REPUBLIC OF KENYA

COMMISSION ON ADMINISTRATIVE JUSTICE
(OFFICE OF THE OMBUDSMAN)

ATI REVIEW APPLICATION NO. CAJ/KSM/ATI/CAH/071/02/26 – LM

KATIBA INSTITUTE..... APPLICANT

VERSUS

COUNTY ASSEMBLY OF HOMABAY..... RESPONDENT

RULING

A. BACKGROUND

1. The Commission on Administrative Justice (Office of the Ombudsman) (hereinafter referred to as "the Commission") is established under *Article 59(4)* of the *Constitution* and the *Commission on Administrative Justice Act, 2011*. The Commission is mandated to address maladministration in the public sector and promote administrative justice, transparency, and accountability in public administration. In addition, the Commission serves as the oversight and enforcement body for the right of access to information under *Article 35* of the *Constitution*, as operationalized through the *ATI Act, 2016* (hereinafter referred to as *ATI Act, 2016*).

2. *Article 35* of the *Constitution* guarantees every citizen the right to access:

i. Information held by the State; and
ii. Information held by another person and required for the exercise or protection of any right or fundamental freedom.

3. Access to information is the cornerstone of democratic governance and accountability. Public entities hold information in trust for the people of Kenya, and disclosure of such information enhances transparency in public administration, promotes responsible management of public resources, and enables citizens to meaningfully participate in governance.

B. FACTS OF THE REVIEW APPLICATION

4. The Commission received an Application for Review dated 26th January 2026 from Nora Mbagathi, the Executive Director of Katiba Institute (the Applicant herein), acting on behalf of the Applicant Institute and in the public interest. The Applicant stated that on 12th March 2025, she submitted a request for information to the Clerk, Homa Bay County Assembly, concerning the construction of the new County Government Headquarters. Specifically, the Applicant sought the following information and documents:-

    a) A certified copy of the Hansard report detailing the session(s) in which the construction of the county headquarters was approved;
    b) A certified copy of the Hansard report detailing the approval of the agreement with the County Pension Fund (CPF);
    c) Minutes and/or reports of County Assembly Committees that deliberated on the approvals;
    d) Documents submitted by the County Executive form the basis of deliberations;
    e) Reports, including financial reports, submitted to or received by the County Assembly on implementation; and
    f) Any county laws forming the legal basis of the project.

5. The Applicant's request for information was received and stamped by the County Assembly of Homa Bay on 24th March 2025. The Respondent did not respond to the request within the statutory period prescribed under *Section* 9 of the *ATI Act*, or thereafter. Consequently, on 26th January 2026, the

Applicant lodged an Application for Review with the Commission pursuant to *Section 14(1)(a)* of the *ATI Act,* seeking a review of the Respondent's failure to disclose the information sought.

6. Upon receipt of the Application, the Commission issued an Access to Information Notice dated 11th February 2026 requiring the Respondent to provide an institutional report and any relevant information concerning the request within seven (7) days. The Respondent did not submit the requested report or information within the stipulated period.

7. Accordingly, the Commission proceeds to determine the matter based on the information on record, pursuant to *Section 23(3)(a)(i)* of the *ATI Act, 2016,* which permits the Commission to determine a review application where the requested information or report is not received within the prescribed period.

ISSUES FOR DETERMINATION

8. After a careful analysis of the request for information dated 12th March 2025 and the application for review dated 26th January 2026 by the Applicant, the Commission frames the following issues for determination in this review application:

i. **Whether the Commission has jurisdiction to review the Respondent's decision or inaction under the ATI Act, 2016**
ii. **Whether the requested information is held by the Respondent; and**
iii. **Whether the Applicant is entitled to access the information sought.**

ANALYSIS OF FACTS, ISSUES AND FINDINGS

i. **Whether The Commission has Jurisdiction to Review the Respondent's Decision or Inaction Under the ATI Act, 2016**

9. *Section 14(1)(a)* of the *ATI Act, 2016*, empowers the Commission to review decisions of public entities and private bodies declining to grant access to information requested by citizens or in any other way violating citizens' right to information. The *ATI Act, 2016,* applies to all public entities based on the understanding that the State is the duty bearer of the right of access to information and exercises its functions through public entities. *Section 2* of the ATI Act, 2016, defines a public entity as;

