

DD24

Li-Fen Chien

From: Li-Fen Chien
Sent: 09 December 2014 03:32 PM
To: 'DavidJ@durban.gov.za'
Cc: 'MaryAnn Grafetsberger'; Robyn Hugo; Sylvia Kamanja
Subject: Internal appeal against the refusal to grant information requested pursuant to the Promotion of Access to Information Act (your ref: PAIA/115824/JED/mag/2/4/1)
Attachments: Cover letter - Internal Appeal against decision by Municipality to refuse access - 9 December 2014.pdf; SDCEA_eThekwini - Form_B - 9 Dec 2014.pdf; SDCEA_eThekwini - Annexure A - 9 Dec 2014.pdf; Internal Appeal - Annexure 1.pdf; Internal Appeal - Annexure 2.pdf; Internal Appeal - Annexure 3.pdf; Internal Appeal - Annexure 4.pdf

Tracking:

Recipient

Delivery

'DavidJ@durban.gov.za'

'MaryAnn Grafetsberger'

Robyn Hugo

Sylvia Kamanja

Delivered: 2014-12-09 03:32 PM

Delivered: 2014-12-09 03:32 PM

Dear Dr David

1. We act for the South Durban Community Environmental Alliance (SDCEA) and refer to their Promotion of Access to Information Act (PAIA) request (your ref: PAIA/115824/JED/mag/2/4/1).
2. We hereby submit an internal appeal on behalf of SDCEA in accordance with section 75 of PAIA and attach the following documents for your attention, namely:
 - Cover letter;
 - Form B; and
 - Annexure A (including Annexures 1 – 4).
3. Kindly confirm receipt.

Kind regards

Li-Fen Chien

Attorney

Centre For Environmental Rights NPC

A non-profit Company with registration number 2009/020736/08

PBO No. 930032226, NPO No. 075-863, VAT No. 4770260653

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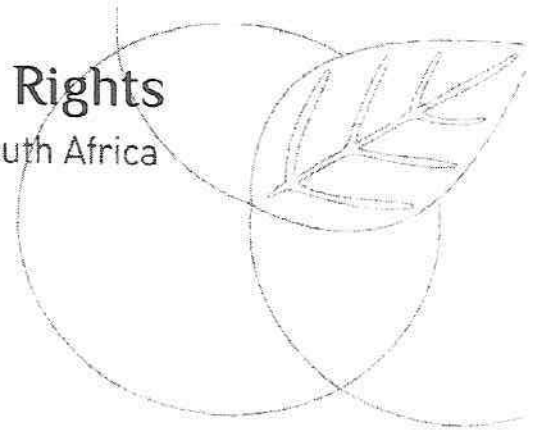


**Centre for
Environmental Rights**
 Advancing Environmental Rights in South Africa



Centre for Environmental Rights

Advancing Environmental Rights in South Africa



Dr JE David
The Deputy Information Officer
eThekweni Metropolitan Municipality
By fax: 031 311 2171
By email: DavidJ@durban.gov.za

Copy to:
Ms Grafetsberger
By email: MaryAnn.Grafetsberger@durban.gov.za

Your ref: PAIA/115824/JED/mag/2/4/1

Date: 9 December 2014

Dear Dr David

INTERNAL APPEAL AGAINST THE REFUSAL TO GRANT INFORMATION REQUESTED PURSUANT TO THE PROMOTION OF ACCESS TO INFORMATION ACT, ACT 2 OF 2000 (PAIA)

1. We act for the South Durban Community Environmental Alliance (SDCEA).
2. Please find enclosed a completed Form B Notice of Internal Appeal, and the grounds for the internal appeal marked "Annexure A" (which includes Annexures "1" – "4") supporting the appeal, submitted in accordance with section 75 of PAIA.
3. This internal appeal relates to your refusal to grant SDCEA copies of the Atmospheric Emission Licences (AELs) and AEL compliance reports for Shell and BP Petroleum Refinery and Engen Petroleum Refinery submitted to eThekweni Metropolitan Municipality.
4. In accordance with section 77 (3) (a) of PAIA, you are required to respond to this internal appeal within 30 (thirty) days of receipt hereof. We therefore expect a decision on this internal appeal to be communicated to us by 8 January 2015.
5. Kindly confirm receipt.

