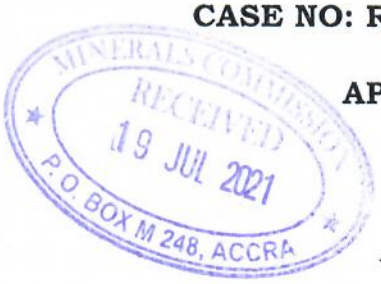
THE RIGHT TO INFORMATION COMMISSION, ACCRA

IN THE MATTER OF AN APPLICATION FOR REVIEW OF COST CHARGED BY THE MINERALS COMMISSION FOR INFORMATION REQUESTED UNDER THE RIGHT TO INFORMATION ACT, 2019 (ACT 989)

CASE NO: RTIC/AFR/2021/01



EVANS AZIAMOR-MENSAH **APPLICANT**
THE FOURTH ESTATE
ACCRA

VERSUS

MINERALS COMMISSION **RESPONDENT**
ACCRA

DETERMINATION BY THE RIGHT TO INFORMATION COMMISSION

DATE: 19TH JULY 2021

According to section 43 (2) (b) of the Right to Information Act, 2019 (Act 989), the Right to Information Commission (hereafter "the Commission") has the power to "determine the need for the nature and form of investigation required for the determination of a matter before the Commission." In exercise of this power granted it by Act 989, the Commission, in this application for review by Evans Aziamor-Mensah, a reporter for The Fourth Estate (hereinafter referred to as the "the Applicant"), decided to undertake an expeditious determination of the matter by writing to the Minerals Commission (hereinafter "the Respondent") and requesting a response to the review application. The Commission asked to be furnished with the relevant pieces of information and reasons underpinning the Respondent's decision regarding the Applicant's request for information. In so

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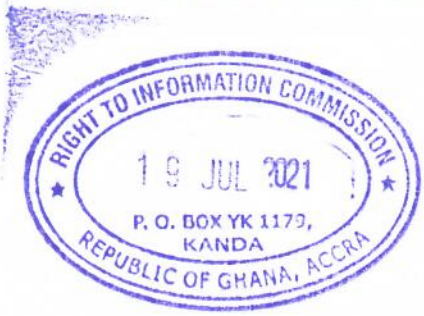
Evans Aziamor-Mensah



doing, the Commission complied with the *audi alteram partem* ("Hear the other side") rule of natural justice.

It is worthy to note that section 43 (2) (c) of Act 989 also vests the Commission with the power to ***"make any determination as the Commission considers just and equitable including issuing recommendations or penalties in matters before the Commission."*** By section 44 (c), the Commission is mandated to take appropriate action necessary to help it resolve a complaint before it. It is premised on these separate levels of power that the Commission makes the determination herein.

FACTS

In an application (marked herein as "Exhibit 1") addressed to the Commission dated 17th June, 2021, the Applicant complained that, on 27th May, 2021, he requested for some pieces of information from the Respondent. This request (marked as "Exhibit 2) was made pursuant to his right to information under article 21 (1) (f) of the Constitution, 1992 and section 18 of Act 989. The information requested for were:

1. The full list of companies issued with mining licences from January 2013 to May 2021;
2. The full list of mining companies whose licences have been revoked and suspended;
3. The reasons or justification for revoking or suspending the licences of the mining companies listed in Point (2) above; and
4. The total amount of money accrued to the Government of Ghana from the annual monitoring of earth-moving and mining equipment used for mineral operations according to the Fees and Charges (Miscellaneous Provisions) Act, 2018 (Act 983) from January 2020 to May 2021.

According to the Applicant, the Respondent responded to his request on 7th June, 2021 with a letter (marked as "Exhibit 3") signed by the Chief Executive Officer which determined that the Applicant needed to pay an application fee of Ghana

Cedi equivalent of one thousand United Stated Dollars (US$1,000). The Respondent hinged its determination of the applicable fee on section 75 of Act 989, section 103 of the Minerals and Mining Act, 2006 (Act 703), and Regulation 4 of the Minerals and Mining (Licensing) Regulations, 2012 (LI 2176). It is this determination by the Respondent, which forms the subject of the Applicant's review application to the Commission.