> *"(a) any public office, as defined in Article 260 of the Constitution; or (b) any entity performing a function within a commission, office, agency or other body established under the Constitution."*

10. The Respondent in this matter is the County Assembly of Homabay, established under *Article 176* of the Constitution, and the *County Governments Act, 2012*, therefore a duty bearer under *Article 35* of the *Constitution*. From the foregoing description, it is clear that the Respondent falls under such public entities as described in *Section 2* of the *ATI Act, 2016*. Accordingly, the Commission finds and holds that it has jurisdiction to review the Respondent's decision, action or inaction under the *ATI Act, 2016*.

ii. Whether the requested information is held by the Respondent

11. The second issue for determination in this review application is whether the Respondent has in its custody the requested information. 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…."*

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'***.

12. The use of the word '*held*' in both the *Constitution* and the *ATI Act, 2016,* 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, 2016* provides an elaborate mechanism through which a request for information should be processed and transferred to another entity 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.

13. The foregoing means that a public entity where a request for information is filed has an obligation to provide a response and state whether it holds such requested information or not. This is supported by *Section 9(4)(a)* of the *ATI Act*, which requires a public entity to respond to a requester indicating whether or not it holds the requested information sought. This requirement to indicate whether information is held by the entity cannot be taken lightly, as it is the foundation of processing a request for information and thus enabling the realization of this important right. In the instant application, the Respondent was required to state whether or not it holds the information. This was neither done within the 21day statutory period allowed for a response nor anytime thereafter.

14. The Commission further notes that *Section 2* of the *County Assemblies Powers and Privileges Act, 2017* expressly recognizes and defines the official records of a County Assembly. The provision defines, among other terms, a "Clerk" and a "journal" as follows:

> *"Clerk" means the Clerk of a County Assembly;*
>
> *"journal" means the minutes and the official records of the county assembly whether in audio, electronic or any other form including all papers and accounts howsoever presented to or belonging to the county assembly, or any other records of the proceedings of the county assembly;*

15. The statutory definition is deliberately broad. A "journal" is not confined to the formal minutes of plenary sittings but extends to the official records of the County Assembly in whatever form, including papers and accounts presented to or belonging to the Assembly and other records of its proceedings. The definition therefore encompasses, in substance, the categories of records sought by the Applicant, including Hansard records, Committee minutes and reports, documents laid before the Assembly and financial records relating to the project.

16. The Commission therefore considers that the information sought is not information which the Respondent can reasonably be said not to hold merely by virtue of its form or the organ through which it was generated. By expressly recognizing minutes, official records, papers and accounts as records of the County Assembly, *Section 2* establishes a statutory framework for the custody and existence of such records within the Assembly.

17. In the circumstances, and having regard to the nature of the information requested, the Commission finds that the Hansard reports, Committee minutes and reports, documents submitted to the Assembly, financial reports and other records relating to the project constitute records of the County

Assembly within the meaning of *Section 2* of the *County Assemblies Powers and Privileges Act, 2017*. The Commission is therefore satisfied that the requested information is information held by, or under the control of, the Respondent for purposes of *Article 35* of the *Constitution* and *Section 4* of the *ATI Act, 2016.*

iii) Whether the Applicant is entitled to access the information sought.

18. *Article 35* of the *Constitution* guarantees every citizen the right of access to information held by the State. *Section 2* of the *ATI Act, 2016* defines a "citizen" to mean "any individual who has Kenyan citizenship, and any private entity that is controlled by one or more Kenyan citizens." The Applicant in this review application is Katiba Institute, a civil society organization operating in Kenya. According to information available on the Applicant's website, its Board of Directors is headed by Chairperson Mr Abdul Noor Mohamed, a Kenyan citizen, and includes Professor Yash Pal Ghai, Jill Cottrel Ghai and John Simbi-Okumu, among others, who are also Kenyan citizens. The Commission therefore finds that the Applicant, being a private body controlled by one or more Kenyan citizens, falls within the definition of a "citizen" under *Section 2* of the *ATI Act* and is entitled to invoke the right of access to information under *Article 35* of the Constitution and the *ATI Act, 2016*.

19. This position was affirmed by the High Court in *Katiba Institute v President's Delivery Unit*, *Constitutional Petition No. 468 of 2017 [2017] KEHC 2183 (KLR),* where the Court held that a juristic person whose directors are Kenyan citizens qualifies as a citizen and is therefore entitled to exercise the right of access to information under *Article 35* of the Constitution and the *ATI Act, 2016*.

