

REPUBLIC OF KENYA
COMMISSION ON ADMINISTRATIVE JUSTICE
(OFFICE OF THE OMBUDSMAN)
ATI REVIEW APPLICATION NO. CAJ/ATI/CMA/000/56/22-SC

KENNEDY MURIITHI RIUNGU.....APPLICANT

VERSUS

CAPITAL MARKETS AUTHORITYRESPONDENT

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 public institutions thereby building back strong institutions for the public good and sustainable development.

4. The Commission on 12th October 2022 received a letter of the same date Referenced AKO/VA/KMR/02/2022 from AKO Advocates on behalf of Mr. Kennedy Muriithi Riungu, the Applicant herein. The letter made an application for review of a failure by Capital Markets Authority (CMA) to release information as requested by the Applicant (requester then) in a letter dated 11th August 2020.

5. Section 14(1) of the Access to Information Act, 2016 grants any requester for information the right to apply to the Commission for review of a

decision by a public entity or private body. The review can be premised on a decision...

- a. Refusing to grant access to the information applied for;**
- b. Granting access to information in edited form;**
- c. Purporting to grant access, but not actually granting the access in accordance with an application;**
- d. Deferring providing the access to information;**
- e. Relating to imposition of a fee or the amount of the fee;**
- f. Relating to the remission of a prescribed application fee;**
- g. Granting access to information only to a specified person; or**
- h. Refusing to correct, update or annotate a record of personal information in accordance with an application made under section 13.**

6. The Applicant herein in the letter dated 12th October 2022 informed the Commission that the request for information to Capital Markets Authority (CMA) dated 11th August 2020 had not been responded to, thus necessitating the application for review which is premised under section 14(1) of the Access to Information Act.
7. After a careful analysis and consideration of all the information and documents forwarded to the Commission by the parties herein, the Commission makes this determination on the application for review as filed by the Applicant. Whereas some of the facts in this Application seems to revolve around other issues being an application for 'Fit & Proper' by the Applicant to the Respondent and a 'Notice to Show Cause' by the Respondent to the Applicant, the Commission will restrict itself to facts relating to the request for information as lodged by the Applicant to the Respondent through his letter dated 11th August 2020. The Commission makes this determination from a clear understanding and appreciation that while some facts may be related to the issues of 'fit and proper' application and the 'Notice to Show Cause', the facts

on the request for information are distinct and can be assessed separately from the other two issues. As such, the Commission's decision is solely based on its review mandate under the ATI Act.

Procedure on a request for information

8. The Request for information letter dated 11th August, 2020 gives a background on which the request for information is premised. The request for information is made for the following: -
 - a. Full report and recorded statements of respondents in the course of the investigations carried out by CMA before the issuance of the Notice to Show Cause dated 10 July 2020.
 - b. A copy of the Investment Management Agreement between Sanlam Life and Sanlam Investment Management for the relevant period.
 - c. Sanlam Life Insurance board packs bearing all reports for the investment committee meetings that were presented at the two meetings of 3 August 201 and, 7 November 2017 as well as the complete minutes of those meetings. The redacted versions of the minutes shared with the letter of 10 July 2020 had not disclosed certain relevant information such as all the investment reports and presentations relating to Nakumatt and Kaluworks investments that were presented at the two meetings.
 - d. The management accounts and trial balances supporting the financial accounts that were presented to the Sanlam Life Insurance Board audit committee meetings at the two meetings of 3 August 2017 and 7 November 2017 as well as the complete minutes for the two Board Audit Committee meetings.
 - e. The Investment Reports for all Sanlam Life Portfolios sent monthly by Sanlam Investments Limited to the management of Sanlam Life

Insurance for the months of June, July, August, and September 2017 together with the cover emails.

