

**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG**

**CASE NO:**

33696/14

In the application of:

**THE SOUTH AFRICAN HISTORY ARCHIVE  
TRUST**

Applicant

And

**THE MINISTER OF JUSTICE AND  
CORRECTIONAL SERVICES**



First Respondent

**THE DEPUTY INFORMATION OFFICER:  
DEPARTMENT OF JUSTICE AND  
CORRECTIONAL SERVICES**

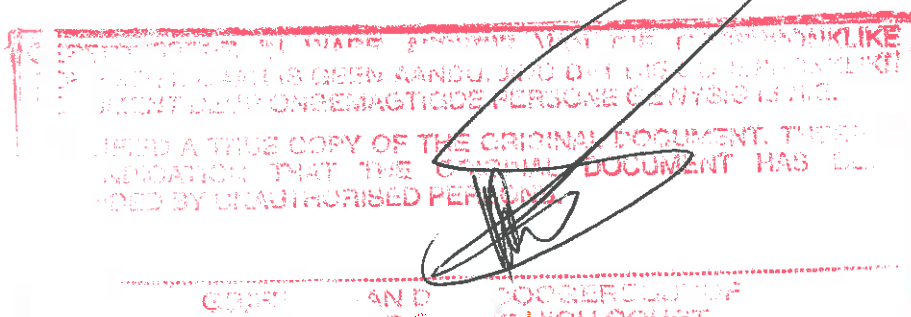
Second Respondent

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**NOTICE OF MOTION**

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Take notice that the applicants intend applying to this Court on a date and time to be determined with the Registrar, for an order in the following terms:



- 1 Declaring that the first respondent's decision to provide access to the information requested by the applicant in terms of the Promotion of Access to Information Act 2 of 2000 ("PAIA") and described in the Founding Affidavit ("the records"), subject to the redaction of all personal details of individuals named in the records, is unlawful and in conflict with the provisions of PAIA.
- 2 Directing the respondents to provide the requested records to the Applicants, within 15 (fifteen) days of the granting of this order.
- 3 Alternatively to paragraphs 1 and 2 above:
  - 3.1 Declaring that the respondents' refusal of access to the records is unlawful and in conflict with the provisions of PAIA;
  - 3.2 Reviewing and setting aside the refusal by the first and second respondents of the applicant's request; and
  - 3.3 Directing the first and second respondents to supply the applicant with a copy of the requested information within 15 (fifteen) days of the granting of this order.
- 4 Directing the respondents to pay the costs of this application in the event that they oppose the relief sought.
- 5 Further and/or alternative relief.

**TAKE NOTICE FURTHER** that the accompanying Affidavits of **Catherine Molra Kennedy, Tricia Erasmus, Archbishop Desmond Mpilo Tutu, Dumisa Ntsebeza, Maria Macdiarmid Burton, Bongani Blessing Finca, Dr Wendy Orr, Lavinia Crawford-Browne, Dr Alex Boraine, Glenda Wildshut, Mahoney Fazel Randera, and Richard Michael Lyster** and the annexures thereto, will be used in support of this application.

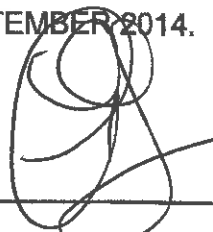
**BE PLEASED TO TAKE FURTHER NOTICE** that the applicant has appointed , **CLIFFE DEKKER HOFMEYR INC** of the address below as the address at which it will accept notice and service of all further process in these proceedings.

**BE PLEASED TO TAKE FUTHER NOTICE** that:

- (a) Notice of intention to oppose this application must be given within 15 (fifteen) days after receipt hereof and must contain an address within 8 (eight) kilometres of the Court to which this application is brought, where notice and service of documents will be accepted.
- (b) Answering affidavits, if any, must be filed within 15 (fifteen) days after service of the notice of intention to oppose this application.
- (c) In default of your complying with rule 3(5) of the Rules of Procedure for Application to Court in terms of PAIA, the Applicant may request the clerk of the court or the registrar as the case may be, to place this application before the Court for an order in terms of section 82(b) of PAIA.
- (d) In default of your delivering a notice of intention to oppose, the matter will without further notice, be placed on the roll for hearing after the expiry of the period mentioned in paragraph (a) above, on a date fixed by the clerk of the court or the registrar as the case may be, in terms of

rule 3(6) of the Rules of Procedure for Application to Court in terms of PAIA.

DATED at SANDTON on this the 11<sup>th</sup> day of SEPTEMBER 2014.



