DENIS MWAFULIRWA VS CENTRAL MEDICAL STORES TRUST
ACCESS TO INFORMATION EXTERNAL REVIEW

REF: HRC/ATI/01/22/2201
1.0 BACKGROUND

The Commission received a complaint of denial of access to information from Mr. Denis Mwafulirwa (herein referred to as a Complainant) by email on 21st February 2022. The complainant alleged that he submitted three requests for access to information to the Central Medical Stores Trust (CMST) but CMST has not provided the information. The Commission is hereby called upon to review the alleged decision of denial of access to information made by the CMST in accordance with the provisions of the Access to Information Act.

2.0 Powers of the Commission

2.1 The Malawi Human Rights Commission (the Commission) is an independent National Human Rights Institution (NHRI) established by the Constitutional of the Republic of Malawi under Section 129, with the primary function of protecting and investigating violations of the rights accorded by the Constitution or any other Law. The Commission derives its duties from the Human Rights Commission Act (HRCA). Section 12 of the HRCA stipulates that the Commission shall be competent in every respect to promote and protect Human Rights in Malawi in the broadest sense possible.

2.2 The Commission under 7 section the Access to Information Act (ATIA) has oversight mandate over the implementation of the Access to Information Act. Under Section 8 [c] of the ATIA, the Commission has powers to “review, on application decisions of information holders with regard to requests for information and make recommendations to the relevant information holder resulting from applications made.”

2.3 In terms of section 8(i) of ATIA, the Commission has powers to review decisions of information holders with regard to denial of disclosure of information or grant of access to information

2.4 Further section 44 permits a person who has exhausted internal review mechanism of information holder to apply to the Commission for the review of the decision of the information holder.
2.5 CMST is an Information Holder in terms of section 2 of the Access to Information Act and therefore its decisions on denial or disclosure of information are amenable for review before this Commission.

2.6 The Commission is satisfied that it has jurisdiction to entertain the application by the Complainant.

3.0 The Complaint
3.1 On 11th May 2021, the complainant wrote to CMST requesting a procurement plan for 2021-2022 financial year and a list of all active or current contracts which CMST has. The request was delivered through email and by hand.
3.2 On 10th December 2021, the complainant submitted two additional requests. He wanted to find out from the CMST more details regarding the two tenders that were floated in the newspaper in September 2021. The invitation for bids had the procurement numbers: CMST/G/MMS/021/000578 and CMST/G/MMS/021/000575. On these tenders, the complainant wanted to (i) know the reason behind the procurement whether the items were being procured based on demand from the public health facilities or for the CMST to replenish their stock, (ii) know the details of the quantities and (iii) know whether the bids were already evaluated at this time or the exact stage the procurement process was at the time of the request.
3.3 The complainant stated that he requested for the information because as a citizen he wanted to appreciate the procurement process at the CMST and in exercise of his oversight obligation. In his view, that would help to enhance transparency and accountability hence reduce fraud and corruption in the procurement processes.

4.0 Procedures
4.1 Procedure taken by complainant
4.1.1 Under Regulation No. 11 of the ATI Regulations, 2021, a request for information must be made in Form 1 which is provided in the Second Schedule of the Regulations.
4.1.2 On 11th May 2021, the complainant using Form 1 requested information from CMST. The details of the information requested as provided under PART D of Form 1 are reproduced here;

"I am requesting for the most current Procurement Plan for Central Medical Stores Trust and a list of all current or active contracts under Central Medical Stores in accordance with the Access to Information Act (No. 13 of 2017) and Public Procurement and Disposal of Assets Act (No. 27 of 2017"

4.1.3 The justification for the said request for information is also reproduced here;
"Information is being sought to increase my awareness on how procurement process is like at the Central Medical Stores Trust. As a citizen of Malawi and a tax payer, I am interested to know more about, understand and appreciate the procurement process at the institution. The information will also allow me to better and meaningfully engage with Central Medical Stores Trust and the Government of Malawi for better public services as needed.

4.1.4 This request was submitted by a general official email of the CMST and later the same request was delivered by hand.

4.1.5 On 29th September 2021, the complainant wrote an email to the Chief Executive Officer of the CMST as a follow up to his request. In this email he reminded the CMST of his earlier request.

4.1.6 On 10th December 2021, the complainant made two additional requests for access to information in writing through email. He wanted to find out from the CMST more details regarding the two tenders that were floated in the newspaper in September 2021. The invitation for bids had the procurement numbers: CMST/G/MMS/021/000578 and CMST/G/MMS/021/000575. On these tenders, the complainant wanted to (i) know the reason behind the procurement whether the items were being procurement based on demand from the public health facilities or for the CMST to replenish their stock, (ii) know the details of the quantities and (iii) know whether the bids were already evaluated at this time or the exact stage the procurement process was at the time of the request.