- f. Complete copy of the forensic report done by Anjarwalla and Khanna Advocates for Sanlam Life Insurance.
- g. All correspondence between Sanlam Investments Limited and CMA on the Nakumatt commercial paper.
- h. All correspondence, Letters of representation, and going concern reports from Sanlam Life to Sanlam Kenya for the half-year reporting for 2017 and Full year reporting for 2017 (issued in Feb 2018).
- i. The internal audit report on Investments on Nakumatt Commercial Papers done by the Sanlam Group Internal Audit Office in or about December 2017.
- j. The audit management letters issued by the external auditor (Messrs PricewaterhouseCoopers) for the year 2017 audits.
- k. Letter(s) issued by Sanlam Life Insurance in or about 2010 (then known as Pan Africa Life Assurance Ltd) with instructions on reporting structure for its investment funds.
- l. Business assets transfer agreement signed between Sanlam Investments Limited and Sanlam Investments East Africa Limited.
- m. Correspondence between the Authority and Sanlam Investments Ltd (former employer) about our client's Fit and Proper Application made in September 2018.
- n. Copies of complaints, if any, received by the Authority from Sanlam Life Insurance Ltd.
- o. Custody and Safekeeping Contract(s) between SLI & Standard Chartered Securities Services as well as Custody reports by Standard Chartered Securities sent to Sanlam Life Insurance Ltd in June 2017, July 2017, August 2017, September 2017, and October 2017 for the following Sanlam Life Insurance safekeeping accounts, viz 9820,9822,9823,9824.

- p. The position of the “Fit & Proper” application that was made on his client’s behalf by Genghis Capital in September 2018.
9. 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. 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.
10. Section 9(4) of the Access to Information Act stipulates the different decisions which can be made by a public entity 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.

11. It has to be noted that the request for information in this review is the one dated 11th August 2020 signed by the Applicant and addressed to the Respondent. Whereas the letter is not explicitly titled as a request for information, its contents especially from paragraph 10 state clearly that information was being sought with clear specifications on the different sets of information being elaborated in Nos (a) to (p). Section 8 (4) of the Act stipulates that a request for information cannot be rejected on want of form and as such, the Commission opines that the Applicant's letter dated 11th August 2020 is a proper request for information. With no response forthcoming on his request, the Applicant on 24th September 2021 wrote a reminder to the Respondent which reminder letter was stamped as received by the Respondent on 27th September 2021.
12. Clearly, the statutory timelines to respond to the request for information had lapsed on 2nd September 2020 but the Applicant chose to write a reminder on 27th September, 2021. Whereas the Respondent in its response to the Commission Ref: *CMA/CMD/8133/572/20* dated 31st October 2022 affirmed that some sets of information had been disclosed earlier to the Applicant through a Notice to Show Cause dated 10th July 2020, and other sets of information were exempt from disclosure in accordance with section 6(1) of ATI Act, the Respondent should have at the very least written a response to the Applicant and informed him as much since the ATI Act section 9(4) expects this and further that the same is in line with the expected standards on effective and efficient service delivery.

The Commission's Review Procedure

13. Upon receipt of the Applicant's letter dated 12th October 2022, the Commission wrote to the Respondent vide letter Referenced

CAJ/ATI/CMA/000/56/22-SC dated 21st October 2022. This action was necessitated by the need to adhere to Constitutional requirements, Fair Administrative Action Act, 2015, the rules of natural justice as well as section 22(3)(a) of the ATI Act, 2016. Section 22 (3)(a) of the ATI Act gives the Commission the liberty to call for information or report from a public entity upon receipt of an application for review or a complaint under the Act. This is done to allow the Commission to satisfy itself on whether there is a need of a further inquiry or not. Further, the law in section 23(2) requires the Commission to be fully satisfied on the correctness of facts as supplied by the parties to a review application before making a decision or an order in relation to the request for information made.

14. In the aforesaid letter by Commission Ref: CAJ/ATI/CMA/000/56/22-SC dated 21st October 2022, the Commission reiterated the contents of the request for information as had been made by the Applicant in his letter of 11th August, 2022. The Commission requested for response to the Applicant promptly as provided by section 9(4) of the Act. The Respondent gave a response to the Commission's through a letter referenced CMA/CMD/8133/572/20 dated 31st October 2022. The Respondent's letter stated...

“...that all information relevant to the NTSC had been shared and in and email dated August 29, 2022, the Authority send additional documents available to the Authority as he had requested.”

Upon receipt of the Respondent's letter dated 31st October, 2022, the Commission forwarded the same to the Applicant's Advocates through its letter of 8th November 2022. The Applicant's advocates responded to the Commission vide a letter Ref: AKO/VA/KMR/02/2022 dated 9th December 2022 whereof the Applicant's advocates raised issues with the procedure adopted by the Commission.