20. The right of access to information, while fundamental, is not absolute. *Section 6(1)* of the *ATI Act, 2016* provides for circumstances in which access to information may lawfully be limited. The Section provides that:

"Pursuant to Article 24 of the Constitution, the right of access to information under Article 35 of the Constitution shall be limited in respect of information whose disclosure is likely to:

a. undermine the national security of Kenya;

b. impede the due process of 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 proceedings; or

i. infringe professional confidentiality as recognized in law or by the rules of a registered association of a profession."

21. The applicability of the exemptions under *Section 6* must be determined on a case-by-case basis, having regard to the nature of the information sought, the evidence before the Commission and the circumstances of each review application. The burden rests on the Respondent to demonstrate the legal and factual basis for withholding information. Accordingly, the mere fact that information relates to proceedings of a County Assembly, or was considered by a Committee, does not, without more, establish that it falls within an exemption under *Section 6* of the *ATI Act*.

22. In the present matter, the Applicant seeks the following information and documents: -

a. A certified copy of the Hansard report detailing the session(s) in which the construction of the county headquarters was approved;

b. A certified copy of the Hansard report detailing the approval of the agreement with the County Pension Fund (CPF);

c. Minutes and/or reports of County Assembly Committees that deliberated on the approvals;

d. Documents submitted by the County Executive forming the basis of deliberations;

e. Reports, including financial reports, submitted to or received by the County Assembly on implementation; and

f. Any county laws forming the legal basis of the project.

From the nature of the information sought, it is evident that the same substantially concerns the utilization of public resources and is of significant public interest. The Commission must therefore determine whether any particular category of the information sought is subject to a lawful limitation under *Section 6* of the *ATI Act*.

23. The Commission did not have an opportunity to examine the physical documents requested, since no response was received from the Respondent. Nevertheless, having regard to the nature of the information sought in items *c* and *d* above, the Commission recognizes that particular portions of those records may contain information falling within one or more of the exemptions under *Section 6(1)*. The possibility that a record may contain exempt information does not, however, justify withholding the record in its entirety where the exempt information can reasonably be severed or redacted.

24. The Commission is therefore required to balance the Applicant's right of access to information against any competing interests protected by *Section 6* of the *ATI Act*. Where disclosure of a particular portion of a record is likely

to occasion any harm contemplated under *Section* 6, the Respondent should adopt the least restrictive means necessary to protect the exempt information, including redaction where appropriate.

25. The Court recognized the importance of proportionality in determining limitations to constitutional rights in the *Legal Advice Centre t/a Kituo cha Sheria* case, where it held 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.*

26. Similarly, in *Kenya Human Rights Commission v Communication Authority of Kenya & 4 Others [2018] eKLR*, 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."*

27. Applying the foregoing principles, the Commission finds that the requested information in items *c* and *d* cannot be withheld in its entirety merely because the records may contain exempt information. Where the relevant records contain information falling within *Section 6(1)*, the Respondent should redact the exempt portions and provide access to the remainder, provided that the non-exempt information can reasonably be severed without defeating the purpose of the exemption.

28. Having considered the general exemptions under *Section 6* of the *ATI Act,* the Commission has also considered the provisions of *Section 13* of the *County Assemblies Powers and Privileges Act, 2017*, having regard to the nature of some of the information sought, particularly the Hansard reports and minutes or reports of County Assembly Committees. *Section 13(1)* of the *County Assemblies Powers and Privileges Act, 2017*provides as follows:

> *"No Member or member of staff, and no person employed to take minutes of evidence before a county assembly or any committee, shall give evidence in any court, tribunal or elsewhere in respect of the contents of those minutes of evidence or of the contents of any document laid before a county assembly or that committee or in respect of any proceedings or examination held before a county assembly or that committee without special leave first obtained from the county assembly."*

29. The effect of *Section 13(1)* of the *County Assemblies Powers and Privileges Act, 2017* is to restrict a Member, member of staff, or person employed to take minutes of evidence before a County Assembly or Committee from giving evidence concerning the contents of such minutes, documents laid before the Assembly or Committee, or proceedings or examinations held before them, without the prior special leave of the County Assembly.