As indicated in the opening paragraph to this decision, upon receipt of Exhibit 1, the Commission wrote a letter (marked as "Exhibit 4") to the Respondent dated 21st June, 2021, with Exhibit 1 attached, and received the same day. In its said letter (Exhibit 4), the Commission requested the Respondent to furnish the Commission with justification and breakdown of what went into the determination of the amount of USD 1,000, as well as the legal basis for that determination, in order to assist in determining the review application. The Commission gave the Respondent 14 days to respond to its letter or risk a determination of the review application without recourse to the Respondent. Unfortunately, no response was received from the Respondent within the 14 days period. It was when the Commission was almost through with its decision that the Respondent's response dated 29th June 2021 (marked as "Exhibit 5") was received by the Commission on 8th July 2021. Nevertheless, the Commission duly considered the Respondent's response in its instant decision.

In its response (Exhibit 5), the Respondent, basically, justified its application of the fee of Ghana Cedi equivalent of USD 1,000 on the premise of the aforementioned section 75 of Act 989, section 103 of Act 703, and Regulation 4 of LI 2176. The Respondent also intimated that "The Minerals Commission and indeed, the RTI Commission do not have the legal wherewithal to review, vary or waive the fees and charges approved by Parliament for services the Commission renders to the general public as has been erroneously pressed upon the RTI Commission by the applicant."

FINDINGS OF FACT

According to the Applicant, the Respondent's decision to charge the fee of Ghana Cedi equivalent of USD 1,000 runs counter to sections 75, 80, and 85 of Act 989. What do these provisions of Act 989 say? Section 75(1) stipulates that an applicant for information shall pay a fee or charge that has been approved by Parliament in line with the Fees and Charges (Miscellaneous Provisions) Act, 2018 (Act 983). Section 75(2) outlines categories of information for which no fee or charge is applicable. The Applicant's claim of contravention of section 75 of Act 989 cannot be premised on the fact that the information he sought from the Respondent is exempt from a fee or charge. Rather, the claim is based on the fact that the charge of Ghana Cedi equivalent of USD 1,000 is not borne out by parliamentary approval in accordance with Act 983. The Respondent's decision, however, was not only based on section 75(1) of Act 989, but also on section 103 of Act 703 and Regulation 4 of L.I. 2176.

Section 103 of Act 703 makes provision for the maintenance of a mineral rights register by the Respondent, which shall be open to public inspection and copying upon payment of prescribed fees. To get the prescribed fees, the Respondent applied Regulation 4 of L.I. 2176. Regulation 4(1) provides that "Application fees and fees that relate to mineral rights and other matters are payable as specified in the Second Schedule." Regulation 4 makes reference to matters such as minimum expenditure required to be incurred by a holder of a reconnaissance or prospecting licence, annual mineral right fee payable, and delayed application for a mineral right. Thus, read as a whole, Regulation 4 is not tailored towards a fee or charge payable by a member of the public for inspection and/or copying of information entered in the mineral rights register. On the contrary, Regulation 4 targets persons or entities holding mining licences or applying for mineral rights. It is to such applicants that the fees stated in the Second Schedule to L.I.2176 appear to apply.

Section 80 of Act 989 makes the Act applicable to information which came into existence before, or comes into existence after, the commencement of the Act. The Commission does not view any part of the Respondent's response to the

Applicant as disputing the tenor of section 80 of Act 989. That is to say that the Respondent's response did not claim that the Applicant's right to information did not extend to the information he requested for. The Respondent's response only sought to apply a certain level of fees or charge before the information requested would be released.