4.1.7 The Commission noted that electronic request for information is permitted under Regulation No. 12 of the ATI regulations.

4.1.8 On 22nd December 2021, the complainant appeared before CMST management team as request by the same to look at his request.

4.1.9 In January 2022, the complainant was oriented on the procurement process at CMST.

4.2 Procedure followed by the CMST

4.2.1 The ATIA under Section 19 requires that where request for information is made, an information officer should within fifteen working days after the request is received give notice to the applicant as to whether that information exists, and where it does, whether access to the entire information requested or part will be given. Where access shall be granted, the same should be given promptly.
4.2.2 Further, in terms of regulation 13(1) of the ATI Regulations, 2021 a decision to grant or refuse access to information to an information seeker should be communicated in Form 2 in the Second Schedule of the Regulations.

4.2.3 In the case at hand, on 13th December 2022, CMST through its Senior Public Relations Officer, Mr. Herbert Chandilanga, wrote to the Complainant acknowledging receipt of the requests and followed by a phone conversation. In the email Mr. Chandilanga indicated that (i) CMST had planned to engage MHRC for orientation in the ATIA for better handling of the requests; and (ii) requested for a meeting with the complainant for clarifications on his requests. The Commission noted that CMST did not use Form 2 in communicating to the Complainant.

4.2.4 On 22nd December, the complainant met the senior management of the CMST and his requests were discussed. Later in January 2022, the complainant was taken through the procurement process for his appreciation.

4.2.5 On 10th March 2022, CMST provided an electronic copy of the 2020-2021 procurement plan to the complainant.

4.3 Procedure followed for review

4.3.1 On 3rd December 2021, the Complainant made an internal review appeal by writing to the Chief Executive Officer (CEO) of the CMST explaining the challenges he faced and his interest to access the information. The CEO acknowledged receipt of his email. Request for internal review was not submitted on form 5 as stipulated by regulation 23 of the ATI Regulations.

4.3.2 On 21st February 2021, the Complainant, through Form 6 as stipulated under regulation 26 of the ATI Regulations, submitted a request for external review at the Malawi Human Rights Commission.

4.3.3 In terms of the Form 6 submitted to the Commission, the Complainant’s request for external review relates to;

   a) Refusal of access to information-by-information holder
   b) Failure to comply with set time limits by information holder
   c) Information holder agree to release information but does not honor the request to release the information (i.e., “deemed denial” s27 of ATIA)
4.3.4 The Commission acknowledged receipt of the complaint and asked for the documentation.

5.0 Issues for consideration

5.1 Whether or not CMST refused the Complainant access to information in terms of the ATIA.
5.2 Whether there was non-compliance with the timelines stipulated under the Act on the part of CMST.
5.3 Whether there was deemed denial of access to information in terms of section 27 of ATIA.

6.0 Facts and Evidence

6.1 Evidence from Mr. Denis Mwafulirwa (Complainant)

6.1.1 Mr. Mwafulirwa said that he made an initial request to CMST in May 2021 which was followed by several reminders in person, email, and by phone (refer to attachments). His request was to have access to the procurement plan for 2021-2022 and a list of active contracts.

6.1.2 In December, 2021, he submitted two more requests targeting the specific tenders that CMST advertised in newspaper in September 2021.

6.1.3 He said the purpose for his request was to appreciate the value for money in procuring those items and also to see whether the procurement was demand driven or not.

6.1.4 He said CMST invited him to a meeting where clarifications were made as regards his requests.

6.1.5 He said that the meeting resolved to provide him a copy of a procurement plan and to orient him on the CMST procurement process. He confirmed participation in the procurement process orientation in January 2022.

6.1.6 Furthermore, he confirmed receiving the procurement plan from the CMST on 10th March 2022. He also confirmed that his request on active contracts was not based on the advertised tenders rather he was for a list of all active contracts that CMST had.

6.2 Evidence from CMST.
6.2.1 The Chief Executive Officer of Central Medical Stores Trust (CMST), Dr. Chikaiko Chadzunda confirmed the receipt of the complaint. He stated that the complainant was called and directed to the procurement department. However, he conceded to have kept the requests for longer time which he attributed to lack of knowledge in the ATIA.

6.2.2 Mr. Charles Khombeni, Acting Director of Procurement at CMST said that the complainant, Mr. Dennis Mwafulirwa, was looking for the current procurement plan, current contracts and details of the tenders that were advertised in the newspaper.

