



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**  
**PETITION NO. 143 OF 2017**

**In the matter of Articles the alleged contravention of Rights and Fundamental Freedoms under  
Article 35 and 47 of the Constitution of Kenya 2010**

**and**

**In the matter of section 4 (10 (b) of Access to Information Act No. 31 of 2016, Laws of Kenya.**

**Mercy Nyawade.....Petitioner**

**vs**

**Banking Fraud Investigations Department.....1<sup>st</sup>Respondent**

**The Hon. Attorney General.....2<sup>nd</sup>Respondent**

**Director of Public Prosecutions.....3<sup>rd</sup>Respondent**

**JUDGEMENT**

**Introduction**

1. For a better understanding of the applicants' claim for access to information and the respondent's refusal, it is necessary at the outset to outline the legal basis for the claim. The right of access to information held by the state is guaranteed by Article 35 of the Constitution. It provides:-

*35. (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. The importance of this right has been explained by the constitutional Court of South Africa in *Brümmer vs Minister for Social Development and Others*<sup>[1]</sup> where the Court said:- ".....access to information is fundamental to the realisation of the rights guaranteed in the Bill of Rights....."

3. Access to Information Act[2] 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.

4. Section 4 provides that Access to information held by a public entity or a private body shall be provided expeditiously at a reasonable cost. More important is the wording of subsection (4) which provides that the Act shall be interpreted and applied on the basis of a duty to disclose and non-disclosure shall be permitted only in circumstances exempted under section 6 which provides that:-

*Limitation of right of access to information*

( Pursuant to Article 24 of the Constitution, the right of access to information under Article 35 of the  
1 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.  
)

( For purposes of subsection (1)(a), information relating to national security includes—  
2

) (  
a military strategy, covert operations, doctrine, capability, capacity or  
deployment;  
)

(b foreign government information with implications on national security;  
)

(  
c intelligence activities, sources, capabilities, methods or  
cryptology;  
)

(d foreign relations;

(e scientific, technology or economic matters relating to national security;  
)

(  
f vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans or  
protection services relating to national security;  
)

( information obtained or prepared by any government institution that is an investigative body in  
g the course of lawful investigations relating to the detection, prevention or suppression of crime,  
) enforcement of any law and activities suspected of constituting threats to national security;

(  
h information between the national and county governments deemed to be injurious to the conduct  
of affairs of the two levels of government;  
)

( cabinet deliberations and records;  
i

)

( information that should be provided to a State organ, independent office or a constitutional  
j commission when conducting investigations, examinations, audits or reviews in the performance of  
) its functions;

(  
k information that is referred to as classified information in the Kenya Defence Forces Act;  
) and

(  
l any other information whose unauthorized disclosure would prejudice national security.  
)

( Subsection (1)(d) and (e) shall not apply if a request for information relates to the results of any  
3 product or environmental testing, and the information concerned reveals a serious public safety or  
) environmental risk.

( Despite anything contained in subsections (1) and (2), a public entity or private body may be  
4 required to disclose information where the public interest in disclosure outweighs the harm to  
) protected interests as shall be determined by a Court.

(  
5 A public entity is not obliged to supply information to a requester if that information is reasonably  
) accessible by other means.

In considering the public interest referred in subsection (4), particular regard shall be had to the constitutional principles on the need to—

(  
a promote accountability of public entities to the public;  
)

(b) ensure that the expenditure of public funds is subject to effective  
oversight;  
(  
6  
)

(  
c promote informed debate on issues of public interest ;  
)

(d) keep the public adequately informed about the existence of any danger to public  
health or safety or to the environment; and

( ensure that any statutory authority with regulatory responsibilities is adequately discharging its  
e functions.  
)

( Unless the contrary is proved by the public entity or private body, information is presumed not to be  
7 exempt if the information has been held for a period exceeding thirty years.  
)

5. This Court has on several occasions in the past pronounced upon the proper approach to constitutional construction embodying fundamental rights and protections. What is to be avoided is the imparting of a narrow, artificial, rigid and pedantic interpretation; to be preferred is one which serves the interest of the Constitution and best carries out its objects and promotes its purpose. All relevant provisions are to be considered as a whole and, where rights and freedoms are conferred on persons, derogations there from, as far as the language permits, should be narrowly or strictly construed.[3]

6. In peremptory terms, the constitution imposes an obligation on all courts to promote the spirit, purport and the objects of the Bill of Rights, when interpreting legislation. In *Phumelela Gaming and Leisure Ltd v Gründlingh and Others*[4]the S.A. constitutional court observed: ?