2nd Floor Springtime Studios,
1 Scott Road, Observatory, 7925
Cape Town, South Africa
Tel 021 447 1847, Fax 086 738 9098
Email info@cer.org.za, www.cer.org.za

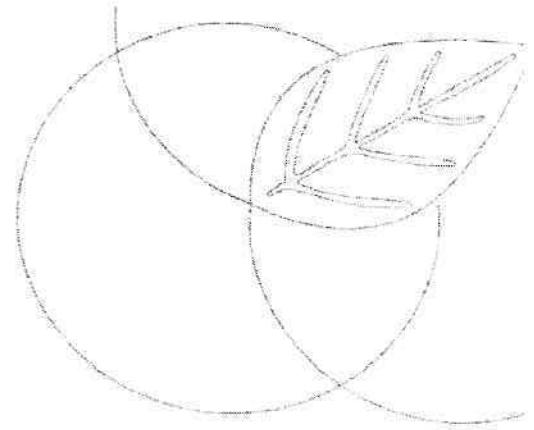
Yours faithfully
CENTRE FOR ENVIRONMENTAL RIGHTS

per:



Robyn Hugo
Attorney

Direct email: rhugo@cer.org.za



FORM B
NOTICE OF INTERNAL APPEAL
(Section 75 of the Promotion of Access to
Information Act 2000 (Act No. 2 of 2000))
[Regulation 8]

STATE YOUR REFERENCE NUMBER: PAIA/115824/JED/mag/2/4/1

A. Particulars of public body

The Information Officer/Deputy Information Officer:

Dr JE David
eThekweni Metropolitan Municipality
PO Box 1014
Durban
4000

B. Particulars of requester/third party who lodges the internal appeal

- (a) The particulars of the person who lodge the internal appeal must be given below.*
(b) Proof of the capacity in which appeal is lodged, if applicable, must be attached.
(c) If the appellant is a third person and not the person who originally requested the information, the particulars of the requester must be given at C below.

Name of Organisation: Centre for Environmental Rights
Registration number: 2009/020736/08
Postal address: 2nd Floor, Springtime Studios, 1 Scott Road, Observatory, 7925
Fax number: 0867309098
Telephone number: +27214471647
E-Mail Address: lchien@cer.org.za

Capacity in which an internal appeal on behalf of another person is lodged: Attorney

C. Particulars of requester

This section must be completed ONLY if a third party (other than the requester) lodges the internal appeal.

Full names and surname: South Durban Community Environmental Alliance
NPO number: 028-964

The decision against which the internal appeal is lodged

Mark the decision against which the internal appeal is lodged with an X in the appropriate box:

<input checked="" type="checkbox"/>	Refusal of request for <i>access</i>
<input type="checkbox"/>	Decision regarding fees prescribed in terms of section 22 of the Act
<input type="checkbox"/>	Decision regarding the extension of the period within which the request must be dealt with in terms of section 26(1) of the Act
<input type="checkbox"/>	Decision in terms of section 29(3) of the Act to refuse access in the form requested by the requester
<input type="checkbox"/>	Decision to grant request for access

E. Grounds for appeal

If the provided space is inadequate, please continue on a separate folio and attach it to this form. You must sign all the additional folios.

State the grounds on which the internal appeal is based:

See Annexure "A" and see also Annexures "1" to "4".

State any other information that may be relevant in considering the appeal: None.

F. Notice of decision on appeal

You will be notified in writing of the decision on your internal appeal. *If you wish to be informed in another manner, please specify the manner and provide the necessary particulars to enable compliance with your request.*

State the manner: By email.

Particulars of manner: rhugo@cer.org.za; skamanja@cer.org.za; lchien@cer.org.za.

Signed at CAPE TOWN this 9th of December 2014.



SIGNATURE OF APPELLANT

Robyn Hugo (Attorney)

Centre for Environmental Rights

FOR DEPARTMENTAL USE:

OFFICIAL RECORD OF INTERNAL APPEAL

Appeal received on

(date) by (state rank, name and surname of information officer/deputy information officer).
Appeal accompanied by the reasons for the information officer's/deputy information officer's decision and, where applicable, the particulars of any third party to whom or which the record relates, submitted by the information officer/deputy information officer on (date) to the relevant authority.

OUTCOME OF APPEAL:

DECISION OF INFORMATION OFFICER/DEPUTY INFORMATION OFFICER
CONFIRMED/NEW DECISION SUBSTITUTED
NEW DECISION:

DATE

RELEVANT AUTHORITY

RECEIVED BY THE INFORMATION OFFICER/DEPUTY INFORMATION OFFICER
FROM THE RELEVANT AUTHORITY ON (date):

**SOUTH DURBAN COMMUNITY ENVIRONMENTAL
ALLIANCE**

Appellant

eTHEKWINI METROPOLITAN MUNICIPALITY

Respondent

**APPEAL AGAINST eTHEKWINI METROPOLITAN MUNICIPALITY'S REFUSAL
TO GRANT ACCESS TO INFORMATION REQUESTED PURSUANT TO THE
PROMOTION OF ACCESS TO INFORMATION ACT, 2000**

The Appellant

1. The Appellant is South Durban Community Environmental Alliance (SDCEA). SDCEA is an environmental justice organisation based in south Durban, mandated to assist civil society in understanding and defending their rights, including the constitutional right to live in an environment not harmful to human health or wellbeing.
2. In this matter, SDCEA is represented by Robyn Hugo in her capacity as Attorney for the Centre for Environmental Rights (CER). The CER is a non-profit organisation with registration number 2009/020736/08, PBO number 930032226 and NPO number 075-863, established to advance environmental rights in South Africa.