6.2.3 Mr. Khombeni said that during the meeting with the complainant they observed that the complainant lacked knowledge in the procurement process hence they offered to orient him for his better appreciation. A meeting for orientation was arranged and the complainant attended. He said at this meeting, the complainant clarified that his request on active contracts was only referring to contracts based on the advertised tenders. Otherwise according to Mr. Khombeni, the complainant could have been given the list of the concluded contracts.

6.2.4 Furthermore, he said that as an institution it was agreed to provide a procurement plan to him through the Information Officer. However, he told the complainant that they could not grant him access to information for the unconcluded bids. The bidding process is deemed concluded when a contract is awarded to a successful bidder. The decision was based on the law (PPDA) which prohibits disclosing such information. He cited S34 (1) of the PPDA. But he insisted that the decision was not to deny him access to information rather at the appropriate time such information could be shared with him.

6.2.5 Moreover, Mr. Khombeni believes that the information on the tenders which the complainant was looking for was exempted under the ATIA (S28-38).

6.2.6 As regards to self-disclosure of the procurement plan and contracts on the official website in relation to ATIA S15; Mr. Khombeni said that a procurement plan is produced in every financial year which is submitted to the office of PPDA and the PPDA was supposed to upload on their website. However, he said, tender documents are uploaded on the CMST website and he was not certain if the procurement plan in question was uploaded on their website.

6.2.7 Mr. Khombeni reiterated that it was in the interest of CMST to comply with the ATIA that was why they engaged MHRC for the training in access to information law and there are plans to have all their public information digitalized to increase accessibility.

6.2.8 On whether CMST has an information officer; Mr. Khombeni said currently their PRO, Mr. Herbert Chandilanga was assigned that role.
6.2.9 Responding on how the CMST decision to grant access to information or not to the requester was communicated; Mr. Khombeni said it was a verbal response because they did not know it was supposed to be a written response.

6.2.10 Information Officer who is also a Public Relations Officer, Mr. Herbert Chandilanga said that he had made communications with the complainant on the matter. Like the CEO, he also acknowledged of keeping the request for long. He said at first the CMST was not sure how to handle his requests and that is why they asked for a meeting with him in December 2022.

6.2.11 According to him, the procurement law (PPDA) prohibits disclosing information of the tenders before finalizing the process and considered such information as exempted from disclosure on part VI of ATIA.

6.2.12 He conceded that the procurement plan was not sent to the complainant as agreed during their meeting, however, it was delivered on 10th March 2022 soon after the meeting with officers from the Commission. This is because the PRO was not sure of what will be the use of such information once given to the complainant. He also said a list of contracts was not given to the complainant likewise a response was given regarding the request for information on the specific tenders mentioned.

6.2.13 Mr. Chandilanga confirmed that there was no procurement plan on the official website but tenders were available on the website. He also pointed out that a lot of information was missing on their website because of its capacity and design.

6.2.14 However, he said, there were positive steps taken to increase disclosure of information through media briefing and upgrading their website to accommodate more data.

6.2.15 On the appointment of an information officer, Mr. Chandilanga said he was an acting Information Officer as the office was waiting to appoint one. Furthermore, he said as PRO it was not proper for him to double as information officer but he was acting in that capacity as a matter of necessity.

6.2.16 Mr. Chandilanga said that CMST response to the complainant was put in writing because they were still discussing with him to give him access to information on the remaining requests at different intervals. Therefore, he did not consider that as a denial to access information.

6.3 Facts from the PPDA

6.3.1 Mr. Gift Gwaza, Director of Review and Monitoring, represented the Public Procurement and Disposal of Assets Authority (PPDA).
6.3.2 He said according to Section 34 (1) of the PPDA, no information concerning bids can be divulged during the evaluation process except when the contract has been approved by the PPDA and awarded to the successful bidder. Because divulging such information might jeopardize the procurement process.

6.3.3 However, he said the procurement law was silent on active contracts but all closed contracts become public documents.

6.3.4 In response to section 15 (2) of ATIA which provides for self-disclosure for information regarding contracts; he said a list of contracts can be provided even published on the website but not actual signed contracts. For example, in the case under review, CMST should be able to disclose information as regards to the parties contracted, cost of the contract and timeframe for the contract.

6.3.5 Mr. Gwaza pointed out that information regarding the outcome of the bids cannot be accessed by everyone except a person who participated in the bidding but was not successful.