15. It has to be noted that the process at the Commission is not bound strictly by rules of procedure or by strict technical requirements. It has become important to state this position at the onset as the Applicant's advocates in the aforesaid letter to the Commission Ref: AKO/VA/KMR/02/2022 dated 9th December 2022 seemed to construe the law to mean that the Commission should act purely as a court of law which was not the intention brought out by the ATI Act, 2016. This is seen for instance in section 21(2) of the Act which provides that...

“The Commission shall have all the powers as are provided for under this Act, its constitutive Act and the Constitution as are necessary for the performance of its functions under this Act”.

16. The invoking of the powers of the Commission under the Commission on Administrative Act, 2011 which to a large extent advocates for amicable resolution of disputes through alternative dispute resolution in section 29 for instance connotes the fact that the process under the ATI Act is not bound by strict rules of procedure. In any event, if the Commission were to strictly act like a court, it would make no sense to have the framework under the Commission and this would make the review mechanism inaccessible to many deserving citizens.

17. In the Respondent's letter to the Commission Ref: CMA/CMD/8133/572/20 dated 31st October 2022, the Respondent in relation to the request for information stated in paragraph 9 ...

“That in June 2, 2022, the Authority held a meeting with Mr. Kennedy Muriithi Riungu and informed him that all information relevant to the NTSC had been shared and in an email dated August 29, 2022, the Authority send additional documents available to the Authority as he had requested.”

The contents of the other paragraphs of the letter relate to the '*fit & Proper*' application by applicant and the '*Notice to Show Cause*' to the Applicant.

18. The Commission in its inquiry process as stipulated by section 22(3) sought to bring the parties to the dispute together to seek a common understanding vide the powers granted by section 29 of the CAJ Act. Further, the Respondent's letter Ref: *CMA/CMD/8133/572/20* dated 31st October 2022 was not clear as to the specific information disclosed to the requester and thus the Commission sought the meeting to engage the parties to seek clarity on information disclosed and whether the Applicant received the same as alleged by the Respondent. The meeting took place on 31st January 2023 whereof after lengthy discussions, the parties agreed that the Respondent would write an official response to the Applicant's request for information as reiterated in the Commission's letter dated 21st October 2022. It was agreed by the parties that the response by the Respondent was to be filed by 7th February 2023. However, in a letter to the Commission ref *CMA/CMD/133/E.572/20* dated 6th February 2023, the Respondent requested for extension of time by fourteen days to allow for collating and reviewing the response. That letter was copied to the Applicants Advocates. Following the said meeting and as per the sought extension, the Respondent through a letter ref: *CMA/CMD/133/E.572/20* dated 20th February 2023 and received on 23rd February 2023 gave an official response to the request for information. The contents of that response will be discussed herein after.

Issues for determination

19. After a careful analysis of the request for information, the various responses thereto by the Respondent, the Commission frames the following issues as the issues for determination in this review:

- i. **Whether the Respondent Authority (CMA) had in its custody/possession all the information requested by the Applicant;**
- ii. **Whether the information requested by the Applicant and which was in the custody/possession of the Respondent should be disclosed to the Applicant;**
- iii. **Whether the Respondent disclosed all the information which was required to be disclosed lawfully;**
- iv. **The orders which the Applicant is entitled to.**

Whether the Respondent Authority (CMA) had in its custody/possession of all the information requested by the Applicant

20. The first issue to determine in an application for review under the ATI Act 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 (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’.**

21. 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. Thus, the obligation to provide such information cannot be invoked if the Respondent demonstrates that it is not in possession of such information. This is why section 10 of the ATI Act provides an elaborate mechanism through which a request for

information should be processed and transferred to another entity even where the recipient of a request for information is not in actual possession of the information sought but has knowledge of the entity with actual possession of such information. 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.

22. The Respondent, in its letter Ref: CMA/CMD/133/E.572/20 dated 20th February 2023 to the Commission and copied to the Applicant's Advocates at paragraph 47 indicates that ... "*it would be unreasonable to require the Authority to supply the Applicant with documents not in its possession.*" Further, the Respondent in paragraph 47 (supra) indicates that section 9(4)(a) of the ATI Act contemplates a response from a public agency indicating that it does not have the documents requested for. The Commission agrees with the Respondent on this aspect but guides that the Act does not expect public entities to give a blanket response especially where several sets of information have been sought with their particulars given in the request. A response to each set of information is expected to be given by the recipient public entity. The Commission notes that the Respondent in paragraph 59 of the letter Ref CMA/CMD/133/E.572/20 dated 20th February 2023 has specified the sets of information not in its possession being those mentioned in paragraphs (d) (e) (h) (i) (j) and (l) of CAJ letter being: -