CLIFFE DEKKER HOFMEYR INC

Applicant's Attorneys

1 Protea Place

Sandown

Sandton, 2196

Tel: (011) 562 1358

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Email: Tricia.Erasmus@dlacdh.com

Ref: T Erasmus / J Cassette /01954103

TO:

THE REGISTRAR OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

BY HAND

AND TO:

THE MINISTER OF JUSTICE AND

CORRECTIONAL SERVICES

BY SHERIFF

First Respondent

SALU Building, 28<sup>th</sup> Floor,

316 Thabo Sechume Street

PRETORIA

c/o The Office of the State Attorney



12<sup>th</sup> Floor, North State Building  
95 Market Street  
Johannesburg

**AND TO:**

**THE DEPUTY INFORMATION OFFICER:  
DEPARTMENT OF JUSTICE AND CORRECTIONAL  
SERVICES**

**BY SHERIFF**

Second Respondent  
Momentum Centre  
329 Pretorius Street  
PRETORIA

**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG**

**Innocentia Reholegile Moele**  
155 - 5th Street  
Sandown, Sandton, 2196

**CASE NO:**

In the application of:

Commissioner of Oaths  
Ex-Officio / Practising Attorney R.S.A.

  
Certified True Copy

**THE SOUTH AFRICAN HISTORY ARCHIVE TRUST**

Applicant

And

**THE MINISTER OF JUSTICE AND  
CORRECTIONAL SERVICES**

First Respondent

**THE DEPUTY INFORMATION OFFICER:  
DEPARTMENT OF JUSTICE AND  
CORRECTIONAL SERVICES**

Second Respondent

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**FOUNDING AFFIDAVIT**

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I, the undersigned,

**CATHERINE MOIRA KENNEDY**

do hereby make oath and state the following:

- 1 I am an adult female director of the South African History Archive Trust, situated at the Women's Jail, Constitution Hill, 1 Kotze Street, Braamfontein, Johannesburg.
- 2 The facts herein contained are within my personal knowledge, unless stated otherwise or indicated by the context, and are to the best of my knowledge and belief both true and correct. Where I make legal submissions, I do so on the



basis of advice of the applicants' legal representatives.

  
Certified True Copy

- 3 I have personal knowledge of this matter and I am duly authorised to bring this application on behalf of the applicant. In this regard, I attach a copy of a resolution of the Trustees of the South African History Archive Trust marked "CMK1".

#### THE PARTIES

- 4 The applicant is **THE SOUTH AFRICAN HISTORY ARCHIVE TRUST** ("**SAHA**"), a non-governmental organisation constituted as a trust in terms of the laws of South Africa. SAHA requested the information, which forms the subject matter of this application, from the first and second respondents.
- 5 The first respondent is the **MINISTER OF JUSTICE AND CORRECTIONAL SERVICES**, formerly known as the Minister of Justice and Constitutional Development, in the national government ("**the Minister**"), who is cited in his official capacity as the Minister responsible for the Department of Justice and Correctional Services ("**the Department**"), with offices situated at SALU Building, 28<sup>th</sup> Floor, 316 Thabo Sehume Street, (corner of Thabo Sehume and Francis Baard Street) Pretoria. The first respondent is cited care of the Office of the State Attorney, Johannesburg, whose address is 12<sup>th</sup> Floor, North State Building, 95 Market Street (corner of Kruis Street) Johannesburg. The first respondent is a member of the National Executive and is responsible for the records that were subject to the applicant's request for information under the Promotion of Access to Information Act 2 of 2000 ("**PAIA**").



- 6 The second respondent is **THE DEPUTY INFORMATION OFFICER OF THE DEPARTMENT OF JUSTICE AND CORRECTIONAL SERVICES**, with offices situated at the Momentum Centre, 329 Pretorius Street Pretoria. The second respondent is cited in her official capacity, as the officer who decides whether requests for access to information, directed to the Department in terms of PAIA, should be granted or refused.

#### **THE NATURE OF THIS APPLICATION AND RELIEF SOUGHT**

- 7 This application is brought in terms of section 78(2) read with section 82 of PAIA, in response to the decision by the first respondent:

7.1 initially to refuse the request for information and then subsequently to, grant the applicant's request for access to information subject to the condition that all personal details of individuals mentioned in the records, be redacted.

- 8 The request, made on 24 July 2013 sought access to the following:

*"Transcripts of all hearings conducted by the Truth and Reconciliation Commission under section 29 of the Promotion of National Unity and Reconciliation Act, 2003."*

- 9 In relation to the part of the form which asks for further particulars of the records requested, SAHA responded in Annexure A to the request. In this document, SAHA indicated that it had been advised by the Commissioners of the Truth and Reconciliation Commission ("TRC") that the Commission had decided at a meeting in March 2003 to allow the public access to the material obtained at hearings conducted under section 29 of the Promotion of National

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Unity and Reconciliation Act No 34 of 1995 ("TRC Act"), subject to certain conditions. Affidavits deposed to by several Commissioners, and one TRC staff member present at the meeting, were attached to support this position. Annexure A went on to indicate the types of records which fall within the boundaries of the request, which were already publically available. It also refers to other examples of records which would fall within the purview of the request.

