REPUBLIC OF KENYA
COMMISSION ON ADMINISTRATIVE JUSTICE
(OFFICE OF THE OMBUDSMAN)

ATI REVIEW APPLICATION NO. CAJ/KSM/ATI/CG/HBY/071/01/26 – LM

KATIBA INSTITUTE……..……..……..……...APPLICANT

VERSUS

COUNTY GOVERNMENT 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.

A. FACTS OF THE REVIEW APPLICATION

1. The Commission received an Application for Review dated 26th January 2026 from Nora Mbagathi, the Executive Director of Katiba Institute, acting on behalf of the Applicant. The Applicant stated that on 12th March 2025, she submitted a request for information to the County Secretary, County Government of Homa Bay, seeking information regarding the construction of the new County Government of Homa Bay Headquarters. Specifically, the Applicant sought the following information and documents:-

    1. Minutes of the County Executive Committee meeting where approval was granted for the construction of the new county headquarters;
    2. Copies of the County Assembly approvals authorizing the County Executive Committee to construct the County headquarters through a lease-to-own scheme or similar financing arrangement;
    3. Copies of the County Assembly approvals authorizing the County Executive Committee to raise loans or incur liabilities relating to the project;
    4. Copies of approvals granted by the National Government for the lease-to-own financing model;
    5. Copies of agreements entered into between the County Pension Fund (CPF) and the County Government of Homa Bay regarding the construction of the County headquarters;

6. A report detailing the financial obligations imposed by the project on the County Government or its residents, including contingent liabilities; and
7. A statement detailing the current status of the project, including reports prepared regarding its implementation.

2. The Applicant's request for information was received and stamped by the County Government 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.

3. Upon receipt of the application, the Commission issued an Access to Information Notice dated 3rd February 2026 requiring the Respondent to provide an institutional report or any relevant information regarding the request.

4. Vide a letter dated 11th February 2026, the Respondent requested an extension of one (1) month within which to submit the requested documents, citing the voluminous nature of the records and the time required to compile and facilitate access thereto.

5. The Commission granted the requested extension through its letter dated 4th March 2026. However, upon expiry of the extended period, the Respondent had neither provided the requested information nor submitted a substantive response to the Commission.

6. Consequently, the Commission proceeds to determine this matter pursuant to Section 23(3)(a)(i) of the *ATI Act, 2016*, which permits the determination of a review application where the requested information

or response is not received by the Commission within the prescribed period.

B. ISSUES FOR DETERMINATION

7. 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 and the response dated 11th February 2026 by the respondent, the Commission frames the following issues for determination:
   i. **Whether the Commission has jurisdiction to review the Respondent's decision or inaction under the ATI Act, 2016;**
   ii. **Whether the Applicant is entitled to access the information sought;**
   iii. **Whether the Respondent holds the requested information; and**
   iv. **Whether the nature of information sought falls within the categories subject to disclosure under the ATI Act, 2016.**

C. 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*

8. *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."

9. The Respondent in this matter is the County Government of Homa Bay, established under *Article 176* of the Constitution, and operationalized by the *County Governments Act 2012*. It follows therefore that the Respondent is a duty bearer as envisaged under *Article 35* of the Constitution and Section 2 of the *ATI Act, 2016*.

10. Consequently, 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 Applicant is Entitled to the Right of Access to Information

11. *Article 35* of the *Constitution* guarantees every citizen the right of access to information held by the State. The term 'citizen' is defined by Section 2 of the *ATI Act, 2016*, 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 at the Applicant's website https://katibainstitute.org/ki-board-of-directors/ , the Applicant's Board of Directors is headed by Chairperson Mr. Abdul Noor Mohamed, who is a Kenyan Citizen. The Applicant's Board of Directors includes Professor Yash Pal Ghai, Jill Cottrel Ghai, and John Simbi - Okumu, among others, who are Kenyan citizens. As such, the Commission finds that the Applicant fits the definition of a citizen as defined in *section 2* of the *ATI Act, 2016* by being a private body controlled by one or more Kenyan citizens.

12. The foregoing position was affirmed by the High Court in ***Katiba Institute Vs President's Delivery Unit (Constitutional Petition 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 *Section 4* of the *ATI, Act 2016*.