6.3.6 He said that although they were implementing the Open Contracting (OC) Initiative under the World Bank Programme and that the OC was under consideration, keeping information for bidding process confidential was still ideal until the process was concluded. He went on to providing a checklist of what could be disclosed and what could not be disclosed during the procurement process as indicated in the table below:

<table>
<thead>
<tr>
<th>Information</th>
<th>Disclosed</th>
<th>Not disclosed</th>
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<tbody>
<tr>
<td>Procurement plan</td>
<td>✓</td>
<td></td>
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<tr>
<td>Notice of procurement</td>
<td>✓</td>
<td></td>
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<tr>
<td>Submitted bids</td>
<td>✓</td>
<td></td>
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<tr>
<td>Bids evaluation</td>
<td></td>
<td>✓</td>
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<tr>
<td>Concluded bids evaluation</td>
<td>✓</td>
<td></td>
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<tr>
<td>Financial evaluation</td>
<td></td>
<td>✓</td>
</tr>
<tr>
<td>Outcome of evaluation (Without disclosing comparisons among bidders)</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>Awarded contracts including those not successful</td>
<td>✓</td>
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<tr>
<td>Bidders’ performance</td>
<td>✓ -only to the</td>
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<td>bidder</td>
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6.3.7 Mr. Gwaza also said that PPDA was better placed to investigate any allegations of fraud and corruption in the procurement process of any public institution. Therefore, citizens were free to report such issues to their office.

On the Information Officer and procedures as contained in the ATIA; Mr. Gwaza confirmed that their office has an Information Officer who was also the PRO. In addition, procedures and mechanisms were in place in compliance with the ATIA.

7.0 The Law

7.1 The starting point is section 19 of ATIA read together with Regulation 13 (1) the Information Holder must communicate the decision to grant or refuse access to information within fifteen days from the date the request of information is received.

7.2 Section 19 of ATIA further requires that if a decision to grant access to information is made, then the same must be provided promptly.

7.3 Where the Information Holder fails to comply with the time limits set out in the ATIA that is deemed as denial of access to information under section 27 of ATIA and the same is subject to review.

7.4 Where the Information Holder decides to refuses to disclose information which is requested either in whole or in part, section 25 of ATIA as read together with Regulation 22 (1) of the ATI Regulations, requires that the same should be notified in writing, stating the grounds for the refusal of the grant of access to information including specific provisions of the ATIA relied on to justify its decision. The Information Holder is further required under section 25(2) to inform the applicant of the availability of a process for reviewing the decision, the institution to which the review may be lodged and the period within which the application for review may be made.

7.5 Section 28 (1) of ATIA recognises that certain information is exempted from disclosure and the categories exempted from disclosure are stipulated under sections 29 to 36 of ATIA. Section 38 of ATIA make it mandatory that an Information Holder who refuses to grant access to information must prove on the balance of probabilities that the information is exempted from
disclosure and show the harm that would result from the disclosure of the information against the protected interest under the relevant exemption.

7.6 Section 21 of ATIA allows partial disclosure of information where the Information Holder determines that part of the information requested is exempted from disclosure. The Information Holder shall disclose the remainder of the information which is not exempt from disclosure and shall accordingly inform the person who made the request.

7.7 Where an Information Holder refuses to disclose information requested, in terms of section 39 of ATIA the applicant can apply for internal review within sixty working days of receipt of a notice of the decision. The application for internal review can be made orally or in writing. Regulation 23(1) requires that the application for internal review should be made in Form 5 under the Second Schedule of the ATIA Regulations.

7.8 The head of an information holder is required to make a decision on behalf of the institution within five working days of receipt of the application for review under section 41 of the ATIA.

7.9 Where access to information is denied after internal review, in terms of section 42 of ATIA, such decision must be communicated in writing, stating grounds for the denial and also inform the applicant of the right to appeal.

7.10 Section 44 (1) of ATIA allows a person who has exhausted the internal review mechanism of the information holder to apply to the Commission.

7.11 Section 44 (2) of ATIA provides the grounds for review as follows:
   (a) the refusal of access by the information holder to the information requested.

   (b) the payment of fees payable pursuant to section 24 which the applicant considers to be unreasonable. There was no issue of payment of fees.

   (c) the failure of the information holder to comply with the various timelines stipulated for processing requests for information or decisions on internal review.