- 10 A copy of the request is attached hereto marked "CMK2."
- 11 On 6 August 2013, the respondents refused access to the records requested. Therefore, on 28 September 2013, SAHA lodged an internal appeal provided for in terms of section 74 of PAIA. The deadline for this internal appeal was 29 October 2013. To date, the second respondent has failed to respond to the applicant's internal appeal and accordingly, the appeal is deemed to have been refused in terms of section 77(7) of PAIA.
- 12 The applicant attempted to engage constructively with the respondents on several occasions as detailed below, with little success. However, eventually, on 8 April 2014, the Minister wrote to the applicants indicating that he was overturning the second respondent's initial decision and would grant access to the records, subject to the condition that personal details of individuals mentioned in the records be redacted.
- 13 The applicant wrote to the Minister indicating that it did not consider that the Minister was entitled under PAIA to redact such details. To date no response



to that letter has been received and no records have been provided to SAHA. The applicant is therefore forced to bring these proceedings to obtain access to the records requested.

- 14 The applicant seeks an order from this Court:
- 15 Declaring that the Minister's decision to grant access to the records requested, subject to the condition that all personal details of the individuals referred to therein be redacted, is unlawful and in conflict with PAIA and directing the respondents to provide access to the documents.
- 16 Alternatively, in the event that the Minister in fact stands by his decision to refuse access to the records concerned:
  - 16.1 Declaring that the decision to refuse access to the records concerned, is unlawful and in conflict with PAIA;
  - 16.2 Reviewing and setting aside the refusal by the first and second respondents of the applicants' request; and
  - 16.3 Directing the first and second respondents to supply the applicant with a copy of the records requested in the applicant's request for information dated 24 July 2013.
- 17 The applicant is forced to frame its relief in the above manner because of the Minister's lack of response to the applicant's concerns about the instruction to redact information before access is granted.

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**Jurisdiction**

18 I am advised and submit that this Court has jurisdiction to hear this application by virtue of the definition of 'court' in section 1 of PAIA which provides that 'court' includes the High Court within whose area of jurisdiction the requester is domiciled or ordinarily resident.

19 Moreover, this Court has jurisdiction to hear this matter by virtue of section 82(2) of PAIA which provides that the court hearing an application of the present sort may grant any order that is just and equitable including orders:

- "(a) confirming, amending or setting aside the decision which is the subject of the application concerned;*
- (b) requiring from the information officer or relevant authority of a public body or the head of a private body to take such action or to refrain from taking such action as the court considers necessary within period mentioned in the order;*
- (c) granting an interdict, interim or specific relief, a declaratory order or compensation; or*
- (d) as to costs."*

20 Each of the respondents is a "*public body*" within the meaning of that term as contemplated by section 1 of PAIA. The applicants have exhausted the relevant internal appeal procedures in PAIA. Section 77(7) of PAIA provides that where the relevant authority fails to give notice to the requester of its decision in relation to an internal appeal, such authority is regarded as having dismissed the internal appeal.

21 Accordingly, the applicant is entitled to bring this application in terms of section 78(2) read with section 82 of PAIA.



22 In this affidavit, I shall address the following issues in turn:

- 22.1 An overview of the objectives and function of SAHA;
- 22.2 The importance of the right of access to information and the role of PAIA in giving effect to the constitutional right;
- 22.3 The factual background to this application;
- 22.4 The TRC Commissioners' affidavits;
- 22.5 The refusal by the respondents to grant access to the records concerned and why there is no basis in law for such refusal;
- 22.6 The overturning of the decision to refuse access and the instruction to redact personal details; and
- 22.7 That public interest requires that access be granted.

#### THE OBJECTIVES AND FUNCTION OF SAHA

- 23 SAHA's founding objectives are to preserve, collect and catalogue materials of historic, contemporary, political, social, economic and cultural significance, and to encourage the accessibility of such materials to the public as a whole. I attach hereto a copy of SAHA's trust deed marked "CMK3".
- 24 SAHA is an independent NGO dedicated to documenting and providing access to archival holdings that relate to past and contemporary struggles for justice in South Africa. In the late 1980's SAHA was established by anti-apartheid activists and its founding mission was to promote the recapturing of South

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Africa's lost and neglected history and to record history in the making. Further, SAHA aims to document, support and promote awareness of past and contemporary struggles for justice through archival practices and outreach, and the utilisation of access to information laws.

- 25 SAHA launched its Freedom of Information Programme in 2002 which is dedicated to using PAIA as a method to test and extend the boundaries of freedom of information in South Africa. This programme further seeks to create awareness of, compliance with and use of PAIA.
- 26 Since 2001, SAHA has made over 1800 requests for information from various government departments and it has brought numerous applications in the High Court arising out of refusals of such requests. SAHA has further intervened as *amicus curiae* in a number of PAIA applications.
- 27 SAHA has proceeded to develop a comprehensive capacity training programme for NGOs and community based organisations on using PAIA. It has further developed resource kits, workshop guides, PAIA case study DVDs, and a dedicated online management system for the submissions and monitoring of PAIA requests made by the general public. SAHA has also trained hundreds of activists, students, community members, NGO members, attorneys and paralegals in the use of PAIA.
- 28 The request for access to the records concerned was made in this context.