According to ***section 85 of Act 989, "Where an enactment in existence immediately before the coming into force of this Act provides for the disclosure of information by a person or an authority, the disclosure of the information is subject to this Act."*** This indicates that section 103 of Act 703, which creates a right in the public to inspect and/or copy information provided in the mineral rights register upon payment of prescribed fee or charge, is subject to Act 989 in terms of the payment of fee or charge determined in accordance with Act 983.

From the foregoing observations made by the Commission, the following findings of fact can be made:

1. The Respondent's decision regarding the charge or fee applied against the Applicant was based, primarily, on Regulation 4 of L.I. 2176, per the Second Schedule. Applicants for information from the mineral rights register, such as the Applicant herein, are not the target of Regulation 4 of L.I.2176; rather holders of mining licences and applicants for mineral rights;
2. Section 103 of Act 703 is subject to Act 989 in respect of payment of fee or charge for information requested from a public institution or a relevant private body. However, fees or charges are yet to be approved by Parliament in accordance with Act 983 for information applied for from public institutions or relevant private bodies; and
3. An assessment of the information sought by the Applicant from the Respondent points to statistical data or information as opposed to economic data or information.

ISSUE FOR DETERMINATION

Based on the nature of information requested by the Applicant and the Respondent's response to the request, the Commission sets down for its determination the main issue:

Whether or not the Respondent was legally justified to charge a fee of Ghana Cedi equivalent of USD 1,000 for the information requested by the Applicant.

Aside the main issue identified above, the Commission sets down the sub-issue:

If the Respondent was not legally justified to charge a fee of Ghana Cedi equivalent of USD 1,000, what is the right fee that ought to have been charged?

RESOLUTION OF ISSUES

Whether or not the Respondent was legally justified to charge a fee of Ghana Cedi equivalent of USD 1,000 for the information requested by the Applicant

As found as a fact by the Commission, the main ground upon which the Respondent based its charge or fee of Ghana Cedi equivalent of USD 1,000 is Regulation 4 of L.I. 2176. The target of that law, however, does not cover an ordinary applicant for statistical data or information such as the Applicant herein. The target is a holder of a mining licence or an applicant for a mineral rights. This is easily ascertainable from the language and tenor of Regulation 4. Regulation 4 makes allusion to issues such as "the minimum expenditure required to be incurred by a holder in an operation under a reconnaissance or prospecting licence" and "annual mineral right fee payable." These, surely, cannot be referring to an ordinary applicant for statistical data or information like the Applicant. To help in laying bare the terms of Regulation 4 of L.I. 2176, these are the specific provisions therein:

"Regulation 4—Fees, minimum expenditure and late application

(1) Application fees and fees that relate to mineral rights and other matters are payable as specified in the Second Schedule.

(2) For the purpose of these Regulations, the minimum expenditure required to be incurred by a holder in operation under a reconnaissance or prospecting licence for each cadastral unit or twenty-one hectares is ten times the value of the annual mineral right fees as specified in the Second Schedule.

(3) An annual mineral right fee payable under these Regulations shall be paid not later than ninety days before the expiration of each anniversary of the mineral right.

(4) A fee, expenditure or other payment required to be paid or made under these Regulations and which is not yet paid or made within the period specified in sub regulation (3) shall be a debt owed to the Republic and recoverable by the Commission from the holder in Court.

(5) Where a fee, expenditure or other payment required to be paid or made under these Regulations is not paid or not made within the stipulated period, the mineral right shall be terminated.

(6) Despite the provision in these Regulations for rejection of an application in relation to a mineral right made later than the specified period, the Commission may, subject to reasonable explanation provided by the applicant, accept an application made after the specified period but not later than ten days before the expiration of the mineral right.

(7) An application accepted under sub regulation (6) is subject to the payment of fees as specified in the Second Schedule."

From the above provisions of Regulation 4 of L.I. 2176, it is unassailable that the USD 1,000 determined under the Second Schedule was wrongfully applied to the Applicant when he requested for information from the mineral rights register. The Commission hereby resolves the main issue set down for determination by saying that the Respondent was not legally justified to charge a fee of Ghana Cedi equivalent of USD 1,000 for the information requested by the Applicant

herein. The Commission is aware of a legal principle to the effect that something cannot be put on nothing and be expected to stay there; it shall collapse. The Respondent cannot put a fee or charge of Ghana Cedi equivalent of USD 1,000 on the Applicant for a request for statistical data or information when such a fee or charge has no legal basis.