*"A court is required to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation, and when developing the common law or customary law'. In this no court has a discretion. The duty applies to the interpretation of all legislation and whenever a court embarks on the exercise of developing the common law or customary law. The initial question is not whether interpreting legislation through the prism of the Bill of Rights will bring about a different result. A court is simply obliged to deal with the legislation it has to interpret in a manner that promotes the spirit, purport and objects of the Bill of Rights. The same applies to the development of the common law or customary law."*

7. In line with the dictates of the constitution, this court will reject the narrow, literal reading of the above provisions and opt for a construction that promotes wider access to information. Guided by the above constitutional principles, I now proceed to examine the facts of this case.

### **Petitioners case**

8. The petitioner avers that on 4<sup>th</sup> August 2015, Standard Chartered Bank received instructions purporting to originate from Vivo Energy Kenya Limited, authorizing the Bank to draw a loan of US\$ 5.4 Million and pay to finance an ostensible agreement dated 14<sup>th</sup> July 2015 from Continental Energy PTE Ltd of Singapore for the said sum.

9. The instructions purported to have been received at Standard Chartered Banks' Yaya Centre branch were accompanied by the requisite loan application duly signed. The money was to be transferred to Continental Energy PTE Ltd account provided as Standard Chartered Bank, 6 Battery Road #03-01, Singapore 049909, Swift Code SCBLSG22, Bank Code 7144, Branch Code 001, Account Number USD Account 0170517411.

10. Upon verification of the signatures which appeared to be genuine,(i.e. those of two of the authorized signatories), on 10<sup>th</sup> August 2015, the application was processed and payments effected as directed.

11. On 11<sup>th</sup> August 2015, an employee of the Bank, a one Patrick Makau, principal Head of Trade,

Transaction Banking-Kenya & East Africa called one of the signatories to the account (a one Nyamu Muthama and a Mr. Ezan), to confirm the instructions (as well as a separate set of instructions pertaining to a sum of US \$ 7,787,500 for payment to GTH Investments LLC, a transfer that was stopped before it could be effected) and the said persons declined to confirm the payments making it clear that they were not aware of the transactions.

12. Vivo Energy Kenya Limited formally wrote to the Bank confirming that the instructions did not originate from them and that they had no dealings with either Continental Energy PTE Ltd or GTH Investments LLC and on 12<sup>th</sup> August 2015, the petitioner lodged a complaint with the Respondent on behalf of the Bank and recorded a statement and some of the Banks staff were interviewed.

13.

14.

15. The petitioner further avers that despite reminders and enquiries, the Respondent never updated the petitioner or the Bank on the progress of its investigations. Also, the Bank sent swift messages to Singapore recalling the money but this could not be done as it had already been deposited into the Dollar Account of Continental Energy PTE Ltd.

16. Subsequently, it emerged that the Commercial Affairs Division of the Singapore Police Force seized the said sum of US \$ 5,379,42.62 on 13<sup>th</sup> August 2015 under section 35 of the Singapore Criminal Procedure Code and a disposal inquiry was commenced in a Singapore court as to who was entitled to the contested sums with both the Bank and Continental Energy PTE Ltd claiming the same.

17. The petitioner further avers that the Commercial Affairs Division of the Singapore Police Force filed an investigation report prepared by one of its officers from which the petitioner learnt for the first time that:-

*a. **That** the Respondents inquiry file had been forwarded to the Director of Public Prosecution o or about 19<sup>th</sup> February 2016.*

*b. **That** on 28<sup>th</sup> June 2016, the DPP wrote back with his conclusion that it was "apparent that the evidence therein was insufficient to prefer any criminal charges. Further there was no evidence of money laundering in Kenya."*

*c. **That** on 13<sup>th</sup> July 2016, Interpol Nairobi sent an email to Interpol Singapore for onward transmission to Commercial Affairs Division of the Singapore Police Force forwarding the DPP's letter and summarizing its conclusions.*

*d. **That** an internal letter dated 8<sup>th</sup> August 2016 from the Respondent to Interpol Nairobi in which the Respondent inter alia, though riddled with inaccuracies sanctified the alleged transaction between Vivo Energy Kenya Limited and Continental Energy PTE Ltd.*

18. The petitioner further avers that she immediately made inquiries with the Respondent and asked for permission to peruse the investigation file and make copies of the relevant documents. The former request was granted but the latter was declined. Upon studying the investigation file, the petitioner established that the investigation was more extensive than represented by the Kenyan authorities and the Respondent has gathered inculpatory evidence including statements, reports and other material not referred to in the letters set out above and further that the investigations are still going on.

