

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. E063 OF 2021

**IN THE MATTER OF ARTICLES 1, 2,3,10,19,20 (1)-(4), 21,22,35,201, 258
AND 259 OF THE CONSTITUTION**

**KENYA LEGAL AND ETHICAL ISSUES
NETWORK ON HIV & AIDS (KELIN).....PETITIONER**

AND

**CABINET SECRETARY
MINISTRY OF HEALTH.....1ST RESPONDENT**

THE ATTORNEY GENERAL2ND RESPONDENT

AND

**THE COMMISSION ON
ADMINISTRATIVE JUSTICE..... INTERESTED PARTY**

SUBMISSIONS OF THE INTERESTED PARTY

May it please your Lordship,

1. These are the written submissions of the Interested Party, the Commission on Administrative Justice (hereafter to be referred as the Commission) in support of the petition dated 25th February 2021.
2. Kenya Legal and Ethical Issues Network on HIV & AIDS (hereafter referred to as KELIN) is seeking various orders as against the Respondents and the crux of the Orders sought being that the Respondents are in gross violation of values and principles espoused in Articles 35 of the Constitution.

3. Further, KELIN is seeking a declaration that the respondents have violated Articles 35(1) (a) and 35(3) of the Constitution by refusing to release information requested by the Petitioner and making the same information public.
4. KELIN is also seeking a declaration to be issued that the failure of the 1st respondent to provide information sought under Article 35 (1) (a) and also to publicise the information in accordance with Article 35(3) on the basis of the Petitioner's request is a violation of Article 10 of the constitution and specifically the values of the rule of law, participation of the people, human rights, good governance, transparency and accountability.
5. In addition, KELIN is seeking a declaration be issued that the failure by the 1st respondent to provide information sought by KELIN under Article 35 (1) (a) and also publicise the information in accordance with Article 35 (3) is a violation of the obligations imposed on the 1st respondent to ensure public finance is utilized in an open and accountable manner and in a prudent and responsible manner as stipulated in Article 201 (a) and (d) of the Constitution.
6. KELIN is also seeking a mandatory order be issued compelling the 1st respondent to forthwith provide, at the respondents' cost, information sought by KELIN in the letter dated 14th November 2016.
7. The Commission in response to the petition filed a replying affidavit sworn by Leonard Ngaluma, the then Commission's Secretary on 29th Day October 2021, whose contents, the Commission adopts in its entirety.

B. FACTS

8. KELIN wrote to the Cabinet Secretary, Ministry of Health vide a letter dated 14th November 2016 requesting seeking to be facilitated with information pursuant to Articles 3,10 and 35 of the Constitution, in particular the Global Alliance for Vaccines and Immunization (GAVI AUDIT REPORT).
9. KELIN together with other organizations and associations did a reminder to the 1st respondent on its request for information which the 1st respondent ignored and/or declined to provide the requested information.
10. Having received no response, KELIN made an application of review of the denial and/or refusal of the information requested vide a letter dated 23rd August 2017. The Commission acted on the application for review and initiated a letter of inquiry vide a letter dated 14th September 2017 to the 1st respondent stating that the petitioner made an application to the 1st Respondent vide a letter dated 14th November 2016 seeking to be provided for with information.
11. When the Commission's letter was not responded to, the Commission in accordance to its review processes, issued a first reminder dated 22nd November 2017 and a second reminder dated 14th December 2017 seeking for a response from the 1st respondent.
12. Further, KELIN wrote to the Commission stating that they are yet to receive any response in regard to the application for review of denial of information that they had lodged with the Commission. A final reminder dated 8th June

2018 and a Notice to Show Cause dated 24th July 2018 were issued to the 1st respondent for failure to respond to the Commission's letters.

13. The 1st respondent responded to our letters and the Notice to Show Cause stating that the information KELIN sought was within the public domain and on the website of GAVI and other Ministry of Health Development Partners. A final audit report was also forwarded to the Commission to be shared with KELIN, which the Commission did.
14. In turn, KELIN gave its rejoinder appreciating the shared report but indicated that other requests for information were yet to be shared by the 1st respondent.
15. There were numerous letters that included reminders that the Commission wrote to the 1st respondent requesting it to respond to our letters in order to advise the complainant which to date, have never been responded to or acted upon.