The PAIA request and correspondence related thereto

3. On 29 October 2014, the Appellant submitted a request in terms of the Promotion of Access to Information Act, 2000 (PAIA) to the eThekwini Metropolitan Municipality (the Municipality). The request is attached marked annexure "1".
4. The request was submitted to the Deputy Information Officer's secretary, Ms MaryAnn Grafetsberger at the email address MaryAnn.Grafetsberger@durban.gov.za. Mr Neil Larat, Deputy Head for Pollution Control, was copied on said email at Neil.Larat@durban.gov.za.

5. The request was for access to copies of the following records:
 - 5.1. Copies of the atmospheric emission licence (AEL) for Shell and BP Petroleum Refinery (SAPREF) and Engen Petroleum Refinery (Engen); and
 - 5.2. The most recent annual reports reporting on compliance with AELs submitted to the Municipality for the above refineries.

Background to this internal appeal

6. On 29 October 2014, Mr. Desmond D'Sa sent the Municipality an email providing the request form and proof of payment of the request fee. A copy of the proof of payment is attached as annexure "2".
7. On 3 November 2014, Mr. D'Sa sent Ms. Grafetsberger an email to enquire when SDCEA could expect to receive a response from the Information Officer.
8. Ms Grafetsberger responded on the same day, indicating that PAIA provides the requestee with 30 days within which to respond to a request and confirming that the matter was currently receiving attention. A copy of the email from Mr D'Sa, and Ms Grafetsberger's response, is attached as annexure "3".

The Municipality refused the request in terms of section 36(1)(a), (b) and (c) of PAIA

9. On 28 November 2014, the Municipality responded to the request stating that the request was refused based on section 36(1) of PAIA. The section reads as follows:

"36. Mandatory protection of commercial information of third party

(1) Subject to subsection (2), the information officer of a public body must refuse a request for access to a record of the body if the record contains –

(a) trade secrets of a third party;

(b) financial, commercial, scientific or technical information, other than trade secrets, of a third party, the disclosure of which would be likely to cause harm to the commercial or financial interests of that third party; or

(c) information supplied in confidence by a third party the disclosure of which could reasonably be expected –

(i) to put that third party at a disadvantage in contractual or other negotiations; or

(j) to prejudice that third party in commercial competition."

10. This response letter is enclosed as annexure "4".
11. The Municipality's refusal to grant access to the documents requested is the

subject of this appeal.

12. The reasons for this appeal is addressed below.

Grounds for this appeal

13. CER respectfully submits the following grounds of appeal, which are addressed in more detail from paragraph 14 below:

13.1. in refusing to grant the requested information, the Municipality has failed to apply its mind to the request;

13.2. the Municipality has not appropriately interpreted PAIA so as to promote transparency and in favour of disclosure;

13.3. the Municipality has not discharged its onus of proof;

13.4. the documents requested do not fall within the scope and ambit of section 36(1), and can therefore not be refused on these grounds;

13.5. even if it were accepted that some or all of the documents did fall within the scope and ambit of section 36(1) of PAIA (which, expressly, it is not):

13.5.1. the request was made in the public's interest and disclosure of certain of the requested documents may reveal evidence of a substantial contravention of, or failure to comply with, the law. As such, the general "override provision" contained in section 46 of PAIA finds application;

13.5.2. the Municipality should have relied on section 28 of PAIA; and

13.6. the Municipality did not comply with the provisions of section 25(3)(a) of PAIA.

The Municipality has failed to apply its mind to the request

14. The Municipality was obliged to assess the request for information and appropriately determine whether or not the Appellant was entitled to the information. If the decision is taken to refuse access, this should have been done based on one of the grounds of refusal as listed within Chapter 4 of PAIA.

15. The Municipality has failed to appropriately assess the request. This is manifest in the manner in which the response letter was drafted. For example, paragraph 7 of the Municipality's response letter states that, "*the requester may relinquish the right to an internal appeal and by way of an application apply to Court for appropriate relief.*" Section 78 of PAIA provides that a requester may only apply to a court for appropriate relief in terms of section 82 after that requester has exhausted the internal appeal procedure against a decision of the information officer of a public body. It is submitted that this is indicative of the Municipality

failing properly to apply its mind to the request and properly interpreting the provisions of PAIA.

The Municipality has not appropriately interpreted PAIA so as to promote transparency and in favour of disclosure

16. PAIA has its genesis in section 32 of the Constitution of the Republic of South Africa (the Constitution), which provides:

"32 Access to information

(1) Everyone has the right of access to –

- (a) any information held by the state; and*
- (b) any information that is held by another person and that is required for the exercise or protection of any rights.*

(2) National legislation must be enacted to give effect to this right, and may provide reasonable measures to alleviate the administrative and financial burden on the state."