19. The petitioner also states that during the hearing at the inquiry in Singapore, the Continental Energy PTE Ltd heavily relied on among other things the conclusions by investigations authorities that that there was no sufficient evidence of criminal activity or money laundering and it had not been implicated in any criminal activity. Hence, on 9<sup>th</sup> January 2017, the State Court of Singapore, largely on the basis of the conclusions of investigative authorities as described above, ordered the money to be released to

Continental Energy PTE Ltd, but upon application by the Bank, the order was stayed amid serious objections by Continental Energy PTE Ltd.

20. Thereafter, the Bank instituted proceedings before the High Court of the Republic of Singapore against the Continental Energy PTE Ltd being HC/S No. 114 of 2017 seeking recovery of the contested sums and at the Banks application, the court issued an injunction restraining the transfer or disposal of the contested sums.

21. By a letter dated 16<sup>th</sup> February 2017, the petitioner requested the Respondent to supply her with:-

- a. Letter forwarding the file to the DPP as well as details of what was contained i the Duplicate file;*
- b. Letter from DPP stating there was no sufficient evidence to sustain a prosecution;*
- c. Document examiner's report and the all handwriting/signature samples taken;*
- d. All statements by the witnesses interviewed;*
- e. Letter from DPP instructing further investigations and liaison with Interpol and Singapore Police;*
- f. Letter from Interpol advising of closure of Investigations; and*
- g. Letter from DPP advising the Banking Fraud Investigation to conduct further investigations and liaise with Interpol.*

22. The petitioner avers that the above letter elicited no response prompting the petitioner to write a further letter dated 23<sup>rd</sup> February 2017 which similarly elicited no response, hence the petitioner avers that she is entitled to the said information as of right pursuant to article **35 (1) (a) & (b)** of the constitution.

23. The petitioner states that the documents are required to be used in the proceedings pending before the Singapore High Court as evidence where the Banks opponent in the case used information disclosed by the respondent to its prejudice., hence, the documents in question are required in good faith to vindicate the rights to property under article **40** of the constitution as well as fair trial under article **50**. The petitioner also cites violation of her rights under article **47** of the constitution and prays for the reliefs sought in the petition.

### **First and Second Respondent's grounds of objection**

24. Counsel for the second Respondent filed grounds of opposition stating that no request had been made to the DPP, that the DPP is constitutionally mandated to act independently,<sup>[5]</sup>that the petitioner has all the information sought and reasons have been communicated, and that some of the documents are privileged in terms of section **6** of Access to Information Act,<sup>[6]</sup> and that there is an established mechanism of seeking documents required to be used abroad in court cases.

### **Third Respondents Response**

25. On behalf of the third Respondent is the Replying affidavit of Philip Bollo, the investigating officer. He avers *inter alia* that after investigations, they forwarded their recommendations to the DPP on 28<sup>th</sup> June 2016 stating that there was no sufficient evidence of money laundering in Kenya. He admitted the petitioners request for the documents but stated that exhibits can only be handled by a police officer, hence the reason why they could not be released to her, but the petitioner has ignored the said advise and that the police are under no obligation to disclose the said information to her.

26. He also averred that such documents can only be released through police to police co-operation and Mutual Legal Assistance between states under the Interpol rules of procedure and the Mutual Legal Assistance Act<sup>[7]</sup> of Kenya for purposes of aiding the criminal justice system. He also averred that the right to information is not absolute and can be limited under section 6 of the Access to Information Act<sup>[8]</sup> and Article 35 of the Constitution.

### **Petitioners Advocates submissions**

27. Petitioner counsel argued three issues, namely; **(a)** violation of article 35 (1) (a) of the constitution. He cited *Famy Care Limited vs Public Procurement Administrative review Board & Others*<sup>[9]</sup> where it was held that the right to information underpin the values of good governance, integrity, transparency and accountability and the other values set out in Article 10 of the constitution. The right to information is based on the understanding that without access to information, the achievement of the higher values of democracy, rule of law, social justice set out in the preamble to the constitution and article 10 cannot be achieved unless the citizen has access to information.<sup>[10]</sup> **(b)** He argued that the request for information had been made which not disputed. **(c)** Violation of article 47 of the constitution, namely, the right to fair administrative action.