13. Accordingly, the Commission finds and holds that the Applicant, being a private body controlled by one or more Kenyan citizens, is a citizen within the meaning of *Article 35* of the *Constitution* and thus entitled to invoke and enjoy the right of access to information under the Constitution and the *ATI Act, 2016*.

iii. Whether the Respondent Holds the Requested Information

14. *Section 4(1)* of the *ATI Act, 2016* guarantees every citizen 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…."

15. 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'*.**

16. 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. *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.

17. consequently, it is a plausible and lawful response by 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.

18. A public entity in receipt of a request for information has a statutory obligation to respond to the request and indicate whether it holds the requested information. This position is reinforced by *Section 9(4)(a)* of the *ATI Act, 2016,* which requires a public entity to issue a decision to a requester specifying whether or not it holds the information sought. This requirement is fundamental, as it forms the basis for processing a request and facilitating the realization of the right of access to information.

19. In the instant application, the Respondent was required to communicate whether it held the requested information within the statutory timelines. However, no such response was provided within the prescribed period or thereafter. Further, the Respondent's letter dated 11th February 2026 did not indicate that the requested information was not within its possession, but instead sought additional time to enable a comprehensive response.

20. The Commission notes that the information sought by the Applicant relates to approvals, financial arrangements, contractual agreements, and the implementation of a public infrastructure project undertaken by

the County Government of Homa Bay. Such information ordinarily originates from, and is generated by, the County Executive in the course of executing its constitutional and statutory mandate.

21. Under *Article 179* of the *Constitution*, the County Executive Committee is responsible for the implementation of county legislation and the management of county functions. In this regard, the County Executive is the principal organ involved in the initiation, procurement, financing, and execution of development projects. These functions necessarily generate records including project proposals, financial agreements, procurement documentation, contracts, and implementation reports.

22. *Sections 68* and *81* of the *Public Finance Management Act, 2012* requires the County Executive through the County Treasury and accounting officers to maintain proper financial records, ensuring accountability in public expenditure, and facilitating audit processes. These statutory obligations require the creation, custody, and maintenance of comprehensive records relating to all financial and contractual undertakings of the County Government.

23. After a careful analysis of the facts of this application together with the statutory requirements as shown herein above, the Commission is duly convinced that the Respondent holds the requested sets of information.

iv. Whether the Nature of Information Sought Falls Within the Categories Subject to Disclosure Under the *ATI Act, 2016*.

24. It is clear that the information sought relates to the financing and implementation of a major public infrastructure project funded using public resources, being the construction of the Respondent's County Headquarters. Transparency in public expenditure is a fundamental

Constitutional principle, and thus disclosure of such information becomes a matter of public interest.

25. The High Court in ***Trusted Society of Human Rights Alliance Vs Cabinet Secretary Devolution & Planning & 3 Others [2017] KEHC 8755 (KLR)***, underscored the importance of transparency in governance and public spending by stating that:

> *"Access to information is a foundational element of accountability and good governance. It enables citizens to scrutinize public expenditure and the decisions made by those entrusted with public power."*

26. The right of access to information, while fundamental, is not absolute. *Section 6(1)* of the *ATI Act, 2016*, provides for circumstances under which disclosure of information may be exempt. The said 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."*

27. The applicability of the above exemptions is determined on a case-by-case basis based on the facts, evidence and circumstances in each review application before the Commission.

28. The Applicant sought access to the following:

1. *Minutes of the County Executive Committee meeting where approval was granted for the construction of the new county headquarters;*
2. *Copies of the County Assembly approvals authorizing the County Executive Committee to construct the county headquarters through a lease-to-own scheme or similar financing arrangement;*
3. *Copies of the County Assembly approvals authorizing the County Executive Committee to raise loans or incur liabilities relating to the project;*
4. *Copies of approvals granted by the National Government for the lease-to-own financing model;*
5. *Copies of agreements entered into between the County Pension Fund (CPF) and the County Government of Homa Bay regarding the construction of the County headquarters;*
6. *A report detailing the financial obligations imposed by the project on the County Government or its residents, including contingent liabilities; and*

7. *A statement detailing the current status of the project, including reports prepared regarding its implementation.*

29. The Commission observes that to a large extent, the requested sets of information relate to the utilization of public resources and the decision-making processes at the County Government. Such information is therefore subject to disclosure in furtherance of transparency and accountability. Additionally, it is noted that much of the requested information falls within the scope of proactive disclosure under *Section 5* of the *ATI Act, 2016* and *Regulation 10* of the ATI (General) Regulations, 2023.