C. ISSUES FOR DETERMINATION

16. From the Petition, the following is a summary of the main issues which arise for determination:
 - I. Whether the information sought by the Petitioner should have been proactively disclosed by the 1st Respondent.
 - II. Whether the information sought by the Petitioner should be provided by the 1st Respondent.

D. ANALYSIS

17. *Whether the information sought by the Petitioner should have been proactively disclosed by the 1st Respondent*
18. The Interested Party is a Constitutional Commission established under Article 59(4) and Section 3 of the Commission on Administrative Justice Act of 2011, charged inter alia, with the mandate to investigate any conduct in state affairs, or any act or omission in public administration by any state organ, state or public officer in national and county government, that may result in any impropriety or prejudice.
19. Article 59 (5) (4) (c) envisages that; *If Parliament enacts legislation restructuring the Commission under clause (4) each successor commission shall be a commission within the meaning of Chapter Fifteen, and shall have the status and powers of a commission under that Chapter.*
20. Section 8 of the Commission on Administrative Justice Act, 2011 gives the Commission mandate to investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive official, unfair or unresponsive official conduct within the public sector.
21. Further Section 26 of the Commission on Administrative Justice, Act, 2011 reads that; *In addition to the powers conferred in Article 252 of the Constitution. Article 252 (1) (a) and (c) of the Constitution states that: Each commission, and each holder of an independent office may conduct*

investigations on its own initiative or on a complaint made by a member of the public; and may perform any functions and exercise any powers prescribed by legislation, in addition to the functions and powers conferred by this Constitution.

22. Article 35 of the Constitution provides that;

(1) *Every citizen has the right of access to*

(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.*

(2) *Every person has the right to the correction or deletion of untrue or misleading information that affects the person.*

(3) *The State shall publish and publicise any important information affecting the nation.*

23. Article 35 of the Constitution confers the right of access to information by every citizen to information held by the State and information held by another person required for the exercise or protection of any right or fundamental freedom.

24. The importance of this right was fully appreciated by the drafters of our Constitution and they dutifully included Article 35 to make this right attainable as the foundation for an open, responsive, accountable and democratic government and its institutions. The Constitution therefore, grants citizens' access to information as a constitutional right and can only be limited by the Constitution and the relevant legislation.

25. The Access to Information Act was enacted to give effect to Article 35 of the Constitution. It provides a framework for public entities and private bodies to proactively disclose information that they hold and to provide information on request in line with the constitutional principles. The Access to Information Act, 2016 is a normative derivative of the right to access to information under Article 35.

26. The Preamble of the Access to Information Act, 2016, clearly states that it is an *“Act of Parliament to give effect to Article 35 of the Constitution; to confer on the Commission of Administrative Justice the oversight and enforcement functions and powers and for connected purposes.”*

27. In the *High Court case of Savraj Singh Chana v Diamond Trust Bank (Kenya) Limited & another [2020] eKLR* it was observed that:

63. The preamble of the Access to Information Act, 2016 clearly states that it is an “Act of Parliament to give effect to Article 35 of the Constitution; to confer on the Commission of Administrative Justice the oversight and enforcement functions and powers and for connected purposes.” It is therefore an Act of Parliament specifically enacted to give effect to the right of access to information under Article 35 of the Constitution.

28. The Access to Information Act of 2016 has two main objectives firstly, is to have mechanisms and procedures to give effect to right to access information of how the information is requested and obtained from public and private bodies in an efficient way. Secondly, it seeks to bring about accountability

and promote transparency especially in public bodies for effective governance.

29. In the *High Court Case of Khalifa & another v Principal Secretary, Ministry of Transport & 4 others; Katiba Institute & another (Interested Parties) (Constitutional Petition E032 of 2019) [2022] KEHC 368 (KLR)* it was observed that:

Two of the objects of the Act must be emphasized. Firstly, the Act seeks to establish voluntary and mandatory mechanisms or procedures to give effect to the right to access to information in a manner which enables persons to obtain access to records of public and private bodies swiftly, inexpensively and effortlessly as soon as reasonably possible. Secondly, it seeks to promote transparency, accountability and effective governance of all public and private bodies.