- i. All the correspondence, letters of representations and going concern reports from Sanlam Kenya for 2017 and 2018;
- ii. The management accounts and trial balances supporting the financial accounts that were presented to the Sanlam Life Insurance Board Audit Committee;

- iii. The internal audit report on investments on Nakumatt Commercial Paper prepared by Sanlam Group Internal audit office 2017;
- iv. The audit management letters issues by the external auditor (PwC) for the year 2017;
- v. Business assets transfer agreement signed between Sanlam Investments Limited and Sanlam Investments East Africa
- vi. Copies of the cover emails pertaining to the said monthly investment reports.

23. A public entity having stated that certain sets of information are not in its possession, then the Commission cannot make a decision requiring disclosure on such information as doing so would be unreasonable and unjustifiable unless a contrary position is demonstrated that the entity is withholding information to defeat the request made. The Commission has no reason to doubt the position given by the Respondent in this review and will proceed as such. This is surmounted by the fact the ATI Act provides for a conclusive mechanism in section 28 to deal with instances of misrepresentation of facts if it may later come to light that the Respondent misrepresented or misled the Commission on possession of such sets of information. In any event, a close examination of the sets of information indicated in paragraph 59 thereof of the Respondent's letter dated 20th February 2023 shows that those are information/documents belonging to third parties and thus it can be concluded correctly that possession thereof is with such other third parties where requests for access can be made.

24. What is important to reiterate here is the guidance that public entities have a further obligation in section 10 of the ATI Act after receipt of a request for information to transfer a request for information, or a part thereof to another public entity if the first entity is not in possession of such sought information but has knowledge that the information is held by the other public entity. The difference in the current situation is that section

10 of the ATI Act requires transfer to another public entity and not a private body as is the case in the present application. This is in line with the different access regimes established for public and private bodies. The Commission takes note that the information elaborated in paragraph 59 (*supra*) thereof belongs to third parties who are 'private bodies' and as such, the Respondent cannot be said to be in breach of the obligation created under section 10 of the ATI Act. Hence, the Commission observes that the Respondent is under no legal obligation to provide such information and the Applicant is advised to seek the same from the relevant parties holding the same.

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

25. The right of access to information is not an absolute right and the same can be limited within the parameters set out in Article 24 of the Constitution. Indeed, the ATI Act in section 6(1) limits disclosures of certain sets of information in clear terms thereof. As, such a public entity can rely on the provisions of section 6(1) of the Act to limit the disclosure of certain sets of information lawfully. The Respondent herein in paragraphs 44 to 56 of its letter Ref: CMA/CMD/133/E.572/20 dated 20th February 2023 has expounded on the sets of information which are in its possession but whose disclosure cannot be made according to its assessment. The Respondent relies on the limitations indicated in paragraph 45 of its letter being: -

- a. If disclosure would endanger the safety, health or life of any person;
- b. If the disclosure would damage a public entity's position in any actual or contemplated legal proceedings;

c. If disclosure would infringe professional confidentiality as recognized in law or by the rules of a registered association of a profession.

26. The Commission's role in reviewing such a decision where the Respondent invokes a limitation is to confirm whether such limitation applies to the particular set of information concerned and if so, whether such limitation applies partly or wholly to the requested information. This is in recognition of the letter and spirit of the Act as provided in section 4 of the Act specifically section 4 (4) which provides that...

“This Act shall be interpreted and applied on the basis of a duty to disclose and any non-disclosure shall be permitted only in circumstances exempted under section 6.”

Further, the Commission's role on this issue is informed by the fact that the ATI Act in section 6 subsections (2) and (3) gives specificity on certain sets of information which may not necessarily fall within the limitation clause even though the same may be expressly listed in section 6 (1) of the Act.

27. In any request for information where the public entity relies on any limitation under section 6 of the ATI Act, the burden is on the entity to demonstrate that indeed such requested information falls within the ambits of the limitation clause. This is in line with the case of ***Mercy Nyawade vs. Banking Fraud Investigations Unit [2017]*** eKLR, where the Honourable court at paragraph 45 held that...