### **First and Second Respondents' Submissions**

28. Counsel submitted that right to information is available after a decision is made affecting a person not before, that there is need to restrict some information,<sup>[11]</sup> that article 24 (1) of the constitution and section 6 of the Access to Information Act<sup>[12]</sup> provides for limitation of rights. Counsel cited *South African case of Cape Metropolitan Council vs Metro Inspection Services Western Cape CC & Others*<sup>[13]</sup> in support of the proposition that an applicant has to state the right that he wishes to exercise, protect and what the information is required and how that information would assist him in exercising or protecting that right and that if the applicant does not show how the information will be of assistance for the stated purpose, access to that information will be denied.<sup>[14]</sup>

29. Counsel also cited *Thuita Mwangi & 2 Others vs Ethics & Anti- Corruption*,<sup>[15]</sup> *Geoffrey M. Anyira vs DPP & 2 Others*,<sup>[16]</sup> *Edmond Apaa & Others vs EACC*<sup>[17]</sup> and *Washington Jakoyoo vs DPP & 3 Others*.<sup>[18]</sup> To me, all these cases relate to the right of an accused person to be supplied with information against him under article 49 of the constitution as opposed to rights under article 35 of the constitution, hence I find them to be irrelevant to the issues before me.

30. Also cited is the position that national security, defence, public or individual safety, commercial interests and the integrity of government decision making processes are legitimate aims which may justify non-disclosure of information.<sup>[19]</sup>

### **Third Respondents' Submissions**

31. Counsel submitted on two issues, namely; **(a)** counsel submitted that the file constitutes confidential communication and that it would be absurd for the police to be compelled to release such documents and that the file is still under investigation. **(b)** that there is no violation of the petitioners Rights in that rights under article 35 are not absolute.

### **Analysis of the facts, the law and issues**

32. This case raises one important issue:- namely; how the state discharges the burden, under article 24 of the constitution and section 6 of the act, of establishing that its refusal to grant access to information is justified. In other words, what should the state do to demonstrate that refusal falls within the exceptions under section 6 of the Act.

33. Offering citizens access to state-held information is "one of the most effective ways of upholding the constitutional values of transparency, openness, participation and accountability."<sup>[20]</sup> **Currie and De Waal** suggest that accountability is unattainable if the government has a monopoly on the information

that informs its actions and decisions. Access to information is not only fundamental to a properly-functioning [participatory democracy](#); it also increases public confidence in government and enhances its legitimacy. There are also, according to **Cora Hoexter**:-

*"many other benefits to be had. For instance, access to information discourages corruption, arbitrariness and other improper governmental conduct. It facilitates the protection of rights, something that is easily demonstrated in the area of administrative justice. Like reasons for administrative action, access to state-held information can be of enormous assistance to a person who suspects that her/his rights to administrative justice have been infringed and is in the process of building a case."*[\[21\]](#)

34. Before the enactment of the Constitution of Kenya, 2010, there was no general right of access to information in Kenya. Considerable resources were directed instead towards maintaining secrecy in government. Many statutes contained provisions making it a criminal offence for officials to release information. The inclusion of a right of access to information in state hands was therefore "an innovation of great significance"[\[22\]](#) in the Constitution of Kenya 2010. Article 35 confers on every person "the right of access to all information held by the state or any of its organs at any level of government in so far as such information is required for the exercise or protection of any of his or her rights."

35. The purpose of article 35 is to exclude the perpetuation of the old system of administration, a system in which it was possible for government to escape accountability by refusing to disclose information even if it had bearing upon the exercise or protection of rights of the individual. This is the mischief it is designed to prevent. Demonstrable fairness and openness promotes public confidence in the administration of public affairs generally. This confidence is one of the characteristics of the democratically governed society for which the Constitution strives.

36. As is evident from the provisions of the act cited above, the act was enacted to give effect to the constitutional right of access to any information held by the State. And the formulation of the sections cited above casts the exercise of this right in peremptory terms – the requester must be given access to the information so long as the request does not fall within the exceptions in section 6 of the act. Under our law, therefore, the disclosure of information is the rule and exemption from disclosure is the exception.

37. It is clear from section 6 of the act, that there are reasonable and justifiable limitations on the right of access to information. The purpose of section 6 is to protect from disclosure certain information that, if disclosed, could cause material harm to, amongst other things: the defence, security and international relations of the Republic; the economic interests and financial welfare of the Republic and commercial activities of public bodies; and the formulation of policy and taking of decisions by public bodies in the exercise of powers or performance of duties conferred or imposed by law.