17. Section 32, in turn, had its origin in Constitutional Principle IX in Schedule 4 to the Interim Constitution which required the Constitutional Assembly to produce a Constitution which made provision for "*freedom of information so that there can be open and accountable administration at all levels of government*". Commenting on Constitutional Principle IX, the Constitutional Court emphasised that what the principle required was:

*"not access to information merely for the exercise or protection of a right, but for a wider purpose, namely to ensure that there is open and accountable administration at all levels of government"*¹

18. PAIA is constitutionally-mandated legislation as envisaged in section 32(2) of the Constitution and captures the spirit of the Constitution. The purpose of PAIA are:

- a) to foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information; and
- b) actively [to] promote a society in which the people of South Africa have effective access to information to enable them to more fully exercise and protect all of their rights.²

19. The Constitutional Court has stated that -

"The importance of this right too, in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give

¹ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996 1996 (4) SA 744 (CC) at para 83.*

² Preamble to PAIA.

*effect to these founding values, the public must have access to information held by the State. Indeed one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency must be fostered by providing the public with timely, accessible and accurate information... Apart from this, access to information is fundamental to the realisation of the rights guaranteed in the Bill of Rights.*³

20. The courts have emphasised that PAIA must be interpreted to promote transparency and accountability,⁴ and that grounds of refusal must be interpreted strictly and narrowly so as to promote the overriding purposes of PAIA.⁵
21. According to the Department of Environmental Affairs Chief Directorate: Air Quality Management and Climate Change Atmospheric Emission Licence: Manual for Licensing Authorities,⁶ one of the aims of PAIA is to enhance transparency, accountability and effectiveness of government. PAIA is also applicable to public bodies, which include national, provincial and local government. Public bodies are legally obliged to provide any information requested in terms of PAIA by a member of the public - subject to certain exceptions as provided for in Chapter 4 of PAIA.
22. It is manifest from the response letter to the request (annexure "4"), that the Municipality has not interpreted the provisions of PAIA with a view to promoting transparency and accountability. The sections on which the Municipality has relied to refuse the request have been interpreted by it to have far-reaching application, and, in refusing, the Municipality has not taken into consideration the spirit of promoting the overriding purposes of PAIA.

The Municipality has not discharged its onus of proof

23. In keeping with the purpose of PAIA, a party seeking to justify refusal of access to a record bears the onus of proving that the information requested falls within a ground of refusal under PAIA.⁷ Further, a party relying on section 36 (1) of PAIA must provide a basis to substantiate its reliance and must adduce evidence that harm 'will and might' happen if it provides access to the requested information. The burden lies with the holder of the information and not with the requester.⁸
24. The onus of justification resting on the party refusing disclosure comprises two

³ *Brümmer v Minister for Social Development and Others* [2009] ZACC 21; 2009 (6) SA 323 (CC); 2009 (11) BCLR 1075 (CC).

⁴ *Minister for Provincial and Local Government v Unrecognised Traditional Leaders, Limpopo Province (Sekhukhuneland)* 2005 (2) SA 110 (SCA) at para 18. *MEC for Roads & Public Works, EC v Intertrade Two (Pty) Ltd* 2006 (5) SA 1 (SCA) at para 21; *Clase v Information Officer, SAA (Pty) Ltd* 2007 (5) SA 469 (SCA) at para 1; *President of the Republic of South Africa and Others v M&G Media Ltd* 2011 (2) SA 1 (SCA); *Centre For Social Accountability v Secretary of Parliament and Others* 2011 (5) SA 279 (ECG) at paras 50-59.

⁵ *Avusa Publishing Eastern Cape (Pty) Ltd v Qoboshiyane NO* 2012 (1) SA 158 (ECP) at para 17.

⁶ http://www.airqualitylekgotla.co.za/Downloads/2009/Atmospheric_emission_licence_Manual_for_licensing_authorities.pdf

⁷ Section 81(3) of PAIA.