## THE IMPORTANCE OF THE RIGHT OF ACCESS TO INFORMATION AND THE ROLE OF PAIA IN GIVING EFFECT TO THE CONSTITUTIONAL RIGHT

29 Section 32 of the Constitution provides for a right of access to information held by both public and private bodies. It states that:

- "(1) Everyone has the right to have access to*
- a) any information held by the State; and*
  - b) any information that is held by another person that is required for the exercise or protection of any right.*
- (2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the State."*

30 PAIA is the national legislation envisaged in section 32(2) of the Constitution. It was enacted in order to give effect to access to information and to promote the values of openness, transparency, accountability and good governance – principles foundational to the Constitution.

31 The preamble of PAIA provides that the system of government in South Africa before 27 April 1994 *"resulted in a secretive and unresponsive culture in public and private bodies which often led to an abuse of power and human rights violations"*. The preamble continues that PAIA is enacted to *"foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information"*.

32 Section 9 of PAIA describes as its object, *inter alia*, the promotion of:

- "... transparency, accountability and effective governance of all public and private bodies by, including, but not limited to, empowering and educating everyone*
- i) to understand their rights in terms of this Act in order to exercise their rights in relation to public and private bodies;*

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- ii) *to understand the functions and operation of public bodies; and*
- iii) *to effectively scrutinise... decision-making by public bodies that affects their rights."*

33 I am advised and submit that:

33.1 In terms of PAIA, public bodies are now under a duty to provide access to a requested record, or part of it, unless refusal of the request is permitted or required by one or more of the grounds listed in PAIA; and

33.2 Every request for access to information in terms of PAIA is an invocation of the section 32 right in the Constitution and entitles the requestor to access to the requested record, or part thereof, if that requestor complies with all the procedural and statutory requirements set out in the statute, unless there is a valid ground of refusal which the private or public body may rely on.

33.3 The Constitutional Court has repeatedly made clear that the right of access to information is fundamental to the realisation of the rights guaranteed in the Bill of Rights.

***The Conduct of the Department in relation to PAIA requests***

34 It is in this context that the response received from the Department must be evaluated. I am advised and submit that the failure by the Department to engage meaningfully or at all with the provisions of PAIA indicate a failure to comply with the obligations imposed on public bodies by the statute.



- 35 This is particularly so in the context of the specific information requested in this instance. The records of the TRC, including the transcripts of hearings, are an important part of South Africa's transition to democracy. A central purpose of the TRC process was to investigate the gross violations of human rights under apartheid and to make the findings known in an effort to prevent a recurrence of such atrocities in future.
- 36 Moreover, an important part of the reconciliation that took place in South Africa was enabled through the public nature of the process. In line with this, the TRC Commissioners took a decision in March 2003, that an official policy be adopted to allow all the section 29 TRC hearing records to be open to the public, subject to the usual privacy conditions, to be determined on a case by case basis. The conditions contemplated by the TRC Commissioners included a consideration of factors such as whether sensitive information would be released or whether there would be implications for the persons named in the transcripts. The affidavit of Ms Yasmin Sooka, which was attached to the request and is attached hereto as "CMK4" makes this clear and in particular, emphasises that each request would be considered on its own merits, while considering the rights of the public to have access to the information concerned.
- 37 Of importance, Ms Sooka also confirms that the TRC did not enter into confidentiality agreements with any of those who were subpoenaed and/or appeared voluntarily before the TRC in section 29 in-camera hearings.

- 38 The respondents' decision to issue a blanket refusal of access to such records, is, in light of this decision of the TRC, entirely unsustainable.
- 39 It also reflects a pattern of conduct by the Department to fail to give effect to their obligations under PAIA. I say this based on the following:
- 39.1 SAHA submitted 50 PAIA requests to the Department, specifically in relation to the TRC records, during the period of 2001-2014;
- 39.2 In over 90% of the requests submitted, the Department failed to respond within the statutory time frames;
- 39.3 Records were released (either in full or in part) in response to less than 20% of requests initially submitted, although in some instances there were documents missing from the released records, which, despite SAHA having followed up about these gaps, have not subsequently been provided;
- 39.4 Only 5 refusals have been overturned at the internal appeal stage; and
- 39.5 SAHA has secured favourable out-of-court settlements in relation to the two court challenges it has lodged against the Department, in respect of 5 specific requests.
- 40 What is clear from this is that the Department has repeatedly failed to engage meaningful or at all with its obligations under PAIA and under section 7 and 32 of the Constitution.

