

**THE COMMISSION ON ADMINISTRATIVE JUSTICE**  
(Office of the Ombudsman)



*Hata Mnyonge ana Haki*

**REPUBLIC OF KENYA**  
**COMMISSION ON ADMINISTRATIVE JUSTICE**  
**(OFFICE OF THE OMBUDSMAN)**  
**ATI REVIEW APPLICATION NO. CAJ/ATI/KRC/004/50/25-MW**

**WYCLIFFE ASALWA SALANO.....APPLICANT**

**VERSUS**

**KENYA RAILWAYS.....RESPONDENT**

**RULING**

**Background**

1. The Commission on Administrative Justice (Office of the Ombudsman) (hereinafter referred to 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, 2011) with the mandate to address complaints of improper conduct in public administration, with authority to conduct investigations, issue summons to public officers and compel the production of documents. It also serves as the oversight institution on the implementation of the right to access to information under the Access to Information Act, 2016.
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. Section 14(1) of the Access to Information Act, 2016 grants any requester of information the right to apply to the Commission for review of a decision by a public entity or private body. The review may 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.**

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

5. The Commission on 14<sup>th</sup> April 2025, received an application for review under Section 14(1)(a) of the Access to Information Act, 2016 dated 11<sup>th</sup> April 2025 from the Applicant herein to review the decision of the Respondent declining to provide information requested through a letter dated 21<sup>st</sup> March 2025.
4. The Applicant, in a letter dated 21<sup>st</sup> March 2025 addressed to the Managing Director, Kenya Railways, sought details of the visibility

diamond at a level crossing near Kitale Town particulars of which were as follows: -

- a. The class of level crossing at Beacons N1 and N2 in the Survey Map, *FR No. 165/62 and FR No. 389/62*;
- b. The date when the level crossing at Beacons N1 and N2 were first approved and whether the permission of the Managing Director; Kenya Railways was sought in changing the orientation of the road at the same point;
- c. Whether the level crossing from the registers at the subject point is a Skew Crossing or Right-Angled Crossing; and
- d. Copy of a marked survey showing the visibility diamond at the level crossing near Kitale Town.

#### **Commission's Review Procedure**

5. The Applicant lodged an application for review to the Commission vide an email dated 11<sup>th</sup> April 2025. The Commission through a letter *Ref: CAJ/ATI/KRC/004/50/25-MW* dated 16<sup>th</sup> April 2025 to the Respondent then requested the Respondent to furnish the Commission with its Institutional Report and any relevant documentation to facilitate appropriate decision on the application.
6. The Respondent through a letter dated 19<sup>th</sup> May 2025 referenced: *KR/L/5/39* responded to the Commission indicating that the information requested had been communicated to the Applicant through a letter *Ref: KR/ETS-RD/WL-RC/FL086* dated 29<sup>th</sup> April 2025, which was shared through email and a hard copy of the same collected by the Applicant on 9<sup>th</sup> May 2025. The letter by the Respondent dated 29<sup>th</sup> April 2025, informed the Applicant as follows;
  - a. The road at the crossing is classified as a farm road according to Line Sheet No. 14 (Kitale Branch M32.5-M35,

falling under Road Class D as per the East African Railways and Harbours Engineering Manual;

- b. The orientation of the road had not been altered. The road intersects the railway line and the railway reserve at near right angles approaching from the right-hand side of the rail (Eldoret-Kitale direction). Consequently, the area of visibility at the level crossing is categorized as a right-angled crossing;
  - c. On the left-hand side (Eldoret-Kitale direction) after crossing the railway line and reserve, the road runs parallel to the railway reserve for approximately 50 meters before turning left to join road B2 (Eldoret-Kitale direction). That the parallel section remains within the clear vision zone between the motorist's line of sight and the rail level; and
  - d. The minimum clear visibility extends 300 feet in each of the four directions along the road and rail measured 300 feet in each of the four directions along the road and rail measured from the point of intersection.
7. The Applicant through a letter dated 28<sup>th</sup> May 2025 lodged a rejoinder to the Respondent's letter dated 29<sup>th</sup> April 2025. The Applicant indicated that road at the crossing (Moi's Bridge – Kitale Section) classified as a farm road was at another Level Crossing, thereby making details provided in the Respondent's correspondence irrelevant to the subject matter. Additionally, the Applicant indicated that information on the existence of level crossing registers was outstanding.
8. Consequently, the Commission through a letter dated 9<sup>th</sup> June 2025 forwarded the Applicant's rejoinder to the Respondent and requested for a response within seven days of receipt to enable a decision on the Application. No response was received.