⁸ *BHP Billiton PLC Inc v DE Lange* (189/2012) [2013] ZASCA 11 (15 March 2013) at para 25.

separate parts:⁹

- 24.1. First, there is a burden of justification. That is, the party must allege sufficient facts which, if proven true, would justify non-disclosure.
 - 24.2. Second, there is a true onus of proof. If any of the facts alleged in justification is disputed by the requester, the dispute of fact must be resolved on a balance of probabilities by ordinary evidentiary processes, with the party refusing disclosure bearing an onus.
25. In order to discharge the onus resting on it, the party seeking to justify non-disclosure must identify every document which is being withheld and the basis upon which the document is being withheld in terms of PAIA.¹⁰
26. Moreover, the party defending non-disclosure must adduce evidence of all the facts upon which it is alleged that the requested record falls within a category of justifiable non-disclosure. The party defending non-disclosure cannot merely offer a bald allegation to this effect. This is so as the relevant facts are often peculiar to this party.¹¹
27. The court has explained the degree of proof that is required as follows:

"It follows that the difference between (b) and (c) of s 36 (1) is to be measured not by degrees of probability. Both involve a result that is probable, objectively considered. The difference, in my view, is to be measured rather by degree of expectation. In (b), that which is likely is something which is indeed expected. This necessarily includes, at least that which would reasonably be expected. By contrast, (c) speaks of that which "could reasonably be expected." The results specified in (c) are therefore consequences (i) that could be expected as probable (ii) if reasonable grounds exist for that expectation."¹²

28. In its response letter, the Municipality did not justify its refusal to access the documents requested. It merely stated that, *"the request for information is hereby refused by the Deputy Information Officer...based on section 36 of the Act..."* It did not discharge its onus of proving that any of the information requested in the application falls within the scope and ambit of section 36(1) of PAIA.

28.1. The Municipality has not offered reasons as to why the records requested fall within the scope and ambit of section 36 (1) or put forward any evidence that would support such reasons. It has failed to establish a causal link between the information requested and its reliance on section 36 (1).

28.2. The Municipality has not indicated the basis upon which it asserts the right to withhold the information. Rather, it has merely stated that, *"the refusal*

⁹ *President of the RSA v M&G Media Ltd* 2011 (2) SA 1 (SCA) at para 14.

¹⁰ *CCII Systems (Pty) Ltd v Fakie NNO (Open Democracy Advice Centre, as Amicus Curiae)* 2003 (2) SA 325 (T).

¹¹ *President of the RSA v M&G Media Ltd* 2011 (2) SA 1 (SCA) at paras 18-19.

¹² *Transnet Ltd & another v SA Metal Machinery Co (Pty) Ltd* 2006 (6) SA 285 (SCA) para 42.

is based on section 36 of the Act..." It is not clear on what basis it is alleged that the information requested contains trade secrets of a third party and/or financial, commercial, scientific or technical information or on what basis the information requested was supplied in confidence by a third party the disclosure of which could reasonably be expected: to put the third party at a disadvantage in contractual or other negotiations or to prejudice that third party in commercial competition.

29. The blunt invocation of section 36(1) of PAIA does not discharge the burden of justification and is clearly impermissible.
30. The Municipality has failed to provide adequate reasons for the refusal. It has merely alleged that the aforementioned grounds of refusal apply, without indicating why this is so.

The documents requested in the application do not fall within the scope and ambit of section 36(1)

31. Section 36 (1) of PAIA has already been set out in paragraph 9 above. It is denied that these grounds are applicable in the circumstances. The content of the information requested does not contain trade secrets (section 36(1)(a)), is not likely to cause harm to the commercial or financial interest of the third parties (section 36(1)(b)), nor was information supplied in confidence with its disclosure reasonably expected to put the third parties at a disadvantage in contractual or other negotiations, or prejudice their commercial competition (section 36(1)(c)). As a result, the Municipality cannot rely on these grounds to refuse the records requested.
32. The Appellant requested the refineries' AELs and most recent compliance reports in terms of their licences. As set out above, the Municipality's response letter is founded on the ground that the documents requested contain information the disclosure of which would be likely to cause harm to commercial or financial interests of the third parties involved.
33. "Trade secrets", as referred to in section 36(1) (a), are *"the kind of information that consists of all confidential matter which is useful for the carrying on of the business and which could therefore be used by a competitor, if disclosed to him, to gain a relative competitive advantage... Whether information constitutes a trade secret is a factual question. For information to be confidential it must be capable of application in the trade or industry, that is, it must be useful and not be public knowledge and property; known only to a restricted number of people or a close circle; and be of economic value to the person seeking to protect it."*¹³
34. The information sought does not meet this test.
35. Specifically focusing on section 36 (1) (b) of PAIA, both categories broadly refer to information that must be of a sort that:

¹³ *Experian South Africa (Pty) Ltd v Haynes and Another* 2013 (1) SA 135 (GSJ)