“It is apparent from this comparative analysis of the standards applied by courts in other jurisdictions with legislation comparable to ours that the state may discharge its evidentiary burden only when it has shown that the record withheld falls within the

exemptions claimed. Exemptions are construed narrowly, and neither the mere ipse dixit of the information officer nor his or her recitation of the words of the statute is sufficient to discharge the burden borne by the state.”

Again, in the case of **Legal Advice Centre t/a Kituo cha Sheria & 33 Others vs Cabinet Secretary Ministry of Education & & Others, Nairobi Petition No 104 of 2019 [2021] eKLR**, the court at paragraph 54 held that...

“The burden on justifying the limitation on the right to access of information rested on the person resisting disclosure, as provided for in article 24(3) of the Constitution which stated that the State or a person seeking to justify a particular limitation should demonstrate to the court, tribunal or other authority that the requirements of the article had been satisfied.”

Further, the court in the same case observed at paragraph 55 that...

“Therefore, although the right of access to information was not absolute, to satisfy the requirements set out under article 24 of the Constitution, the respondents had to demonstrate that the limitation imposed on a constitutional right was fair, reasonable, necessary and justifiable in a democratic society, and that it fell within the exceptions provided in the Access to Information Act.”

28. The Respondent herein relies on the limitation in section 6(1)(c) to withhold disclosure of an Investigations Report and statements made thereof as requested by the Applicant in clause (a) of his request. The Respondent in paragraphs 49, 50 and 52 of its letters indicated that the full investigations report and statements of third parties given to the Authority as requested by the Applicant cannot be disclosed as the

documents contain names and details of whistleblowers who shared information with the Authority that triggered the investigations. The Respondent indicated that disclosure of such documents would reveal the whistleblowers identities and this may endanger their safety, health or lives. Further, the Respondent states in paragraph 50 that it has an obligation to protect their identities and well-being by restricting access to the investigations report.

29. The Commission takes note of the fact that the Investigations report requested by the Applicant is the report of investigations carried out by the Respondent and which gave rise to the Notice to Show Cause to the Applicant dated 10th July, 2020. According to the Applicant, he sought access to this report so as to be in a position to defend himself adequately in the Notice to Show Cause. There is clearly a very delicate balancing act which is required in this situation so as to manage the competing rights and interests; on one hand is the right of the Applicant to access the report and thus be able to defend himself and on the other, the obligation on the Respondent to prevent whistleblowers from danger or harm that may arise through disclosure of the information.
30. The ATI Act in section 16 gives an obligation to public entities to ensure protection of persons making disclosures of information that may be deemed to fall within the realm of public interest information as defined in section 16(5). One of the mechanisms for ensuring such protection is through invoking the limitation clause thus withholding information whose disclosure may put such persons in danger of their wellbeing, safety or life if their identities are made public.
31. The Honourable court took note of this delicate balance in the **Legal Advice Centre t/a Kituo cha Sheria case**, whereof the court adopted a proportionality test to a limitation by holding in paragraph 60 that...

“The test for determining whether a restriction was appropriate should be one of proportionality. A

proportionality test was appropriate as it preserved rights, provided a framework for balancing competing rights and enabled other important public concerns, such as national security and public order, to be duly taken into account.

Similarly, in ***Kenya Human Rights Commission vs Communication Authority of Kenya & 4 Others [2018] eKLR*** at paragraph 72, the court held that ...

“A limitation of a constitutional right will be constitutionally permissible if (i) it is designated for a proper purpose; (ii) the measures undertaken to effectuate such a limitation are rationally connected to the fulfilment of that purpose; (iii) the measures undertaken are necessary in that there are no alternative measures that may similarly achieve that same purpose with a lesser degree of limitation; and finally (iv) there needs to be a proper relation (“proportionality stricto sensu” or “balancing”) between the importance of achieving the proper purpose and the special importance of preventing the limitation on the constitutional right.”