30. In the *High Court case of Katiba Institute v Presidents Delivery Unit & 3 others [2017] eKLR* it was observed that: *On the other hand, section 5 of the Act further provides that a public entity should facilitate access to information held by it.*

31. The court further went on to state at paragraph 48:

*This is even greater a responsibility given the nature of the Constitutional obligation the state, state officers or public bodies have for disclosure. This is so because as observed in *Trusted Society of Human Rights Alliance & 3 Others v Judicial Service Commission (supra)*, the exercise of this right*

should not require individuals to demonstrate a specific interest in the information. And where therefore a public authority seeks to deny access to information, it should bear the onus of justifying the refusal at each stage of the proceedings. Access to Information Act is also absolutely clear that information should be disclosed free of charge, the reason for seeking information notwithstanding.

32.*In the High Court case of Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company & 2 Others [2013] eKLR the court state that:*

34. The second consideration to bear in mind is that the right to information implies the entitlement by the citizen to information, but it also imposes a duty on the State with regard to provision of information. Thus, the State has a duty not only to proactively publish information in the public interest-this, I believe, is the import of Article 35(3) of the Constitution of Kenya which imposes an obligation on the State to 'publish and publicise any important information affecting the nation', but also to provide open access to such specific information as people may require from the State.

36. The recognized international standards or principles on freedom of information, which should be included in legislation on freedom of information, include maximum disclosure: that full disclosure of information should be the norm; and restrictions and exceptions to access to information should only apply in very limited circumstances; that anyone, not just citizens, should be able to request and obtain information; that a requester should not have to show any particular interest or reason for their request; that

'Information' should include all information held by a public body, and it should be the obligation of the public body to prove that it is legitimate to deny access to information.

33. There are international treaties that advocate for the right to access to information. Article 19 of the Universal Declaration of Human Rights and Article 19 of the International Covenant on Civil and Political Rights (ICCPR) as an element of freedom of expression. It includes as the right to seek and receive information.

34. The UN Human Rights Committee in General Comment 34, adopted in 2011, interpreted the scope and limits of the right to information, stating that Article 19 of the ICCPR ensures the right to access information held by public bodies. It also requires that States proactively disseminate information in the public interest and ensure that the information is easily accessible, prompt, effective and practical.

35. There are also other important international treaties which require public access to information. Article 10 of the UN Convention Against Corruption (UNCAC) requires States to take such measures as may be necessary to enhance transparency in its public administration including: *Adopting procedures and regulations allowing members of the general public to obtain, where appropriate, information on the organization, functioning and decision making processes of its public administration and with due regard for the protection of privacy and personal data.*

36. Further, Article 13 of the UNCAC requires that States should ensure that the public has effective access to information and take measures for respecting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption.
37. The Declaration of Principles of Freedom of Expression and Access to Information in Africa (the Declaration) establishes or affirms the principles for anchoring the rights to freedom of expression and access to information in conformance with Article 9 of the African Charter which guarantees individuals the right to receive information as well as the right to express and disseminate information.
38. The Constitution under Article 2 (6) envisages that: *Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.* We submit that the above mentioned treaties form part of the laws of Kenya and that public bodies especially those that formulate and implement policies touching on the public should be guided by them in relation to access to information.
39. The right to access information is a fundamental human right and the information held by public bodies should be based on the principle of maximum disclosure to mean that information should be disclosed to the widest extent possible subject to very few restrictions.
40. States and/or public bodies should also observe the principle of publishing information held by them. Public bodies should be under an obligation to publish key information. Access to information implies not only that public

bodies should accede to requests for information, but also that they should publish and disseminate widely documents of significant public interest.

41. In addition to the above principle, there is a principle of promotion of open government. This is to mean that public bodies must actively promote open government by informing the public of their rights and promoting a culture of openness within government which are essential if the goals of access to information are to be realized.

42. It is the Commission's submissions that the information that was sought by KELIN ought to have been proactively disclosed by the 1st Respondent, including information that was sought but was not provided in its response to the Commission letter during the review processes.

43. *Whether the information sought by the Petitioner should be provided by the 1st Respondent*

44. It is the Commission's submission that in as much as KELIN had requested for the information as guided by the Access to Information Act, 2016, the information KELIN sought should have been proactively disclosed by the 1st respondent in line with Articles 10, 35 (3) and 201 (a) of the Constitution. Further, Section 5 of the Access to Information Act, 2016 provides that a public entity shall facilitate access to information held by it.