- 35.1. is confidential, and
- 35.2. incapable of public disclosure without being likely to cause harm to the commercial or financial interests of a third party.
36. The test of being “likely to cause harm” to commercial and financial interests in section 36(1)(b) is a stringent test. It requires the party asserting a right to resist disclosure to produce evidence showing that it is probable that there will be harm to the commercial or financial interests of the third party.¹⁴ The evidentiary enquiry relates to probable harm and not to a risk of possible harm.
37. The harm contemplated by these provisions of PAIA must be harm to the legitimate interests of the third party. By way of illustration, the disclosure of the fact that a refinery is unlawfully polluting the environment may cause it reputational damage that would probably result in harm to its financial or commercial interests, but this cannot be interpreted in terms of PAIA to justify non-disclosure in order to avoid that sort of harm.¹⁵
38. The Courts have taken a fairly robust attitude to claims of justification under this ground of refusal. Indeed, there are no judgments of which we are aware in which a right to refuse disclosure was upheld on this basis.¹⁶
39. An AEL cannot be regarded as being confidential, nor does it contain commercially or financially sensitive information that could harm the third parties’ interests. The contents of the licence should, in any event, have been disclosed as part of the relevant public participation process and can therefore not be considered confidential because it has already been accessed by some members of the public during that process.¹⁷ In this regard, section 38(1)(d) of the National Environmental Management: Air Quality Act (AQA) provides that a copy of the AEL application must be made available to any person who wishes to comment on the application. Without access to this information, the Appellant’s ability to monitor SAPREF and Engen’s compliance with air quality legislation is severely limited.
40. Insofar as section 36(1)(c) is concerned, it is submitted that the AELs and compliance reports were not supplied to the Municipality in confidence. In fact, the AELs were not provided to the Municipality at all. Rather, as the licensing authority, the Municipality itself provided the AEL to the third parties, following their successful application therefor. The AEL governs the manner in which SAPREF and Engen are required to conduct activities they undertake which

¹⁴ *Transnet Ltd v SA Metal Machinery Co (Pty) Ltd* 2006 (6) SA 285 (SCA) at paras 38-39.

¹⁵ By way of analogy, see *Media 24 Ltd v SA Taxi Securitisation (Pty) Ltd (AVUSA Media Ltd as Amici Curiae)* 2011 (5) SA 329 (SCA) at para 16; *Caterham Car Sales & Coachworks Ltd v Birkin Cars (Pty) Ltd* 1998 (3) SA 938 (SCA) at para 31.

¹⁶ In *De Lange and Another v Eskom Holdings Ltd and Others* 2012 (1) SA 280 (GSJ) the Court held that the pricing formula in the Eskom Billiton electricity supply agreement for the smelters operated by Billiton was information the disclosure of which was likely to cause harm to Billiton. However, it nevertheless ordered disclosure of the information on the basis of the override clause (which shall be discussed later).

¹⁷ Section 36(2) of PAIA provides that a record may not be refused if it consists of information already publicly available.

result in atmospheric emissions and which have or may have a significant detrimental effect on the environment. Similarly, as set out above, the AEL application would, in any event, have been available as part of the prescribed public participation process for AEL applications – it could therefore also not have been supplied in confidence. The compliance reports would have been provided by the refineries to the Municipalities as conditions of the AELs and indicates the extent of their compliance with such AELs. These reports could not have been – and were not – supplied in confidence.

41. Even if the documents were supplied in confidence (which is denied), it is submitted that the requested information can in no way put the third parties at a disadvantage in contractual or other negotiations or prejudice them in commercial competition. This section does not apply because AELs and compliance reports do not relate to contractual or other negotiations or commercial competition. In terms of s22 of AQA, applicants cannot conduct listed activities without AELs. Chapter 5 of the AQA prescribes the procedure for applying for an AEL and the factors to be taken into account in determining whether or not to grant it.
42. As indicated above, compliance reports are conditions of the AEL. It is submitted that it is clear that there are no contractual or other negotiations applicable to these processes.
43. It is also denied that disclosure of the records can have any bearing on the parties' commercial competition.
44. The public is entitled to know whether or not activities with a significant detrimental impact on the environment, including human health – which require an AEL – are being lawfully conducted and whether or not remediation and rehabilitation efforts have been put in place. This lack of information on the pollution levels at and around SAPREF and Engen seriously hampers the Appellant's ability to monitor and evaluate the immediate and on-going impacts of the pollution at the refineries and to assess the remedial measures undertaken by the refineries. The Appellant refers to the recent judgement, in the Supreme Court of Appeal, of the *Company Secretary of ArcelorMittal South Africa v Vaal Environmental Justice Alliance* (case no. 69/2014 of 26 November 2014), in which the court confirmed that organisations advocating for environmental justice are entitled to monitor the operations of private companies and its effect on the environment and that "*there is no room for secrecy*" for corporations operating in South Africa.¹⁸ As stated above, the Appellant is an environmental justice organisation and is therefore entitled to access the requested records to exercise its environmental right on behalf of the communities it represents.
45. In the circumstances, the Municipality has not discharged its onus of proving that the information requested falls within the scope and ambit of section 36(1). Nor does the requested information fall within the scope of any of the other grounds for refusal in Chapter 4 of PAIA.

¹⁸ Paragraphs [80] and [82].