32. The question which arises in the instant review application is whether there is a way in which disclosure can be done to enable the right of the Applicant to access information while at the same time protecting the interests of whistleblowers. Adopting the proportionality test as well as examining whether there are other alternatives, the Commission is of the view that while the Respondent has given reasons as to why disclosure of the ‘full investigations report’ cannot be done, the Commission is of the view that other ways exist which if explored can enable disclosure of some parts of the investigation report (not the full report) or information contained in the investigation report applicable to the Applicant while

ensuring the concerns raised by the Respondent are taken care of. One of the ways in which this can be done is through redacting information on the requested report and providing such redacted copies to the Applicant unless such redacted documents contain information which may directly or indirectly leak the identities of the whistleblowers. If then this does not work based on the contents of the requested documents, the Respondent can enable access through providing an abridged version (summary) of the investigations report to the Applicant to allow access to necessary and relevant information applicable to him but at the same time, protect the disclosure of sensitive third parties' information. In the **Legal Advice Centre t/a Kituo cha Sheria case** whereof petitioners sought access to the 'full investigation reports' in relation to the Garissa University terrorists attack conducted by Independent Policing Oversight Authority (IPOA) (7th Respondent) and the Commission on Administrative Justice (CAJ) (8th Respondent), the Court did not order the release of such 'full investigations report' based on a limitation of national security but recognized that the rights of the petitioners had been met through supply of an **"...abridged version of the report for their purpose."** (see paragraph 75 thereof). Thus, the Commission is guided by the holding by the Honorable Court that an abridged version of an investigations report can suffice as an alternative to limiting the 'full investigations report' and thus meet the delicate balance of competing interests. Thus, the Commission directs the Respondent herein to proceed as guided in this paragraph.

33. In relation to the limitation on disclosure of information that is likely to infringe on professional confidentiality as recognized in law, the Respondent in paragraph 53 of its letter indicates that the information requested in No.s (b)(f)(k)(n) and (o) of the request falls within this limitation. Specifically, the Respondent particularized these sets of information as: -

- i. Correspondence between the Authority and Sanlam Investments Ltd on Mr. Kennedy Muriithi Fit and Proper Application made in September 2018
- ii. Custody and safekeeping contracts between SIL & Standard Chartered Securities Services as well as custody reports by Standard Chartered Securities Services sent to Sanlam Life Insurance Ltd in June 2017, July 2017, August 2017, September 2017 and October 2017 for accounts 9820,9822,9823 and 9824.
- iii. Investment Management Agreement between Sanlam Life Insurance and Sanlam Investment Management
- iv. Complete copy of forensic report prepared by Anjarwala and Khanna Advocates
- v. Letter(s) issued by Sanlam Life Insurance in or about 2010 with Instructions on reporting structure for its investment funds.
- vi. Copies of complaints received by the Authority from Sanlam Life Insurance.

34. The Commission has examined the response herein and the nature of documents concerned as enumerated above (i) to (vi). The Commission notes that the Respondent has neither expounded on nature of the professional privilege relied on to limit access to these documents nor provided the legal provision supporting the same. Nevertheless, the Commission is in agreement with the Respondent position explained in paragraph 53 that the documents were sought and obtained from third parties and thus cannot be disclosed without obtaining the consent of such parties. However, the Commission is of the view that this limitation does not apply to the set of information indicated in No. (vi) being copies of complaints received by the Authority from Sanlam Life Insurance. The basis of this observation is that these documents (copies of complaints) form the basis of the investigations conducted by the Respondent. As a regulatory body established as

such by an Act of Parliament, the Respondent is expected to have a complaint handling mechanism which is fully accessible and open to all stakeholders including citizens. Upon a complaint being lodged, then it is within the possession, control and ownership of the Respondent and not the complainant thereof. Thus, the analogy advanced that the Respondent has to obtain consent of Sanlam Life Insurance is mistaken. The complaint documents do not fall within the stated limitation. The Commission notes that a complaint lodged through a letter or an email to the Respondent may contain information and personal data which is subject to exemption as per section 6(1). Thus, the Commission informs the Respondent to disclose copies of the complaints or in the alternative, the information contained in the complaints in a manner that allows compliance with the law.

35. In relation to the limitation that disclosure would damage the Authority's position in actual legal proceedings, the Commission notes that apart from stating that the Applicant filed a case against the Respondent being *Constitutional Petition No. 482 of 2022; Kennedy Riungu vs. Capital Market Authority*, the Respondent has not given the particulars of the information/documents sought which would otherwise damage its position in the court case. The Commission observes that where a public entity relies on a limitation in a response to a request for information, the entity has a statutory obligation to state clearly the exact section of the law relied upon, the particular set or sets of information applicable and further explain on how such limitation applies to such information as held in ***Mercy Nyawade vs. Banking Fraud Investigations Unit*** case. Thus, based on the fact that no particulars have been given by the Respondent in relation to this limitation, the Commission will not make any observation thereto save the guidance given herein before.