9. Further, the Commission through a letter dated 22<sup>nd</sup> August 2025, requested final remarks from the Respondent on the existence of Level Crossing Registers highlighted in the Applicant's rejoinder dated 28<sup>th</sup> May 2025. Similarly, no response was received.
10. In light of the Respondent's failure to respond, the Commission proceeds to determine this application pursuant to Sections 22(3)(a)(i) and 23(2)(a) of the Access to Information Act, 2016 and Regulation 25(8) of the Access to Information (General) Regulations, 2023.

**Issues for Determination:**

11. After a careful analysis of the request for information by the Applicant dated 21<sup>st</sup> March 2025, the request for review dated 11<sup>th</sup> April 2025, the Respondent's responses dated 29<sup>th</sup> April 2025 and 19<sup>th</sup> May 2025, and the rejoinder by the Applicant dated 28<sup>th</sup> May 2025, the Commission identifies the following as the issues for determination in this review:
  - i. **Whether the Commission has jurisdiction to review the decision of Respondent;**
  - ii. **Whether the Respondent holds the information requested by the Applicant;**
  - iii. **Whether the requested information is accessible under the Access to Information Act, 2016;**
  - iv. **Whether the Respondent disclosed the requested information to the Applicant; and**
  - v. **What orders should issue.**

**i. Whether the Commission has Jurisdiction to Review a Decision by the Respondent;**

12. The Supreme Court in *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 others (2012) eKLR*, held that jurisdiction must be derived from the Constitution or legislation or both.

13. Section 14 of the Access to Information Act, confers on the Commission review jurisdiction over decisions of public entities or select private bodies on requests for information. Additionally, Section 21 of the Act, mandates the Commission to investigate violations of the right of access to information and to review decisions relating to such requests.

14. The courts have also affirmed the primary jurisdiction vested on the Commission under the Access to Information Act. In *Lempaa Suyianka and the African Center for Peace and Human Rights v Ministry of Foreign and Diaspora Affairs & Others, Petition E681 of 2024*, the High Court emphasized that disputes concerning denial of access to information should first be addressed through the statutory mechanism established under the Access to Information Act.

15. Section 2 of the ATI Act, 2016 defines 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;"**

16. The Respondent herein, is a State Corporation established under Section 3 of the Kenya Railways Corporation Act, CAP 397 (hereinafter referred as KRC Act). Section 8 of KRC Act mandates the Respondent, under the direction of its Board to

provide efficient and effective rail and inland waterways transport.

17. The Commission therefore finds that the Respondent is a public entity within the meaning of Section 2 of the Access to Information Act and that the Commission has jurisdiction to review the Respondent's decision.

**ii. Whether the Respondent holds the information requested by the Applicant on the existence of Level Crossing Registers;**

18. Section 4 (1) of the ATI Act provides 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 in the custody or control of the Respondent.

19. The ATI Act gives a clear procedure which must be followed once a request for information has been lodged with a public entity. 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 *inter-alia* 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; ...”**

20. The long title of the Kenya Railways Corporation Act stipulates that it is...

**“An Act of Parliament to provide for the establishment of a Corporation to be known as Kenya Railways, for the transfer to the Corporation of the undertakings of the East African Railways Corporation within Kenya, for the functions of the Corporation and for purposes connected therewith”.**

21. The East African Railways and Harbours Engineering Manual acts as a reference guide for the design, construction, maintenance, and operation of railway infrastructure and services in the East African region. Consequently, Section 7.04 provides for the Register of Level Crossings and stipulates the following...

**“All level crossings and livestock crossing points shall be recorded in registers in the offices of the District Engineer and Chief Engineer. In them will be recorded the mileage, type, class, and the party with whom the Agreement if any has been concluded. Where required, a decision regarding the class of a level crossing should be sought from the Chief Engineer”.**

22. Section 17 of the Access to Information Act obligates public entities to keep and maintain records that are accurate, authentic, have integrity, useable and in a manner that facilitates the right of access to information. Additionally, the Public Archives and Documentation Service Act, CAP 19 which is the overarching legislation on public records management, places an obligation on all public entities to create and preserve records.