38. The burden of establishing that the refusal of access to information is justified rests on the state or any other party refusing access. This position was clearly expressed by the Constitutional Court of South Africa in *President of the Republic of South Africa & Others vs M & G Media Limited* [\[23\]](#) where it was held that:-

*"The imposition of the evidentiary burden of showing that a record is exempt from disclosure on the holder of information is understandable. To place the burden of showing that a record is not exempt from disclosure on the requesting party would be manifestly unfair and contrary to the spirit of..... the Constitution. This is because the requester of information has no access to the contents of the record sought and is therefore unable to establish that it is not exempt from disclosure under the Act. By contrast, the holder of information has access to the contents of the record sought and is able to establish whether or not it is protected from disclosure under one or more of the exemptions ..... Hence .....the evidentiary burden rests with the holder of information and not with the requester."*

39. Thus, the Respondents have a burden and a duty to demonstrate that the information sought falls within the exceptions under section 6 of the act. It is not enough to allege it does, as has happened in this

case, without discharging the evidential burden to the required standard.

40. Before formulating the standard to assess whether the state has properly discharged its burden under section 6 of the act, it is desirable to consider foreign jurisprudence dealing with comparable legislation. Foreign jurisprudence is of value because it shows how courts in other jurisdictions have dealt with the issues that confront us in this matter. At the same time, it is important to appreciate that foreign case law will not always provide a safe guide for the interpretation of our Constitution. When developing our jurisprudence in matters that involve constitutional rights, as the present case does, we must exercise particular caution in referring to foreign jurisprudence.[\[24\]](#)

41. The United States has well-developed access to information jurisprudence. Its Freedom of Information Act (FOIA) contains nine exemptions to disclosure. The FOIA places on the agency the burden to demonstrate to the court that it has properly relied on the exemption claimed by the agency refusing the information request. The agency claiming the exemption can discharge its burden only by presenting the court with evidence that the information withheld falls within the exemption claimed, and such evidence should not be controverted by either contrary evidence on the record or evidence of bad faith on the part of the agency.[\[25\]](#)

42. In *Hayden vs National Security Agency*,[\[26\]](#) the District of Columbia Circuit Court of Appeals summarised the appropriate procedures to be used by trial courts in determining whether documents should be released. It said: **(1)** The trial court must make a *De novo* review of the agency's classification decision, with the burden on the agency to justify nondisclosure. **(2)** In conducting this review, the court is to give substantial weight to affidavits from the agency. **(3)** The court is to require the agency to create as full a public record as possible, concerning the nature of the documents and the justification for nondisclosure. **(4)** If step **(3)** does not create a sufficient basis for making a decision, the court may accept classified affidavits in camera, or it may inspect the documents In camera. This step is at the court's discretion . . . . **(5)** The court should require release of reasonably segregable parts of documents that do not fall within FOIA exemptions..[\[27\]](#)

43. The Canadian Access to Information Act[\[28\]](#) just like our Access to Information Act[\[29\]](#) provides for a number of exemptions to disclosure, as well as judicial review of a refusal of access to information.[\[30\]](#) The Act stipulates that the burden of establishing that a challenged refusal is authorised rests with the government institution refusing access.[\[31\]](#) Unlike in both the United States and South Africa, where courts engage in a *de novo* review of the lawfulness of the refusal, Canadian courts limit their review to whether or not the refusal was reasonable.[\[32\]](#) As in the United States, to establish proper reliance upon a discretionary exemption from disclosure, the government must provide evidence that the record falls within the description that is contemplated by the statutory exemption invoked.[\[33\]](#) The government must provide actual direct evidence of the confidential nature of the information at issue,[\[34\]](#) which must disclose a reasonable explanation for exempting the record.[\[35\]](#)

44. In Australia, requests for access to government records are governed by the Freedom of Information Act 1982.[\[36\]](#) Australian courts have held that the test for determining whether a refusal was justified is a reasonableness test, and the state's burden is not discharged merely by showing that the refusal was not irrational, absurd, or ridiculous.[\[37\]](#) Rather, it must go further to show that, in light of the public interest, there were reasonable grounds for the refusal. Even where a government minister has certified refusal on the grounds of public interest, the court must still ask itself whether, in the light of countervailing factors in the public interest, there were reasonable grounds for the refusal.[\[38\]](#)