Even if it were accepted that some or all of the documents did fall within the scope and ambit of sections 36(1)(a), (b) or (c) of PAIA (which, expressly, it is not):

A. The request was made in the public's interest and disclosure of the requested documents may reveal evidence of a substantial contravention of, or failure to comply with, the law. As such, the "general override provision" contained in section 46 of PAIA finds application

46. Sections 36(1) (a), (b) and (c) are subject to the general override provision contained in section 46 of PAIA.

"46. Mandatory disclosure in public interest

Despite any other provision of this Chapter, the information officer of a public body must grant a request for access to a record of the body contemplated in section 34 (1), 36 (1), 37 (1) (a) or (b), 38 (a) or (b), 39 (1) (a) or (b), 40, 41 (1) (a) or (b), 42 (1) or (3), 43 (1) or (2), 44 (1) or (2) or 45, if—

(a) the disclosure of the record would reveal evidence of—

- (i) a substantial contravention of, or failure to comply with, the law; or*
- (ii) an imminent and serious public safety or environmental risk; and*

(b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question."

47. PAIA defines "public safety or environmental risk" in the following terms:

"Public safety or environmental risk' means harm or risk to the environment or the public (including individuals in their workplace) associated with-

- (a) a product or service which is available to the public;*
- (b) a substance released into the environment, including, but not limited to, the workplace;*
- (c) a substance intended for human or animal consumption;*
- (d) a means of public transport; or*
- (e) an installation or manufacturing process or substance which is used in that installation or process."*

48. The general override provision will accordingly operate when the disclosure of the record would reveal evidence of: a substantial contravention of or failure to comply with the law; or an imminent and serious *public safety or environmental risk*; and the public interest in the disclosure outweighs the harm contemplated in section 36.

49. It is submitted that, in the present case, there is a harm or risk to the environment or the public associated with substances released into the environment and associated with a refinery process. As set out above, activities which require AELs are those which result in atmospheric emissions and may have a significant

detrimental effect.

50. Disclosure of these records would reveal the extent to which SAPREF and Engen are operating in accordance with their AELs and whether these companies are in contravention of the air quality legislation and other environmental legislation by polluting the air and putting the surrounding communities within which they operate at risk. It would thus reveal evidence of any substantial contravention of, or failure to comply with, the law.
51. Moreover, in any event, the public interest override must be construed generously and broadly to bring PAIA within constitutional grounds. In the present case, it would clearly be in the public interest to make such information available, and this public interest would override any alleged basis (including section 36) to refuse access to the records.
52. The application was made to further the Appellant's mandate, which is manifestly in the public's interest. Further, disclosure of the requested documents may reveal evidence of a substantial contravention of, or failure to comply with, the law or an environmental or public safety risk.

B. If there were refusal grounds, the Municipality should have relied on section 28 of PAIA

53. Section 28(1) of PAIA provides:

"28. Severability

if a request for access is made to a record of a public body containing information which may or must be refused in terms of any provision of Chapter 4 of this Part every part of the record which –

a. does not contain; and

b. can reasonably be severed from any part that contains,

Any such information must, despite any other provision of this Act, be disclosed.

(3) if a request for access to –

a. a part of a record is granted; and

b. the other part of the record is refused,

as contemplated in subsection (1), the provisions of section 25(2), apply to paragraph (a) of this section and the provisions of section 25(3) to paragraph (b) of this section."

54. Even if there were a valid ground for the Municipality to refuse access to the documents (which is denied), it is submitted that it should have relied on section 28 of PAIA to sever those portions which could reasonably be severed. It is submitted that it would have determined that it would still be able to grant access to the documents, provided that the allegedly sensitive information were severed from the documents, as is required by section 28 of PAIA.
55. Failure to sever the sensitive information as is required by PAIA, is indicative of a decision taken without adequate cognisance of the facts at hand. The response

from the Municipality lacks any indication that severing portions of the records was even considered. Therefore the Municipality has, also in this respect, failed to adequately interpret PAIA to promote transparency and in favour of disclosure.

The Municipality did not comply with the provisions of section 25 (3)(a) of PAIA

56. Section 25(3) (a) and (b) of PAIA states as follows:

“25. Decision on request and notice thereof –

- (3) If the request for access is refused, the notice in terms of subsection (1) (b) must—*
- (a) state adequate reasons for the refusal, including the provisions of this Act relied upon;”*

57. The Municipality has not tendered adequate reasons for refusing the applications and, as set out above, the Appellant is unable to deduce how and why the Municipality relies on section 36. It is insufficient to simply state the provision of PAIA relied upon, as it has done.

58. In the circumstances, the Municipality has failed to comply with the requirements of section 25(3).

Statutory compliance

59. CER hereby submits its appeal of the Municipality's response letter in accordance with the provisions of section 75 of PAIA:

- 59.1. the appeal is submitted within 60 days of the refusal;
- 59.2. CER is delivering this appeal to the Information Officer of the Municipality at his fax and electronic mail address; and
- 59.3. the subject of the appeal and the reasons for the appeal are identified.