  
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## BACKGROUND AND HISTORY OF MATTER

- 41 As described above, SAHA submitted a PAIA request to the Department dated 24 July 2013, requesting transcripts of all hearings conducted by the TRC under section 29 of the TRC Act. A copy of the request is attached as CMK2, referred to above ("**the request**").
- 42 All of the transcripts requested in the request were created from evidence furnished at the TRC hearings. However in March 2003, the TRC Commissioners made a determination regarding section 29 hearing transcripts which accords with section 29(5) of the TRC Act.
- 43 Furthermore, the request had several affidavits attached thereto. The affidavits were deposed to by several former TRC Commissioners and one affidavit was deposed to by the assistant of the Chairman of the TRC, Archbishop Desmond Tutu.
- 44 The above affidavits confirmed that a decision was taken during the course of March 2003 which allowed the general public access to all material obtained during the course of the TRC hearings subject to general privacy restrictions. The content of the abovementioned affidavits will be discussed in further detail below.
- 45 However on 6 August 2013, SAHA's PAIA request was refused by the Deputy Information Officer, Ms M M Raswiswi on the following grounds:
- 45.1 That the requested documents contained personal information which

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could implicate various parties in alleged unlawful activities and that the disclosure could be defamatory and infringe the individuals dignity;

45.2 It would constitute an unreasonable disclosure of highly personal information in terms of section 34(1) of PAIA and the disclosure could endanger the lives or physical safety of the implicated individuals;

45.3 The disclosure could facilitate a contravention of the law to the extent that the reputations and dignity of the individual names may be impaired;

45.4 The documents contain information that that was supplied in strict confidence; and

45.5 The nature of the Department's work and the need to obtain information from various sources could be jeopardised by the disclosure of the requested information which was provided in confidence and the request was therefore further refused in terms of section 37(1) (b) of PAIA. I attach hereto a copy of the refusal letter marked Annexure "CMK 5".

46 I deal with the deficiencies of this refusal below.

47 On 28 September 2013, SAHA proceeded to lodge an internal appeal in terms of section 75 of PAIA. The deadline for the internal appeal was 29 October 2013, however SAHA has to date failed to receive a response to its internal appeal and the appeal was therefore deemed to be dismissed in terms of section 77(7) of PAIA. I attach hereto a copy of the internal appeal marked Annexure "CMK6".

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- 48 SAHA's legal representatives proceeded to correspond with the Department on 19 November 2013 indicating that they requested a favourable response to the aforementioned internal appeal within 14 calendar days, failing which they held instructions to pursue the matter through appropriate legal means. I attach hereto a copy of the said correspondence marked Annexure **"CMK7"**.
- 49 The Department failed to respond adequately to the aforementioned correspondence and on 25 November 2013 SAHA merely received an email noting the content of the correspondence and promising further communication even though no such communication has been received to date. I attach hereto a copy of the said email marked Annexure **"CMK 8"**.
- 50 On 4 December 2013, SAHA's legal representatives forwarded final correspondence to the Department, as a courtesy, informing it that the firm holds instructions to institute legal action. I attach hereto a copy of the correspondence marked Annexure **"CMK 9"**.
- 51 SAHA had to date only received an automated response via email to the aforementioned correspondence. I attach hereto a copy of the said response marked Annexure **"CMK 10"**.
- 52 On 8 April 2014, SAHA received a letter from the Minister, advising that after careful consideration of SAHA's grounds of appeal, he had decided to overturn the second respondent's decision to refuse to provide the requested information. A copy of the letter is attached marked Annexure **"CMK11"**.

*[Handwritten signature]*



53 However the following proviso was attached to the provision of the information:

*"As stated in your appeal, the information you requested regarding transcripts of all hearings conducted by the Truth and Reconciliation Commission (TRC) under Section 29 of the Promotion of National Unity and Reconciliation Act 34 of 1995, as amended,. I have therefore instructed the Department to severe (sic) from the records to be made available to you, individuals personal details. This process may take a while as the TRC in camera hearings are quite a voluminous document."*

54 SAHA responded to the Minister on 2 May 2014 setting out a brief history of the matter. In addition it sought to make the following submissions to the Minister:

54.1 That the blanket redaction procedure in respect of the transcripts was unacceptable and that there was no need to remove personal information in all instances as much of it was already in the public domain;

54.2 That the second respondent is obliged to send out third party notifications in relation to issues not covered in the amnesty hearings and prosecutions. As most of the information had already been made public, the second respondent was obliged to consider each transcript in relation to other TRC documentation;

54.3 The second respondent is obliged under section 46 of PAIA to consider the contents of each transcript and to decide whether the disclosure of the transcript would be in the public interest. This was especially important when section 46 was read in conjunction with the provisions of the TRC Act; and

54.4 Requiring clear time-lines for the provision of the information to SAHA.

55 I attach a copy of this letter marked Annexure "CMK12" without its Annexures

  
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so as to not overburden these papers. The Annexures will however be made available upon request at the hearing.

- 56 Thereafter as no response was forthcoming, SAHA addressed a further letter to the Minister on 3 June 2014, placing him on terms and advising that court action would follow.
- 57 At the date of this application, the information first requested from the Department as far back as 24 July 2013 remains outstanding and no response from the Minister to SAHA's concerns about redaction has been received.