30. The Commission notes, however, that *Section 13(1* **of the** *County Assemblies Powers and Privileges Act, 2017)* must be read together with *Section 13(3)*, of the *County Assemblies Powers and Privileges Act, 2017* which provides as follows:

> *"Subject to the provisions of Article 35 of the Constitution and to any written law relating to data protection and freedom of information for the time being in force, the special leave referred to in subsection (1) may be declined where—*
> *(a) the request is unreasonable in the circumstances;*

(b) the information requested is at a deliberative stage in a county assembly or in a committee;
(c) there is failure to pay such fee as may be reasonably required in the circumstances; or
(d) the applicant fails to satisfy any confidentiality requirements by a county assembly."

31. It is material that *Section 13(3)* of the *County Assemblies Powers and Privileges Act, 2017* expressly makes the exercise of the power to decline special leave subject to *Article 35* of the Constitution and written law relating to data protection and freedom of information. The provision therefore does not operate independently of the constitutional and statutory framework governing access to information. Any reliance on the circumstances set out in *Section 13(3)* of the *County Assemblies Powers and Privileges Act, 2017* to restrict access must consequently be considered in light of *Article 35* of the Constitution and the *ATI Act, 2016*, and must be justified by reference to the particular information sought and the applicable limitation.

32. Further, *Section 13(4) of the County Assemblies Powers and Privileges Act, 2017* provides as follows:

> *"The right of access to information under Article 35 of the Constitution shall be limited to the nature and extent specified under this section for purposes of facilitating freedom of speech and debate in the county assembly as contemplated under Article 33 of the Constitution."*

The Commission understands this provision to recognize that the right of access to information under *Article 35* continues to apply to information relating to the proceedings of a County Assembly, while permitting a limitation to the nature and extent specified under *Section 13* of the *County Assemblies Powers and Privileges Act, 2017* for the purpose of facilitating freedom of speech and debate within the Assembly. The provision does not,

therefore, create a blanket exclusion of County Assembly records from the constitutional right of access to information. Accordingly, the Respondent cannot rely solely on the fact that the information was generated, considered or laid before the County Assembly to justify its withholding. It must demonstrate that the particular information sought falls within a limitation contemplated under *Section 13* of the *County Assemblies Powers and Privileges Act, 2017* or within an applicable exemption under *Section 6* of the *ATI Act*.

33. In the present matter, the Applicant seeks access to Hansard reports, minutes and/or reports of County Assembly Committees, documents submitted by the County Executive forming the basis of deliberations, reports submitted to or received by the County Assembly on implementation of the project, and county laws relating to the project. These are records concerning the business and proceedings of the County Assembly, but the request is for access to records held by the Respondent and does not seek to compel a Member, member of staff or any other person contemplated under *Section 13(1)* of the *County Assemblies Powers and Privileges Act, 2017* to give evidence concerning the proceedings of the Assembly. The Commission therefore finds that *Section 13(1)*, considered in isolation, does not operate as a bar to the Applicant's request for copies of records held by the Respondent.

34. In this regard, the Commission considers that the Hansard reports and Committee records sought by the Applicant cannot be treated as categorically exempt merely by reason of their connection with the proceedings of the County Assembly. Where the information sought concerns deliberations that are still at a deliberative stage, or contains information subject to a specific confidentiality requirement or other lawful limitation, the Respondent must identify the particular information affected and demonstrate the basis upon which access may lawfully be restricted. Conversely, where the information concerns completed approvals,

decisions, financial expenditure, contractual arrangements or county laws, the Respondent must demonstrate a specific statutory basis for withholding the information.

35. In the circumstances, the Commission finds that *Section 13* of the *County Assemblies Powers and Privileges Act, 2017* does not, without more, justify withholding the information sought by the Applicant. The provision must be applied in a manner that protects the legitimate freedom of speech and debate within the County Assembly without unnecessarily limiting the Applicant's constitutional right of access to information. Where the Respondent seeks to restrict access to any particular record on the basis of *Section 13* or any other applicable law, it bears the obligation to identify the specific legal basis for the restriction and demonstrate its application to the information sought. Any restriction must be confined to the nature and extent necessary to achieve the statutory purpose and must be specifically justified in relation to the information sought.