45. It is apparent from this comparative analysis of the standards applied by courts in other jurisdictions with legislation comparable to ours that the state may discharge its evidentiary burden only when it has shown that the record withheld falls within the exemptions claimed. Exemptions are construed narrowly, and neither the mere *ipse dixit* of the information officer nor his or her recitation of the words of the statute is sufficient to discharge the burden borne by the state.[\[39\]](#) Even in jurisdictions like Canada, where courts do not engage in a *de novo* reconsideration of the merits of an exemption claimed, the refusal of access to information held by the state must be reasonable.[\[40\]](#) This is consistent with the importance placed in the Constitution on the right of access to information, as well as with the scheme of

the act, according to which disclosure is the rule and exemptions from disclosure are the exception.[41]

46. The limitation claimed must satisfy the provisions of article 24 of the constitution and must be reasonable and justifiable.

47. Although the right of access to information is not absolute, to satisfy the requirements set out under article 24 of the Constitution, the respondents must demonstrate that the limitation imposed on the constitutional right is “fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom and that it falls within the exceptions provided in section 6 of the act.” What is wrong in this case is that the Respondents did not satisfy this constitutional test nor did they establish that the refusal falls within the exceptions in section 6. The Respondents only made a blanket reliance of section 6 without offering evidence to discharge the burden.

48. In order to discharge its burden under section 6, the state must provide evidence that the record in question falls within the description of the statutory exemption it seeks to claim. The proper approach to the question whether the state has discharged its burden under section 6 is therefore to ask whether the state has put forward sufficient evidence for a court to conclude that, on the probabilities, the information withheld falls within the exemptions claimed.

49. The recitation of the statutory language of the exemptions claimed (as has happened in this case) is not sufficient for the state to show that the record in question falls within the exemptions claimed. Nor are mere *ipse dixit* affidavits proffered by the state.[42] The affidavits for the state must provide sufficient information to bring the record within the exemption claimed. This recognises that access to information held by the state is important to promoting transparent and accountable government, and people’s enjoyment of their rights under the Bill of Rights depends on such transparent and accountable government.[43]

50. Ultimately, the question whether the information put forward is sufficient to place the record within the ambit of the exemption claimed will be determined by the nature of the exemption. The question is not whether the best evidence to justify refusal has been provided, but whether the information provided is sufficient for a court to conclude, on the probabilities, that the record falls within the exemption claimed. If it does, then the state has discharged its burden under section 6. If it does not, and the state has not given any indication that it is unable to discharge its burden because to do so would require it to reveal the very information for which protection from disclosure is sought, then the state has only itself to blame.[44]

51. What must be borne in mind is that access to information disputes are concerned with a constitutional right. In addition, the scheme of the act is such that information must be disclosed unless it is exempted from disclosure under one or more narrowly-construed exemptions. And what is more, the holder of information bears the onus of establishing that the refusal of access to the record is justified under the act.

52. At the risk of repeating myself, the information sought in this case is:- *Letter forwarding the file to the DPP as well as details of what was contained in the Duplicate file; Letter from DPP stating there was no sufficient evidence to sustain a prosecution; Document examiner's report and the all handwriting/signature samples taken; All statements by the witnesses interviewed; Letter from DPP instructing further investigations and liaison with Interpol and Singapore Police; Letter from Interpol advising of closure of Investigations; and Letter from DPP advising the Banking Fraud Investigation to conduct further investigations and liaise with Interpol.*

53. It has not been demonstrated how if at all, any of the above documents fall within any of the exceptions stipulated in section 6 cited above nor has been shown to be reasonable and justifiable in a open and democratic society to satisfy the provisions of article 24 of the constitution.

54. The question is whether the information put forward is sufficient to place the record within the exemption claimed will be determined by the nature of the exemption. The question is not whether the best evidence to justify refusal has been provided. If the information provided is sufficient for the court to

conclude, on the probabilities, that the record falls within the exemption claimed, then the state has discharged its burden under section 6.

55. What must be emphasised, however, is that proceedings under Access to Information Act<sup>[45]</sup> differ from ordinary civil proceedings in certain key respects. First, these disputes involve a constitutional right of access to information. Second, access to information disputes are generally not purely private disputes – requesters of information often act in the public interest and the outcome of these disputes therefore impacts the general health of our democratic polity.

56. It is a reality that some things must be secret. More importantly, however, secrecy must be subjected to the tightest control. The judicial duty that secrecy should be as limited as possible is one that is vital to the success of our democratic order. I cannot ignore this. I must do my judicial duty, however unpleasant it might be.