#### TRC COMMISSIONERS' AFFIDAVITS

- 58 Ms Yasmin Sooka, a previous commissioner of the TRC and the current Executive Director of the Foundation for Human Rights in South Africa deposed to an affidavit, in favour of the section 29 hearing transcripts being made available to the public, on 30 April 2012. As indicated above, a copy of the said affidavit is attached hereto as "CMK 4".
- 59 The affidavit confirms that during a final meeting in March 2003, Ms Sooka made a verbal recommendation to all the Commissioners present that an official policy be adopted allowing the section 29 TRC hearing records to be open to the public subject to the usual privacy conditions. This recommendation met the broad approval of all the other Commissioners present at the meeting. Unfortunately the minutes to the meeting were lost when the laptop of Ms Crawford-Browne, assistant to the Archbishop Tutu, was

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stolen.

60 The TRC and its Commissioners thus held a principled position of allowing access to section 29 TRC hearing transcripts even though they supported conditions which would limit access in respect of certain situations. The position was put forward which called for where those in charge of the section 29 hearing transcripts would apply their mind in each instance and that a "blanket refusal" approach should be cautioned.

61 Commissioners Dumisa Ntsebeza, Maria Macdiarmid Burton, Bongani Blessing Finca, Dr Wendy Orr, Dr Alex Boraine, Glenda Wildshut, Mahoney Fazel Randera, Richard Michael Lyster and the Archbishop Desmond Mpilo Tutu, along with the Archbishop's personal assistant, Lavinia Crawford-Browne, all deposed to affidavits confirming the content of the aforementioned affidavit of Ms Sooka. I attach hereto copies of the said confirmatory affidavits marked Annexure "CMK 13 – CMK 22".

#### THE RESPONDENTS' REFUSAL OF THE REQUEST IS WITHOUT MERIT

62 The Respondents grounds for refusing the request for records required in the PAIA request ( "the PAIA decision"), were as follows:

62.1 *"disclosure would constitute an unreasonable, disclosure of highly personal information in terms of section 34(1) of PAIA"*

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62.2 *"disclosure would facilitate a contravention of the law to the extent that the reputations and dignity of the individual names may be impaired thereby as contemplated in section 39(i)(b)(dd) of PAIA.*

62.3 *"information was supplied after confidentiality was guaranteed", and so disclosure would be a breach of the Department's undertaking,*

62.4 *the nature of the Department's work and the need to obtain information from various sources to carry out the Department's function in the public interest "may be jeopardised by the disclosure of information supplied in confidence." leading to a refusal under section 37(1)(b) of PAIA.*


63 I am advised and submit that this response is flawed for the reasons which follow:

64 First, the PAIA decision summarises the PAIA request in a manner that indicates that the scope of the PAIA request has been misconstrued by the second respondent and that the PAIA request was not fully considered by the decision - maker.

64.1 Specifically, the refusal of the request states that:

*"Your request to have access to documents held by the Department of Justice and Constitutional Development specified by yourself as:*

*'the transcript of the special investigation and hearings (in camera) into the Helderberg Flight, a transcript of evidence given by Joe Verster, a transcript of evidence given by Andrew Masondo, a transcript of evidence given by Hertzog Lerm, a transcript of evidence given by Joe Mamasela, George Meiring, page 202, Joe Verster , pages 134 to 141 and 609, Martin Dolincheck, pages 100, 160 to 162 and 223, Phillip Powel, pages 359 and 363, Walter Felgate, pages 343, 354, 460, 638, 641, 641 and 722, Wouter Basson, Christo Nel, Craig*



*Williamson, Hendrik Mostert, Adriaan van Niekerk, Johannes van der Merwe, Jacobus Conradi, Wilhelm Bellingan, Charles Zeelie, Johan le Roux, Willem Schoon, Nicolaas van Rensburg and James Taylor' was unsuccessful(sic).*

*"Having carefully considered your application and having applied my mind thereto. I regret to inform you that I am unable to provide the documents requested for the reasons set out below in terms of the transcripts of section 29 hearings of the abovementioned individuals, the requested documents contains personal information which implicates various parties in alleged unlawful activities."*

64.2 At part D of its PAIA request, the applicant set out particulars of the record which were provided in annexure A to the PAIA request. The annexure to the PAIA request stated what were merely to be "examples" of information that could be disclosed. The PAIA request by no means confined the request to those examples only.

64.3 The specific cases cited were examples of cases where:

64.3.1 Transcripts of some of the hearings have been made public and are published on the TRC website (currently controlled by the first respondent);

64.3.2 Excerpts of evidence given during investigations were quoted in the public and published report of the TRC ; and

64.3.3 Excerpts of evidence have been furnished at amnesty hearings in other courts, in order to assist the first respondent to consider whether those transcripts could be made public under section 29(5) of the TRC Act.

64.4 What is evident is that the second respondent has failed to apply her

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mind to the full scope of the request, and has limited the PAIA decision to the specific examples cited in the annexure to the PAIA request.

64.5 Accordingly, the request for all transcripts (i.e. all those beyond a request for transcripts of persons named as examples in the annexure to the PAIA request) has not been determined in accordance with section 25(1) of PAIA which requires a consideration of PAIA in relation to the full PAIA request. It is clear that this has not occurred, and the PAIA decision is therefore clearly incorrect and without merit.