36. The Commission further notes that much of the information sought falls within the scope of proactive disclosure contemplated under *Section 5* of the *ATI Act, 2016* and *Regulation 10 of the Access to Information (General) Regulations, 2023.* In particular, *Section 5(1)(c)* provides that a public entity shall—

> *"publish all relevant facts while formulating important policies or announcing the decisions which affect the public, and before initiating any project, or formulating any policy, scheme, program or law, publish or communicate to the public in general or to the persons likely to be affected thereby in particular, the facts available to it or to which it has reasonable access which in its opinion should be known to them in the best interests of natural justice and promotion of democratic principles;"*

Further, *Section 5(1)(e)* provides that a public entity shall—

"upon signing any contract, publish on its website or through other suitable media the following particulars in respect of the contract entered into—

(i) the public works, goods acquired or rented, and the contracted service, including any sketches, scopes of service and terms of reference;

(ii) the contract sum;

(iii) the name of the service provider, contractor or individual to whom the contract has been granted; and

(iv) the periods within which the contract shall be completed."

37. The Commission observes that the information sought substantially relates to the decision-making and approval processes relating to the County Headquarters project, the contractual arrangements underpinning the project, and the utilization of public resources. The information therefore falls within the categories contemplated under *Section 5(1)(c)* and *(e)* of the *ATI Act*. The Commission accordingly finds that, subject to any lawful limitation under *Section 6* of the *ATI Act* or other applicable law, such information ought, in the first instance, to be made available proactively. The obligation of proactive disclosure reinforces the principles of transparency and accountability in the exercise of public functions and the utilization of public resources.

38. In particular, the Commission finds that the information sought in items *a, b, e* and *f* have not been shown to fall within any of the exemptions under Section 6(1) of the ATI Act or any applicable limitation under *Section 13* of the *County Assemblies Powers and Privileges Act*. The Applicant is therefore entitled to access the said information.

39. In relation to the information sought in items *c* and *d*, the Commission finds that the records should not be withheld in their entirety merely because they may contain exempt information. Where any portion of the records falls within an applicable exemption under *Section 6(1)*, the Respondent shall

redact the exempt information and provide access to the remainder, where reasonably severable.

40. Accordingly, the Commission finds and holds that the Applicant is entitled to access the information sought in items *c* and *d*, subject to lawful redaction of any exempt information in accordance with *Section 6* of the *ATI Act, 2016*.

41. In conclusion, the Commission emphasizes that public entities have a constitutional and statutory obligation to facilitate access to information in a timely and transparent manner. This includes the obligation to provide reasoned decisions where access is limited. *Section 4* of the *Fair Administrative Action Act, 2015* further guarantees every person administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Public entities are therefore expected to comply with the statutory timelines governing access to information and to provide sufficient justification where access is restricted. The Respondent's failure to respond to the Applicant's request within the prescribed period undermined the effective exercise of the constitutional right of access to information.

FINAL ORDERS

42. Having made a careful analysis of all the facts and information provided in this review application, the Commission, pursuant to the powers granted by *Sections 22(3)(a)(i)* and *23(2)* of the *ATI Act, 2016* and *Regulation 25(8)* of the *Access to Information (General) Regulations, 2023,* **ORDERS:**

i) **THAT** the Clerk, County Assembly of Homa Bay, shall facilitate access to the information requested by the Applicant, being;

a. A certified copy of the Hansard report detailing the session(s) in which the construction of the county headquarters was approved;

b. A certified copy of the Hansard report detailing the approval of the agreement with the County Pension Fund (CPF);
c. Minutes and/or reports of County Assembly Committees that deliberated on the approvals;
d. Documents submitted by the County Executive forming the basis of deliberations;
e. Reports, including financial reports, submitted to or received by the County Assembly on implementation; and
f. Any county laws forming the legal basis of the project.

ii) **THAT** the Respondent shall facilitate access to the requested information in items *b)* and *c)* in strict compliance with the law and as guided by this Ruling, including redacting any information lawfully exempt from disclosure under *Section 6* of the *ATI Act, 2016*, while providing access to the non-exempt portions of the records where such portions can reasonably be severed.

iii) **THAT** compliance with these orders shall be **within twenty-one (21) days** from the date hereof.

iv) **THAT** in the event of non-compliance with the orders above, the Commission shall recommend criminal prosecution against the Clerk, County Assembly of Homa Bay, in line with *Section 28* of the *ATI Act, 2016*.

Dated, Signed and **Issued** at **Nairobi** this…**6th** .... day of ….**OCTOBER**.....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."***