## Conclusion

57. The grounds for exception to disclose information should be clearly and narrowly defined. Otherwise it is too easy to broaden exceptions and withhold important information. The presumption is always in favour of disclosure, unless the information meets a so-called three-part test, deduced from international law:- **(a) the information relates to legitimate interests protected by the law, and (b) disclosure of the information threatens to cause substantial harm to that interest, and (c) the harm to the interest is greater than the public interest in receiving the information.**<sup>[46]</sup>

58. The fact that the information falls within the list of legitimate exception grounds is not sufficient to exempt it from disclosure. The disclosure must harm the specific interest substantially and this harm must be greater than the public interest in receiving the information.<sup>[47]</sup>

59. Disclosure takes precedence over secrecy, and to give effect to the principle of maximum disclosure, any legislation or provision contradicting this principle should be construed narrowly and in favour of the enforcement of the right.

60. The right to information forms part of human rights and freedoms, and it is essential to be able to access information from public authorities in order to exercise individual human rights and freedoms.

61. Right to Information laws and policies create mechanisms whereby an individual can access information that may have an impact on them, in order to meaningfully exercise other rights in the Bill of Rights.

62. It is clear from the foregoing that the Respondents have failed to establish that the information sought falls within any of the restrictions under section 6 of the act and the tests enumerated in paragraph 57 above. Refusal to furnish the information to the petitioner which she requires for enforcement of a constitutional right as demonstrated in her petition is in my view a gross violation of the Constitution or breach of any of her fundamental rights under article 35 of the constitution.

63. The Court simply cannot countenance a denial of a fundamental right, which is the cornerstone of our legal system. It is the Court's primary duty to protect the basic rights of the people vis-à-vis government actions. The Court cannot just turn a blind eye and simply let it pass. It will continue to uphold the Constitution and its enshrined principles.

64. The third wave<sup>[48]</sup> of democratization in the developing world has created opportunities for development and reconstruction of many nations. This has affected not only on infrastructure and economies, but democratic imperatives have also demanded a rethink of the relationship between those in power and those who voted for them. Alexander Hamilton said:-

*“If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which*

*is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place, oblige it to control itself. A dependence on the people is no doubt the primary control on government; but experience has taught mankind the necessity of auxiliary precautions.” [49]*

65. These “auxiliary precautions” referred to by Hamilton included courts and organs of state, as well as a constitutional legal framework established to support these relationships. Alas, we are not angels and we therefore need these “auxiliary precautions” in order to protect the democratic order. National constitutions need to protect civil and political rights and promote realization of social and economic rights.

66. The Organisation of African Unity’s (predecessor to the African Union) African Charter on Human and People’s Rights, adopted in 1981 and came into force in 1986, [50] also upheld the right of access to information wherein Article 9 of the Charter states that:- “ Every individual shall have the right to receive information.”

67. At the 32<sup>nd</sup> Ordinary Session of the African Commission on Human and Peoples’ Rights (Banjul, The Gambia, 2002) African countries adopted a Declaration of Principles on Freedom of Expression in Africa [51] which states that:- Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.

68. Guided by my analysis of the facts and the law as enumerated above, I find and hold that the Respondents have not demonstrated that the information sought falls within the permitted exceptions.

69. In view of my finding herein above, I find and hold that this petition succeeds. Accordingly, I allow the petition and enter judgement in favour of the petitioner as follows:-

**a. An Declaration** *be and is hereby issued that the Respondents have jointly and severally violated the petitioners Rights under Article 35 (1) (a) and (b) of the Constitution and Section 4 (1) (b) of the Access to Information Act No. 31 of 2016*

**b. An Order be and is hereby issued** *compelling the Respondents jointly and severally to provide the petitioner **within fourteen days** from the date of this judgement with the following:-*

- i. Letter forwarding the file to the DPP as well as details of what was contained in the Duplicate file;*
- ii. Letter from DPP stating there was no sufficient evidence to sustain a prosecution;*
- iii. Document examiner's report and the all handwriting/signature samples taken;*
- iv. All statements by the witnesses interviewed;*
- v. Letter from DPP instructing further investigations and liaison with Interpol and Singapore Police;*
- vi. Letter from Interpol advising of closure of Investigations; and*
- vii. Letter from DPP advising the Banking Fraud Investigation to conduct further investigations and liaise with Interpol.*

**c. That** *the Respondents do pay the costs of this petition to the petitioner.*

Orders accordingly

Signed, Delivered and Dated at Nairobi this 25<sup>th</sup> day of July 2017

**John M. Mativo**

**Judge**

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[1] {2009} ZACC 21; 2009 (6) SA 323 (CC); 2009 (11) BCLR 1075 (CC).