65 Second, at no stage in the PAIA decision has there been any attempt to consider if any part of a transcript can be released, which is required by section 28 of PAIA. In summary, section 28 of PAIA provides that information must be disclosed where information that may or must be refused can reasonably be severed from any part that does not contain information that may or must be refused.

66 Third, the second respondent has indicated a concern that disclosure of the documents :

*"could be highly detrimental to the individuals involved and could reasonably be expected to endanger their lives or physical safety."*

While no reference is made to PAIA in making this assertion, as required by section 25 of PAIA, it is assumed that this is a reference to section 38 of PAIA as a ground for refusal.

66.1 It appears apparent that this ground for refusal has been determined at a

  
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global level, without considering the facts and circumstances of each individual's evidence in transcript, and without considering if part of a transcript could well be made available, as required by section 28 of PAIA.

66.2 The reasoning in the PAIA decision is very unlikely to be true for all the evidence of all the individuals that appeared before the TRC, where evidence is recorded in the transcripts requested by the PAIA request. Accordingly, what the applicant requires is a more considered approach, made on a case-by-case analysis, before this ground is proffered as a reason for refusal to release the information requested.

67 Fourth, the second respondent has not considered as a relevant factor, section 34(2)(a) of PAIA which states that a record containing personal information about a third party may not be refused insofar as it consists of information about an individual who has consented in writing in terms of section 48 of PAIA (or otherwise) to its disclosure to the applicant.

67.1 Section 47(1) of PAIA states that an information officer who is considering a record under section 34(1) of PAIA must take all reasonable steps to inform a third party to whom the record relates of the PAIA request. There is no evidence that this has been done.

67.2 If the appropriate notices to third parties had been sent, then there is a reasonable likelihood that some, or all, of the transcripts might have been released by consent under section 34(2)(a) of PAIA. Not following this process is a clear and obvious breach of the requirements of PAIA. It is



also a further ground to support the applicant's submission that the respondents' refusal to access to the requested information, is without merit.

68 Fifth, the second respondent has not considered as a relevant factor, section 34(2)(b) of PAIA, which, in summary states that a record containing personal information about a third party, may not be refused insofar as it consists of information that belongs to a class information, in circumstances where the individual was informed, before it was given, that the information might be available to the public.

68.1 What is thus required in considering disclosure on such a basis, is an analysis of the factual circumstances on which the evidence provided at the hearing might be made available to the public.

68.2 The applicant's PAIA request provided clear evidence from Ms Yasmin Sooka, former deputy chairperson of the Human Rights Violations Committee of the TRC, in her affidavit of 30 April 2012 that the TRC Commissioners had not agreed that a person's evidence would be treated confidentially. This evidence suggests therefore, that individuals would have some reasonable expectation that their evidence, as a class of information, might be made public and that the individuals concerned were not guaranteed that the information disclosed would be kept confidential. The refusal states unequivocally that the information was supplied in confidence. This is simply not correct.

68.3 There is no evidence that this important factor in determining whether to

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refuse release of personal information was considered in the PAIA decision, and weighed against other concerns.

69 Sixth, the second respondent has not considered as a relevant factor, section 34(2)(c) of PAIA which states that a record containing personal information about a third party may not be refused insofar as it consists of information already publicly available.

69.1 In the annexure to the PAIA request, the applicant specifically drew to the attention of the first respondent that a range of information had already been made public. There is no evidence that this element was considered by the respondents in their refusal to grant access to the transcripts. If it had been considered, it seems likely that some, or at least some part of, the transcripts would have been released.

69.2 This application is being brought on the basis that it is unlikely that release of the transcripts would:

69.2.1 Constitute an unreasonable, disclosure of highly personal information in terms of section 34(1) of PAIA, insofar as certain of these records are already publicly available;

69.2.2 Facilitate a contravention of the law to the extent that the reputations and dignity of the individual names may be impaired thereby as contemplated in section 39(i)(b)(dd) (sic) of PAIA, given that it is already publicly available. In fact, no such section or protection exists under PAIA;



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69.2.3 Be a breach of the first respondent's confidentiality undertaking, given that it is already publicly available; and

69.2.4 Jeopardise future disclosure leading to a refusal under section 37(1) (b) of PAIA, given it is already publicly available.

70 Seventh, the second respondent has not considered section 34(2) (f) of PAIA which, in summary, states that a record containing personal information about a third party may not be refused insofar as it consists of information about an individual who is, or was, an official (that is, an employee) of a public body where the information relates to the position or functions of the individual in that capacity.

70.1 Some individuals that gave evidence that was recorded in the transcripts of the TRC hearings conducted under section 29 of the TRC are likely to fall into this category, on the basis that they were formerly employed by the government or a public body; and

70.2 There is no indication in the PAIA decision that this was a factor considered by the respondents in their refusal to release the transcripts.