Whether the Respondent disclosed all the information which was required to be disclosed lawfully

36. The Respondent in its letter Ref: CMA/CMD/133/E.572/20 dated 20th February 2023 in paragraph 40 indicated that it had provided the following information/documents:

- i. Letter dated 7th February 2020 from Standards Chartered Bank to the Authority.
- ii. Standard Chartered Portfolio Valuation Reports for Sanlam Individual Life as at 30th June 2017 and 30th August 2017.
- iii. Minutes of the meeting of Investment Committee of the BOD, Sanlam Life Insurance held on 3rd August 2017.
- iv. Minutes of the meeting of Investment Committee of the BOD, Sanlam Life Insurance held on 7th November 2017.
- v. Letter dated 10th December 2019 from Kaluworks Limited addressed to the Authority.
- vi. Sanlam Life Limited, 2nd quarter 2017 Investment Report.
- vii. Sanlam Life Limited, 3rd Quarter 2017 Investment Report.
- viii. Sanlam letter to the Authority dated 22nd August 2017.

37. The Respondent in paragraph 43 states that the Authority sent to the Applicant full minutes for the Investment Committee of the Board of Sanlam Life Insurance for Quarter 2 and quarter 3 2017 on 29th August 2022. These sets of information are the same documents supplied to the Applicant attached to the NTSC dated 10th July 2020 as evidenced by the respondent's '*List of Attachments Constituting Relevant Evidence*'. This list was attached to the Respondent's letter to the Commission Ref: CMA/CMD/8133/572/20 dated 31st October 2022.

38. On the other hand, the Applicant through his advocates letter to the Commission Ref: AKO/VA/KMR/02/2022 dated 9th December 2022 acknowledged in paragraph (g) that the Applicant received these

documents through the NTSC but states that the same were insufficient for the purposes of responding to the Notice to Show Cause. Thus, the Commission is fully satisfied that the sets of information enumerated in the Respondent's letter Ref: CMA/CMD/133/E.572/20 dated 20th February 2023 in paragraph 40 were disclosed and received by the Applicant. The only question which remains is whether the aforesaid documents were disclosed in compliance with the law. Whereas the Applicant stated that the information thereof was insufficient to allow him to respond to the NTSC, the Commission will not delve into that as the same is beyond the scope of a review under the ATI Act. What the law expects in a review process is for the Commission to establish whether there was full compliance with the law in relation to any disclosure made. Full compliance, in the Commission's perspective is not equivalent to disclosure of all information as requested since the same law allows for some sets of information to be withheld. This means that even in a situation where the Respondent has lawfully withheld some information, it is possible to hold the view that such a Respondent has complied with the law. Hence, the Commission will adopt the test of 'compliance' with the law.

39. Whereas the Applicant in his letters Ref: KO/VA/KMR/02/2022 dated 12th October 2022 and letter Ref: AKO/VA/KMR/02/2022 dated 9th December 2022 did not explain the basis of the insufficiency in the information supplied, a further engagement with him on 31st January 2023 revealed that one of the insufficiencies was on that fact that the minutes supplied to him by the Respondent (No. iii and iv list of supplied attachments) had been redacted to a point that he could not make sense out what was supplied to him. The Commission carefully examined the documents supplied to the Applicant. In relation to documents supplied in No. (iii) being minutes of the meeting of Investment Committee of the BOD, Sanlam Life Insurance held on 3rd August 2017, the Commission noted that the Respondent supplied minutes 11/2017

and minute 16/2017. In relation to documents supplied in No (iv) being minutes of the meeting of Investment Committee of the BOD, Sanlam Life Insurance held on 7th November 2017, the Commission noted that the respondent supplied minute 17/2017 and 22/2017. Further the Respondent has supplied information on the meeting, its purpose, venue, date of the meeting and date of the meeting as observed in the heading, the persons who attended the meeting together with their designation as well as signature part of the minutes. The Respondent has redacted the other minutes which may not relevant or related to the Applicant.

40. The Commission observes that the Respondent has complied with the law on disclosure of information in that it has disclosed the relevant minutes which related to the Applicant. Apart from stating that the documents supplied by the Respondent were insufficient to allow the applicant defend himself, the Applicant has not stated in any way any information or the nature thereof which would have been useful to him and which had been redacted by the Respondent. Hence, the Commission finds that the Respondent complied with the law and any plea by the Applicant's for additional information to sufficiently defend himself does not lie in the specific documents he requested, perhaps elsewhere.