7.12 The Commission apart from the ATIA provisions which have been stated in this report, also considered the provisions of Section 34 (1) of the Public Procurement and Disposal of Public Assets Act (PPDA 2017) which requires all public officers to keep confidential the information that comes into their possession relating to the procurement and disposal proceedings and to bids, including any bidder's proprietary information.
8.0 Findings and application of the law

The Commission having thoroughly looked at the provisions of the ATIA in the exercise of its powers under section 44 of ATIA makes the following findings:

i. That the Complaint’s requests for information were duly submitted to the CMST in accordance with ATIA and its Regulations.

ii. That CMST did not comply with section 19 of ATIA and Regulation No. 13(1) of AIT Regulations when it failed to inform the Complaint within 15 days from the date the request of information was made. The initial request of formation on was made on 11th May 2021 and CMST only responded in December 2021.

iii. That in view of ii. above, CMST is deemed to have denied the complainant access to information under section 27 of ATIA despite that CMST partially disclosed the information (Procurement Plan) requested by the Complaint on 10th March 2022, after the Commission had already initiated its external review process.

iv. That CMST did not communicate in writing their decision to refuse access to information and the grounds for the same in accordance with ATIA. CMST only communicated verbally communicated to the Complainant that information on floated tenders could not be shared as restricted by the procurement law.

v. The Complaint was not informed about the internal review process at CMST although a request for an internal review was acknowledged the same day but a response was only provided in part after 6 working days.

vi. That CMST does not have clear internal review procedures as required by sections 41 and 42 of ATIA. When the CEO of CMST received the appeal from the Complainant, he did not communicate the same in writing and give grounds for such denial of access to information. CMST did not inform the Complainant of his right to appeal to the Commission on their decision.

vii. That in terms of the evidence given by Mr. Gwaza, the information requested by the Complainant, in relation to Procurement Plan and List of Active Contracts is not exempted from disclosure under section 34(1) of PPDA and CMST ought to have has that information readily available for disclosure.

viii. That the information concerning the two tenders is exempted from disclosure in as far as the bidding process is not completed and the intend to award has not been made public. However, CMST can disclose rationale for bids and details without disclosing the signed contracts.

ix. The Complainant’s request of information related to the rationale for the concerned two tenders and at what stage the bidding process was, which is not exempted from disclosure or categorized as confidential under the PPDA.
x. That some of the information requested by the complainant could be proactively disclosed by the CMST on their website. For example, the procurement plan and list of active contracts.

xi. That having considered the evidence in its totality, the conduct of CMST is tantamount to denial to access to information under its custody.

xii. That the information that was requested was not exempted from disclosure by both ATIA and PPDA.

9.0 Determination

The Commission having found that CMST unlawfully denied access to information to the Complainant, makes the following determinations;

9.1 CMST should within 5 days inform the Complainant the rationale of the two tenders in issue and what stage they are at;

9.2 CMST should within 5 days give the Complainant a list of all active contracts for the Institution

9.3 CMST should within the same five working days, inform the Complainant in writing why full disclosure of the two concerned tenders cannot be given and give grounds for such non-disclosure;

9.4 CMST should within 10 working days put proper procedures for internal review to ensure proper management of requests for information.

9.5 CMST should within 15 working days inform the Commission in writing of its compliance with the determinations made above.

10.0 Appeal

CMST and the Complainant have both the right to apply to the High Court for review of this determination in terms of section 49 of ATIA.
Review of Decisions of Information Holders Panel (RDIHP)

Chairperson
Commissioner Baldwin Chiayamwaka

Members
Commissioner Rosemary Kanyuka
Commissioner Chikondi Chijozi

Secretariat
DCPR
Mr. Peter Chisi

DDCPR
Mr. Chance Kalolokesya
ANNEX

1.0 List of Interviewees

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<tr>
<th>#</th>
<th>NAME</th>
<th>POSITION/INSTITUTION</th>
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<tbody>
<tr>
<td>1</td>
<td>Dr. Chikaiko Chadzunda</td>
<td>Chief Executive Officer-CMST</td>
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<tr>
<td>2</td>
<td>Washington Kaimvi</td>
<td>Director of Finance and Administration-CMST</td>
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<tr>
<td>3</td>
<td>Mr. Charles Khombeni</td>
<td>Acting Director of Procurement-CMST</td>
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<tr>
<td>4</td>
<td>Mr. Herbert Chandilanga</td>
<td>PRO/Information Officer-CMST</td>
</tr>
<tr>
<td>5</td>
<td>Mr. Denis Mwafuirwa</td>
<td>Complainant</td>
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<tr>
<td>6</td>
<td>Mr. Gift Gwaza</td>
<td>Director-Review &amp; Monitoring-PPDA</td>
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2.0 Attachments

i. MHRC form 6

ii. Request form 1 to CMST

iii. Additional requests to CMST

iv. follow up request to CMST

v. response from CMST