60. As per CER's obligations under section 75(1)(b) of PAIA, the internal appeal is duly submitted to the Information Officer.

Relief sought

61. It is submitted that access to the information should not have been refused by the Municipality.

62. The decision to refuse access to the information does not fall within the grounds for refusal set out in PAIA. In terms of section 11 of PAIA, the Appellant has the right to the requested information because it complied with all the procedural requirements in PAIA relating to the request for access, and there is no ground to refuse the information.

63. CER calls on the responsible authority to uphold this appeal and grant access to the information requested.

SIGNED AT CAPE TOWN THIS 9th DAY OF DECEMBER 2014

A handwritten signature in black ink, appearing to be 'R. G. van der Merwe', written in a cursive style.

SIGNATURE OF APPELLANT

"0025"



OFFICE OF THE SPEAKER

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Our reference: PAIA/115824/JED/mag/2/4/1
Telephone: 031 3112366
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19 January 2015

Centre for Environmental Rights (on behalf of)
South Durban Community Environmental Alliance
Attention: Li-Fen Chien
eMail: lchien@cer.org.za

Dear Madam,

PROMOTION OF ACCESS TO INFORMATION ACT APPLICATION –SAPREF AND ENGEN – APPA - INTERNAL APPEAL

Your internal appeal regarding the above matter refers.

RULING BY THE APPEAL AUTHORITY IN RESPECT OF AN INTERNAL APPEAL BY THE CENTRE FOR ENVIRONMENTAL RIGHTS AGAINST THE REFUSAL TO GRANT INFORMATION REQUESTED PURSUANT TO THE PROMOTION OF ACCESS TO INFORMATION ACT, ACT NO.: 2 OF 2000 9 ALSO KNOWN AS PAIA

1. The Appeal Authority has considered an appeal by the Centre for Environmental Rights (CER) on behalf of the South Durban Community Environmental Alliance, hereinafter referred to as the appellant, against the decision to refuse to grant information requested pursuant to an application made pursuant to the Promotion of Access to Information Act, 2 of 2000 (PAIA) under a covering letter dated 9th December 2014.
2. Under paragraph 13 of the Notice of Internal Appeal the appellant has advanced six grounds of appeal as set out hereunder:

13.1

In refusing to grant the requested information Ethekwini Municipality has failed to apply its mind to the request;

2.

Ethekwini has not appropriately interpreted PAIA so as to promote transparency and in favour of disclosure;

3.

EThekwini Municipality has not discharged its onus of proof,

4.

The documents requested do not fall within the scope and ambit of section 36(1) and can therefore not be refused on these grounds;

5.

Even if it were accepted that some or all of the documents did fall within the scope and ambit of Section 36(1) of PAIA:

i.

the request was made in the public's interest and disclosure of certain requested documents may reveal evidence of a substantial contravention of, or failure to comply with the law. As such, the general "override position contained in section 46 of PAIA finds application";

ii.

EThekwini Municipality should have relied on section 28 of PAIA; and

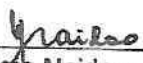
6.

EThekwini Municipality did not comply with the provision of section 25 (3) (a) of PAIA.

3. Having complied with the relevant provisions of the Act (PAIA) regarding the administrative handling of this matter and with specific reference to the provision of section 76 of the Act, I will proceed to deal with the merits of the appeal.
4. For purpose of this ruling it is not necessary to traverse each and every ground of appeal individually. I have however applied my mind to all six grounds of appeal.
5. Having evaluated all the submissions that form part of the record in this matter, these being the preceding application by the requester, the submissions made by both third parties in relation to the initial request, the municipality's findings as well as subsequent submissions by both Engine and SAPREF in terms of section 76(5), I find as follows:

- 5.1 I am satisfied that the relevant officials involved in the handling of this application have duly applied their minds to the request and have appropriately interpreted not only the PAIA but also the general spirit of the Act.
- 5.2 The information requested by the requester contains information relating to confidential operations and technology of the third parties; this information is commercially sensitive. Its disclosure may cause harm and prejudice to the operations of the two third parties.
- 5.3 The requested information fall within the ambit of section 36(1)(a) and (b) of PAIA and therefore the record thereof cannot be disclosed.
6. I am mindful of the overriding provisions of section 46 of PAIA. I have not been advised in what respects the disclosure of the record would reveal substantial contravention of the law or an imminent and serious threat to public safety or environmental risk. The submissions by the requester do not substantiate enough the public interest element they seek to rely on in asking for the override powers of section 46 to be invoked. I accordingly rule against invoking the said provision.
7. The appellant is hereby notified that it may lodge an application with a court against this ruling within 60 days.

Yours faithfully



Logie Naidoo

Appeal Authority
eThekwiní Municipality