30. The Commission did not have an opportunity to examine the physical documents requested in numbers 1 to 4, since no response was received from the Respondent. Nevertheless, having regard to the nature of the requested information being copies of documents, the Commission is of the view that such requested copies may contain exempt information in some parts.

31. In regard to request item No. 5, relating to copies of agreements between the County Pension Fund (CPF) and the County Government of Homa Bay concerning the construction of the County headquarters, the Commission observes that such agreements form part of public contractual arrangements. However, it is noted that these agreements may contain personal or sensitive information relating to identifiable individuals or third parties in some parts which make those parts to fall within the scope of exemptions under *Section 6(1)* of the *ATI Act, 2016*. Accordingly, disclosure of the requested copies in items 1 to 5 without appropriate safeguards, is likely to constitute disclosure of exempt information.

32. The Commission has made a finding herein before that the requested information ought to be disclosed as a matter of public interest as it relates to expenditure of public resources where transparency and accountability is required. This means that the requested information in Nos. 3 to 4 cannot be withheld completely as its disclosure is important to enhance citizen oversight over public resource expenditure.

33. A delicate balancing act is required in this situation to manage the competing rights and interests; on one hand, the Applicant right to access information to hold the County Government to account on use of public resources and on the other, the Respondent's obligation to prevent unwarranted disclosure of exempt information.

34. The Court in ***Kenya Human Rights Commission Vs Communication Authority of Kenya & 4 Others [2018] eKLR*** at paragraph 72, 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."***

35. In determining whether there exists a lawful mechanism through which access to the requested documents may be granted while safeguarding protected interests, the Commission is of the view that

disclosure need not be denied in its entirety where mechanisms exist to facilitate partial access. One such mechanism is the redaction of exempt information from the requested documents and provision of the redacted copies to the Applicant. This approach enables access to the substantive information sought while ensuring that protected information under *Section 6(1)* of the *ATI Act, 2016*, is not disclosed.

36. In light of the foregoing, the Commission holds that the requested information in Nos. 1 to 5 of the Applicant's request is subject to disclosure, taking into account redactions as may be necessary to protect information falling within the statutory exemptions.

37. In relation to the other sets of information sought in Nos. 6 and 7 of the Applicant's request for information, the Commission carefully evaluated the nature of the information sets thereof and finds that these sets of information do not fall within any of the exemptions under *section 6(1*) of the ATI Act, 2016. Thus, the Commission holds that such requested information should be disclosed to the Applicant.

38. In conclusion, the Commission emphasizes that all public entities have a constitutional and statutory obligation to facilitate access to information in a timely and transparent manner as provided by the *ATI Act, 2016*. This obligation includes a duty to provide reasoned decisions where access is limited.

39. Further, *Section 4* of the *Fair Administrative Action Act 2015* guarantees every person the right to administrative action that is expeditious, efficient, lawful and reasonable. Public entities, including the Respondent herein, are expected to comply with statutory timelines unless sufficient justification is provided within the framework of the law. Failure by public officers to respond to lawful requests for information

undermines transparency, accountability and public confidence in governance.

D. FINAL ORDERS

40. 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 ATI (General) Regulations, 2023, **ORDERS:**

1. **THAT** the County Secretary, County Government of Homa Bay, shall facilitate access to the requested information in numbers 1 to 7, being:

    1. Minutes of the County Executive Committee meeting where approval was granted for the construction of the new county headquarters;
    2. Copies of the County Assembly approvals authorizing the County Executive Committee to construct the county headquarters through a lease-to-own scheme or similar financing arrangement;
    3. Copies of the County Assembly approvals authorizing the County Executive Committee to raise loans or incur liabilities relating to the project;
    4. Copies of approvals granted by the National Government for the lease-to-own financing model;
    5. Copies of agreements entered into between the County Pension Fund (CPF) and the County Government of Homa Bay regarding the construction of the County headquarters;
    6. A report detailing the financial obligations imposed by the project on the County Government or its residents, including contingent liabilities; and

7. A statement detailing the current status of the project, including reports prepared regarding its implementation.

2. **THAT** the Respondent should ensure strict compliance with the law in facilitating access to the requested information in Numbers 1 to 5 as guided in this ruling.

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

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

Dated, Signed and **Issued** at **Nairobi** this…**8th** . 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."***