmission at the expense of the applicant"*

17. The Commission notes that Section 11(3) of the Act imposes a mandatory obligation on a public entity to provide information in the form in which it is held. However, the provision of information in an alternative format is discretionary and dependent on the practicability of doing so. The use of the word "shall" denotes a mandatory duty with respect to the form in which the information is held, while the use of the word "may", read together with the phrase "if it is practicable to do so," indicates that the provision of information in another format is not obligatory but contingent upon feasibility

18. The Commission observes that access to court records is governed by specific procedural frameworks. In particular, **Order 21 Rule 20 of the Civil Procedure Rules** requires courts to provide certified copies of proceedings upon request and payment of the prescribed fees, which constitute the official record for purposes of lodging an appeal. Such certified proceedings constitute the official record for purposes of lodging an appeal. The Respondent's direction to the Applicant to follow this established procedure is therefore consistent with the applicable legal framework.

19. Accordingly, the Applicant's right of access to information was therefore sufficiently met through access to typed and certified proceedings as provided by the Respondent.

20. This position is supported by the decision of the High Court of Justice of England in **Department for Business, Enterprise and Regulatory Reform V Information Commissioner & Friends of the Earth Ltd [2008] EWHC 638 (Admin)**, where the Court in paragraph 15 held that:

*"A public authority is not obliged to create information to answer a request."*

21. Similarly, the Constitutional Court of South Africa in the matter **of Brümmer V Minister for Social Development and Others 2009 (6) SA 323 (CC)**, in paragraph 63, it was emphasized that:

*"The right of access to information must be interpreted in a manner that is practical, reasonable and effective."*

22. The Commission finds that the Respondent duly considered the request and provided a written response explaining the unavailability of the

requested format while advising the Applicant on the alternative format available to him. The Respondent further guided the Applicant on the procedure to be followed in accessing the information, albeit in a different format. In the circumstances, the Commission finds that the Respondent's response was lawful, sufficient, and in compliance with the provisions of the Act.

**FINAL ORDERS:**

23. Having carefully considered the request for information dated 2<sup>nd</sup> March 2026 and application for review dated 27<sup>th</sup> March 2026, together with the Respondent's response dated 25<sup>th</sup> March 2026, the Commission, pursuant to the powers granted by sections 23(2)(c) of the Act Cap. 7M and Regulation 25(10) of the Access to Information (General) Regulations, 2023, determines and **ORDERS:**

1. **THAT** the Respondent discharged its lawful obligations under the ATI Act through its response dated 25<sup>th</sup> March 2026; thus, the present review application does not have merit and is hereby dismissed in its entirety.

**Dated, Signed** and **Issued** at **Nairobi** this... **17<sup>th</sup>** ... day of .....APRIL.....2026



**DOROTHY JEMATOR**  
**ACCESS TO INFORMATION COMMISSIONER**

**TAKE NOTICE THAT:**

*Section 23(3) of the ATI 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."*