The Orders which the Applicant is entitled to:

Interim Relief

41. The Applicant in his letter to the Commission Ref: AKO/VA/KMR/02/2022 dated 19th October 2022 made a request for 'interim relief' under section 29(6) of the Commission on Administrative Act as read with section 23 of the Access to information Act. The Applicant requested the Commission to issue...

“an ex parte interim order directing the capital Markets Authority to hold any decision on the Notice to Show Cause dated 10th July 2020 against Kennedy Muriithi Riungu pending the hearing and determination of the request for review dated 12th October 2022.”

The Commission observes that the Applicant relied on a wrong provision of the law as the CAJ Act does not have the said section 29(6). The foregoing notwithstanding, the Commission further observes that the ATI Act does not make an express provision for interim relief or interim order. Whereas a reading of section 23(2)(c) of the ATI Act where the Commission may order ‘any other lawful remedy or redress’ may be interpreted to mean that the Commission can issue an interim relief, a keen analysis of the wording of section 23(2) especially the words that ... **“...if satisfied that there has been an infringement of the provisions of this Act...”** gives an indication that such an order under section 23(2)(c) cannot be issued at an interim stage but only after an extensive inquiry process including giving all parties an opportunity to be heard or submit responses before such an order is made. Thus, it is the Commission's view that there is no express provision in the ATI Act where an interim order or relief can be anchored on in appropriate cases. Hence, the Commission finds that in the absence of such provision, it cannot exercise a power which is not conferred to it by the Act

Compensation

42. The Applicant herein in his letter to the Commission Ref: AKO/VA/KMR/02/2022 dated 12th October 2022 requested the Commission to assess and issue award of compensation against Capital Markets Authority for the costs and punitive damages on account of its wanton and deliberate failure to comply with the Applicants' request for information. The ATI Act in section 23 (2) states that...

“The Commission may, if satisfied that there has been an infringement of the provision of this Act, order (a) the release of any information withheld unlawfully; (b) a recommendation for the payment of compensation; or (c) any other lawful remedy or redress.”

The Commission notes that the Applicant apart from stating that compensation be made for costs and punitive damages against the respondent for ‘wanton and deliberate failure to comply with the Applicants’ request for information’, the Applicant has not given any specific particulars on how the delay by respondent has made him incur the requested ‘costs’ or how much the ‘costs’ are. Further, the request for ‘punitive damages’ has not been particularized specifically or the basis for such given. In the absence of such particulars from the Applicant, the Commission is not be in a position to assess and recommend payment of compensation as well as the quantum thereof, if any.

The foregoing notwithstanding, the Respondent states in paragraph 56 of its letter Ref: CMA/CMD/133/E.572/20 dated 20th February 2023 that the order of compensation for Kshs 45 million has been sought by the Applicant in pending court case being *Constitutional Petition No. 482 of 2022; Kennedy Riungu vs. Capital Market Authority*, a matter which is pending determination before the court. The Applicant has also confirmed that the issues of ‘fit and proper’ application and the NTSC are pending determination before the court. Thus, the Commission observes that whereas the law allows it to recommend payment of compensation in appropriate and clearly established cases of infringement of the Act, the Commission observes that such recommendation cannot be issued if it comes to the knowledge of the Commission that the same order is pending determination before a

court in a litigation between the same parties. As such, the Commission will refrain from making any pronouncement on the issue.

Final Orders

43. Having made a careful analysis of all the facts and information provided by the Parties herein, the Commission, pursuant to the powers granted by section 23(2)(a) of the Access to Information Act makes the following

ORDERS:

1. **THAT** the Respondent should redact the Investigations Report or in the alternative prepare an abridged version thereof and supply such redacted or abridged version of the report to the Applicant.
2. **THAT** the Respondent should supply copies of the complaints lodged with it to the Applicant or in the alternative, the information contained in the complaints in a manner that allows compliance with the law.
3. **THAT** compliance with the above Orders be within 21 days from the date hereof.

Dated, Signed and **Delivered** at **Nairobi** this.....16th day of.... **March**.....2023

LUCY NDUNGU, EBS

ACCESS TO INFORMATION COMMISSIONER