[2] Act No. 31 of 2016

[3] Rattigan & Ors v Chief Immigration Officer & Anor 1994 (2) ZLR 54 (S) at 57 F-H, 1995 (2) SA 182 (ZSC) at 185 E-F, GUBBAY CJ

[4] {2006} ZACC 6; 2007 (6) SA 350 (CC); 2006 (8) BCLR 883 (CC).

[5] Article 157 of the constitution

[6] Supra

[7] Act No. 36 of 2011

[8] Supra

[9] {2012}eKLR

[10] Ibid

[11] Article 19 (3) of ICCPR cited

[12] Supra

[13] (10/99) {2001}ZASCA 56

[14] See *Unitas Hospital vs Van WYK and Another* (231) {2006}ZASCA 34

[15] Pet No. 153 of 2013

[16] {2016}eKLR

[17] {2012}eKLR

[18] {2015}eKLR

[19] *Nairobi Law Monthly Company Limited vs Kenya Electricity Generating Company & 2Others* {2013}eKLR cited

[20] Hoexter *Administrative Law* 94.

[21] Hoexter *Administrative Law* 94-95

[22] Ibid

[23] CCT 03/11 {2011} ZACC 32 Heard on : 17<sup>th</sup> May 2011 Decided on : 29<sup>th</sup> November 2011

[24] Ibid

[25] See U.S.C. § 552 at (a)(4)(B) (burden is on the agency to sustain its action).

[26] 608 F 2d 1381 (DC Cir 1979).

[27] Id at 1384. For guidelines articulated by the District of Columbia Circuit Court of Appeal in respect of a court's exercise of discretion to conduct in camera inspection of documents

[28] R.S.C., 1985, c. A-1 (Access to Information Act)

[29] Supra

[30] See section 41 of the Access to Information Act.-Canada

[31] See section 48 of the Access to Information Act.-Canada

[32] Section 45 of the Access to Information Act provides that applications for court review of refusals shall be heard and determined in summary proceedings and section 50 deals with court orders where reasonable grounds for refusal are not found.

[33] Canada (Information Commissioner) v Canada (Prime Minister) [1993] 1 FC 427 (FCA) at 439.

[34] Canada (Information Commissioner) v Atlantic Canada Opportunities Agency [1999] 250 NR 314; 177 FTR 159 at para 3.

[35] Wyeth-Ayerst Canada Inc v Canada (Attorney General) [2003] FCA 257; 305 NR 317 at para 21

[36] Act 3 of 1982. The Australian Freedom of Information Act provides for two levels of review once an information request has been refused by a government agency. The requesting party can lodge a request for review by the Information Commissioner (IC), and if the IC upholds the refusal then the requesting party can appeal the IC's decision to the Administrative Appeals Tribunal. See Parts VII (Review by Information Commissioner) and VIIA (Review by the Tribunal). At both levels, the refusing agency bears the burden of showing that its refusal was justified. See sections 55D (Procedure in IC Review—onus) and 61 (Onus).

[37] See McKinnon v Secretary, Department of Treasury 228 CLR 423 at 428 (per Gleeson CJ and Kirby J), 445 (per Hayne J) and 468 (per Callinan and Haydon JJ).

[38] Ibid

[39] Supra note 21

[40] Ibid

[41] Ibid

[42] Ibid

[43] Ibid

[44] Ibid

[45] Supra

[46] Right to Access Information Training Manual, Open Democracy Advice Centre (ODAC), 20

[47] Ibid

[48] According to Jones and Stokke (2005) the “third wave refers to a series of democratic transitions in Southern Europe in the 1970s, in Latin America in the 1980s, in Eastern and Central Europe and former Soviet Union from the late 1980s, and in parts of Africa in the 1990s”

[49] Hamilton, A. quoted in President Thabo Mbeki’s Address to a Judicial Symposium held in Johannesburg, South Africa, 2003

[50] African Charter on Human and Peoples’ Rights, available at [http://www.achpr.org/english/\\_info/charter\\_en.htm](http://www.achpr.org/english/_info/charter_en.htm)

[51] African Commission on Human and Peoples’ Rights, Declaration of Principles on Freedom of Expression in Africa, 2002, <http://www.achpr.org/instruments/achpr/>