23. In view of the foregoing legal framework, the Commission finds that the Respondent, being a public entity, had an obligation to

create and maintain Level Crossing Registers and therefore holds the requested information.

**iii. Whether the requested information is accessible under the Access to Information Act, 2016;**

24. 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 is not absolute and Section 6 (1) of the ATI Act restricts disclosure of information in respect of specific categories of information whose release is likely to: -

***(a) Undermine the national security of Kenya;***

***(b) Impede the due process of the law;***

***(c) Endanger the safety, health or life of any person;***

***(d) Involve the unwarranted invasion of the privacy of an individual other than the applicant or the person on whose behalf an application has, with proper authority, been made;***

***(e) Substantially prejudice the commercial interests, including intellectual property rights, of that entity or third party from whom information was obtained;***

***(f) Cause substantial harm to the ability of the Government to manage the economy of Kenya;***

***(g) Significantly undermine a public or private entity's ability to give adequate and judicious consideration to a matter concerning which no***

- final decision has been taken and which remains the subject of active consideration;***
- (h) Damage a public entity's position in any actual or contemplated legal proceeding; or***
- (i) Infringe professional confidentiality as recognized in law or by the rules of a registered association of a profession.***

25. In the present case, the Respondent has not demonstrated that the requested information falls within any of the statutory exemptions. Nevertheless, the Commission has carefully evaluated the nature of the requested information and has not seen any exemption which applies to the requested set of information.

26. Section 11(3) of the ATI Act 2016 provides ...

***“Any information to be made accessible to an applicant shall be produced forthwith at the place where 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.”***

27. In this case, the Respondent failed to provide information about the existence of Level Crossing Registers. The Commission holds that these registers are public records, and therefore the Applicant has the right to access them either through inspection or by obtaining certified copies.

**iv. Whether the Respondent disclosed the requested information to the Applicant;**

28. After receiving the review application dated 11th April 2025, the Commission notified the Respondent of the application on 16th April 2025 and requested an Institutional Report or any additional relevant information. In response, the Respondent stated in a letter dated 19 May 2025 that the Applicant's request had already been addressed in a 29 April 2025 letter.

29. In a rejoinder, the Applicant disputed the relevance of the information provided by the Respondent and indicated that information on the existence of Level Crossing Registers was outstanding.

30. The Respondent did not respond to the Applicant's rejoinder or the Commission's subsequent requests for clarification.

31. The Respondent's failure to address the Applicant's concerns or respond to the Commission leads the Commission to conclude that the information provided related to a different level crossing and no information was provided on the existence of Level Crossing Registers.

**v. What orders should issue;**

32. Having made a careful analysis of all the facts of this Review Application, the Commission, pursuant to the powers granted under Section 23(2)(a) of the Access to Information Act 2016, and Regulation 25(8) of the Access to Information (General) Regulations, 2023, **ORDERS:**

1. **THAT** the Respondent through the Managing Director, facilitates access to the information and records requested by Wycliffe Asalwa Salano contained in the letter dated 21<sup>st</sup> March 2025 with respect to details of

visibility diamond at a level crossing near Kitale Town namely: -

- a. The class of level crossing at Beacons N1 and N2 in the Survey Map, FR No. 165/62 and FR No. 389/62;
  - b. The date when the level crossing at Beacons N1 and N2 were first approved and whether the permission of the Managing Director; Kenya Railways was sought in changing the orientation of the road at the same point;
  - c. Whether the level crossing from the registers at the subject point is a Skew Crossing or Right-Angled Crossing; and
  - d. Copy of a marked survey showing the visibility diamond at the level crossing near Kitale Town.
2. **THAT** compliance with No. 1 be within **Twenty-One (21) days** from the date hereof.
  3. **THAT** in the event of non-compliance with the orders above, the Commission shall recommend criminal prosecution against the Managing Director in line with Section 28 of the Access to Information Act, 2016.

**Dated, Signed** and **Issued** at **Nairobi** this...**26<sup>th</sup>** ... day of .**MARCH**...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 Access to Information 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.”**