It is pertinent, in fact, to point out that aside section 103 of Act 703, equally subject to Act 989 is L.I. 2176 to which the Respondent referred as determining the fee mentioned in section 103 of Act 703. More so, it is trite learning that an Act of Parliament such as Act 989 takes precedence over a subsidiary legislation such as L.I. 2176.

If the Respondent was not legally justified to charge a fee of Ghana Cedi equivalent of USD 1,000, what is the right fee that ought to have been charged?

Again, as has been found as a fact by the Commission, fees or charges to be applied by public institutions or relevant private bodies for information requested by the public are yet be approved by Parliament in accordance with Act 983. This, obviously, leaves a vacuum. Such a vacuum, however, should not be allowed to found application of exorbitant fees or charges by public institutions or relevant private bodies.

The right to information is a right constitutionally guaranteed under article 21(1)(f) of the Constitution, 1992 and under Act 989. In fact, the Commission dare say that if there is any potent tool for ensuring good governance, strong democracy, active participation of the citizenry in the governance of the country, and fighting corruption, that tool should be the right of access to information held by public institutions or relevant private bodies (which are private bodies funded with state funds or resources and performing public functions).

Such information, to all intents and purposes, save as exempted from disclosure by law, is held on behalf of the citizenry. Access to it should therefore not be

allowed to be commercialized. Indeed the import of section 76 of Act 989 leaves no doubt about this point. The section says that fees or charges for access to, or release of, information to an applicant are supposed to be retained by public institutions only to defray expenses incurred in the production and release of information. Because of that reason, such fees or charges are not to be mingled with other funds of the public institution, but are to be kept in a separate bank account. These are the words of section 76 of Act 989:

"76 (1) Subject to the Constitution, a public institution is authorised to retain charges received by that public institution under this Act.

(2) The charges retained by the public institution under subsection (1) shall

(a) only be used to defray expenses incurred by the public institution in the performance of functions under this Act; and

(b) be paid into a bank account opened for the purpose with the approval of the Controller and Accountant-General."

So flowing from the above, even in the absence of Parliament-approved figures, fees or charges applied for the release of information requested by members of the public must be **reasonable**. Those fees or charges should be pegged at amounts meant only to cater for the cost of re-producing that information to the applicant. They should never be pegged at amounts aimed at generating money or commercializing the venture for the institution.

Under section 75(2) of Act 989, there are a number of information-production services by public institutions or relevant private bodies that are not supposed to attract any charge or fee. Some of these include:

"(c) the reproduction of information which is in the public interest...

(g) time spent by an information officer or information reviewing officer in reviewing the information requested;

(h) time spent by an information officer or information reviewing officer in examining whether the information requested is exempt information; or

(i) preparing the information for which access is to be provided."

This scheme of things gives credence to the non-commercial intent underpinning charges or fees, which are supposed to be applied against applicants for information. This aside, the phrase "reasonable cost" runs through section 75 (3), (4) and (5) of Act 989 in relation to charges or fees to be applied towards the production of information in the form or medium requested by applicants:

"75 (3) Where a request is made for information to be provided in a language other than the language in which the information is held, the information officer may request the applicant to pay the reasonable costs for translating the information into the language requested by the applicant.

(4) Where a request is made for a written transcript of the information held by a public institution, the information officer may request the applicant to pay the reasonable cost of the transcription.

(5) Where a request is made for information to be provided in a medium or format in which the information is held, the information officer may request the applicant to pay the reasonable cost of media conversion of reformatting."