45. It is noteworthy that KELIN made a request to the 1st respondent to be facilitated with information and/or documents which should have been provided within twenty-one days as provided for in Section 9 of the Access to

Information Act, 2016. Section 9 (1) of the Access to Information Act, 2016 states that; *Subject to section 10, a public officer shall make a decision on an application as soon as possible, but in any event, within twenty-one days of receipt of the application.*

46. When the requester has not received any information from the public and/or private body when the request was made within the stipulated time, it is deemed that the request of information has been denied as provided in Section 9(6) of the Access to Information Act, 2016. Section 9(6) reads that; *Where the applicant does not receive a response to an application within the period stated in subsection (1), the application shall be deemed to have been rejected.*

47. The refusal and or denial of information by the 1st respondent prompted KELIN to seek for a review of the denial and/or refusal of information to the Commission. Section 14 (1) (a) of the Access to Information Act, 2016 reads that: *Subject to subsection (2), an applicant may apply in writing to the Commission requesting a review of any of the following decisions of a public entity or private body in relation to a request for access to information a decision refusing to grant access to the information applied for.*

48. The application for review of the denial and/or refusal of information was received by the Commission and the review processes and procedures were initiated. It is unfortunate that after several correspondences the information was released partly and some information till date, is yet to be availed.

49. The Petitioner sought information in exercise of its constitutional right under Article 35. It is also clear that even though the law requires the public entity to respond to the request within twenty-one (21) days on whether or not it is

in possession of the information and will or will not disclose, the 1st respondent ignored the law. The 1st respondent was under both a constitutional and legal obligation to allow the petitioner to access information in their possession and held on behalf of the public.

50. The right to access information is an inviolable right that cannot be granted by the State as the same is granted by the Constitution. This was observed in the *High Court case of Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company & 2 Others [2013] eKLR* as the learned judge stated that; *On the above basis, the right to access information is inviolable because it is neither granted nor grantable by the state. This is a right granted by the Constitution and is protected by the same Constitution.*

51. On the Principle of processes to facilitate access to information, the Commission is of the view that the requests for information should be processed rapidly and fairly and an independent review of any refusals should be available. This means that effective access to information requires both that the law stipulate clear processes for deciding upon requests by public bodies, as well as a system for independent review of their decisions.

52. The Access to Information Act, 2016 has provided the application process to access information under Section 8 of the aforementioned Act. The Act provides that an application for request of information shall be made in writing in English or Kiswahili which was done by KELIN by writing a letter to the 1st respondent requesting for information.

53. Further, the Access to Information Act, 2016 has provided for an independent review of any refusals of access to information. The Act has stipulated the mechanism for review of refusal and/or denial of information by according the Commission as an independent body the mandate to review the decisions of refusal and/or denial of information by public bodies.

54. The review mechanism is well placed in Section 14 of the Access to Information Act, 2016. The investigations processes of the review of refusal and/or denial of information and the powers of the Commission is placed in Sections 22 and 23 respectively of the aforementioned Act.

55. It is important to note that the Principle of processes to facilitate access to information is provided by a legislature (the Access to Information Act, 2016) and that the Commission fulfilled its duty in reviewing the refusal and/or denial of information that was sought by KELIN.

E. CONCLUSION

56. The Commission submits that the information that was sought by KELIN falls within the ambit of information that is to be proactively disclosed by the 1st respondent guided by Article 35 (3) of the Constitution, Section 5 of the Access to Information Act, 2016 and the Principle of Maximum Disclosure.

57. It is noteworthy that even after KELIN made a request for information, the same was provided but it was provided partly deeming the same as refusal and/or denial to which the 1st respondent is yet to address and/or provide.

58. It is our submissions that the 1st respondent has violated KELIN's right to access to information and that the court should order for the release of the requested information.

59. In light of the foregoing, we urge Commission this Honourable Court to order the 1st respondent to observe the Principle of maximum disclosure and the Principle of obligation to publish by proactively disclosing the information on its website in the interest of the public.

DATED at NAIROBI this 18th of April 2023



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