The Commission would like to state that, in line with section 75(1) of Act 989, it has submitted for consideration proposed fees and charges to be applied for requests made by the public for information from public institutions and relevant private bodies. The proposed fees and charges were based on comparisons drawn from other right to information jurisdictions, particularly South Africa, as well as the general standard and pricing for specific services and materials on the market. This proposal is going through the requisite administrative

considerations and assessment before presentation to Parliament for approval in accordance with Act 983.

Based on the above, the Commission hereby resolves the sub-issue by holding that the right fee to be charged the Applicant by the Respondent for the information requested in hard copy is the number of pages of the information requested multiplied by GHS1.80 Pesewas, in the case of photocopy. If the requested information is to be furnished in PDF format by electronic mail, the fee/charge shall be GHS 1.90 Pesewas for the whole of the information in its entirety. The Commission finds these fees/ charges, as ordered, **reasonable** in the circumstances; they are based on cue and best practices across Africa, India, and Canada. The fees/charges are also based on market standards for similar services and materials involved.

CONCLUSION

The Commission concludes its decision by clarifying few issues. First, according to section 65 (1) of Act 989, **"A person who is dissatisfied with a decision of a public institution or a relevant private body may apply to the Commission for a review of the decision."** The Commission entertains the Applicant's application for review on account of this provision. The Commission is of the considered view that the Applicant has demonstrated in his application a dissatisfaction with the Respondent's decision exacting a fee or charge of Ghana Cedi equivalent of USD 1,000. Section 66 of Act 989 mandates the exhaustion of internal review procedure within a public institution or a relevant private body before an application for review can lie with the Commission. It is evident from the current application for review that the Applicant did not exhaust any internal review procedure of the Respondent. Having made this observation, however, it is important to draw attention to section 67(1)(c) of Act 989, which makes room for application for review to be made to the Commission without first exhausting internal review procedure where the head of the public institution or the relevant

private body to which an application for information is made is the information officer of that institution or body.

It is instructive to point out that, in the instant application for review, the Applicant indicated that he was dissatisfied with the decision of Mr. Martin K. Ayisi, the Chief Exectutive Officer (CEO) of the Respondent. This is because it was the CEO who signed the Respondent's decision addressed to the Applicant. The Applicant therefore intimated in his application that "I am, however, unable to appeal for internal review to the institution since the CEO is the head." The Commission intimates that the signing of the decision addressed to the Applicant simply implies that the CEO is the officer who requested the payment of the fee or charge of Ghana Cedi equivalent of USD 1,000. Having so decided, the Applicant is properly before the Commission with the application for review.

The Commission hereby states that every public institution or relevant private body is required by Act 989 to have an information unit or office manned by an information officer or a person designated as such. It is the duty of such an information officer to receive applications or requests for information and take decisions on them. This is stipulated in section 19 of Act 989: **"An application to access information shall be dealt with by the information officer of the public institution."** Persons dissatisfied with such decisions shall therefore be required to trigger an internal review procedure by applying to the head of the institution for a review. Further dissatisfaction with the decision of the head of the institution would then found an application to the Commission for a review. An application for review of the Commission's decision shall lie with the High Court.

FINAL ORDERS OF THE COMMISSION

According to section 71(2)(c) of Act 989, the Commission has the power to give a decision setting aside the decision of a public institution or relevant private body. Section 71(4) of Act 989, also, clothes the Commission with the power to issue

directives it considers necessary for the enforcement of its decisions. Consequent upon these provisions, the Commission makes the following final orders in respect of the rights of the parties herein:

a. The Commission hereby sets aside the decision of the Respondent dated 7th June, 2021 demanding payment of Ghana Cedi equivalent of USD 1,000 by the Applicant for the information he requested;
b. The Commission directs the Chief Executive Officer of the Minerals Commission, Mr. Martin K. Ayisi, to ensure the application of a charge or fee of either 1.80 Pesewas multiplied by the number of pages of information to be printed or 1.90 Pesewas, if the information in its entirety is to be emailed to the Applicant in PDF format; and
c. The information must be furnished the Applicant as requested within 14 days from the date of this determination.

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