71 Eighth, a reference is made in the PAIA decision to a contravention of the law to release information that might affect reputations and dignity under section 39(1) (b) (dd) of PAIA. No such ground of refusal exists in PAIA.

71.1 It is possible that the second respondent intended the ground for refusal to refer to section 39(1)(b)(iii)(dd) of PAIA, on the basis that disclosure could reasonably be expected to facilitate the commission of a

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contravention of the law, including but not limited to, escape from lawful detention.

71.2 It is submitted that this provision is not intended to encourage a refusal to release information on the basis of a potential defamation or other claim relating to the loss of reputation or dignity of a person. It is further submitted that this is a tenuous basis for refusal to release all transcripts in the PAIA request and has no merit.

72 Ninth, reliance on section 37(1) (b) of PAIA is an insufficient ground to deny the release of the requested information. In summary, this section provides that information can be refused if the record consists of information that was supplied in confidence by a third party and the disclosure could reasonably be expected to prejudice the future supply of similar information, or information from the same source and it is in the public interest that similar information, or information from the same source, should continue to be supplied.

72.1 The information that was supplied in the transcripts requested in the PAIA request was supplied to the TRC and not to the respondents. The TRC, having completed its mandate, no longer has any need for further information from the same sources or of similar information.

72.2 Furthermore, it is submitted that there is no evidence from any person, expert or otherwise, that the respondents would continue to require the kind of information set out in the transcripts.

73 Tenth, it appears that the refusal to release information based on grounds of




confidentiality and breach of an undertaking was not made with reference to section 37(1) (a) of PAIA. This section provides that a PAIA request must be refused if the disclosure of the record would constitute an action for breach of a duty of confidence owed to a third party in terms of an agreement.

73.1 However, as submitted in relation to other grounds of refusal, this may not be refused where the information is publicly available, which the PAIA request noted was the case for a range of information in some transcripts.

73.2 In addition, there is no evidence of any undertakings that would give rise to legal action against the respondents for a breach of duty of confidence. In addition, according to the evidence provided by Yasmin Sooka in her affidavit of 30 April 2012, no confidentiality agreement was entered into by the TRC and any person subpoenaed or voluntarily appearing at the TRC hearings. It is submitted thus that not only is there no evidence of any legal action relating to breach of confidence by the respondents, but furthermore there is in any event no basis for such action or claims.

74 Finally, the PAIA decision refers to the right of South Africans to have their dignity respected and protected under the Constitution. However, no reference is made to the countervailing right given to all South Africans to access any information held by the State. Legal argument in this regard will be addressed to the court at the hearing of this matter.

75 Of importance, the decision did not consider the purpose and objectives of the



TRC Act which was established, among other things, to report to the Nation about human rights violations and victims.

- 76 To give effect these objectives, it is imperative that all the transcripts be made available and become public. It is only on a clear case by case analysis of the transcripts that the TRC's final objective of the reconciliation and the on-going prevention of human rights violations can be achieved.

#### THE DECISION TO GRANT ACCESS SUBJECT TO REDACTION

- 77 The Minister appears to have decided to grant access subject to the redaction of all personal information of people mentioned in the records. This fails to follow the procedure contemplated by PAIA for addressing the concerns of third parties who may be implicated in records which are subject to a request under PAIA.
- 78 PAIA sets out a third party process in Chapter 5 thereof and requires that if the information officer of a public body is considering a request for access to a record which relate to a third party and therefore be subject to refusal under the grounds enumerated in PAIA, the information officer must notify the third party as soon as reasonably possible, consider their response and ultimately take a decision based on the prescripts of PAIA. In other words, the views of the third party are not determinative of whether to provide access or not.
- 79 In the present case, the Minister failed to conduct any third party procedure and instead, without considering any relevant information, decided to impose a

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blanket redaction on personal information contained therein.

80 The Minister failed to consider, for example:

80.1 Whether any confidentiality interest had already been waived by participation in the TRC proceedings or whether such an interest existed at all;

80.2 Whether the information concerned was already in the public domain; or

80.3 Whether section 46 and the public interest require the disclosure of the records concerned, notwithstanding any third party concerns.

81 In effect, the Minister appears to have decided, without any consideration of the statute whatsoever, that all personal details must be redacted.

82 Redaction (or "severance") is provided for in section 28 of PAIA which provides:

*"(1) 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.*

*(2) 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 subsection and the provisions of section 25 (3) apply to paragraph (b) of this subsection." (Emphasis added.)*

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83 Every redaction is regarded for purposes of PAIA as a refusal of access and must therefore be justified under the grounds of refusal in PAIA. The Minister has failed to do so.

84 In short, the decision to grant access to the applicants subject to a blanket redaction of all personal information, is in conflict with PAIA and without basis in law.

### THE PUBLIC INTEREST OVERRIDES ANY INTEREST

85 In any event, even if there were a valid ground for refusing the request for information concerned, which is not conceded, I am advised and submit that the public interest in the information clearly outweighs any interest advanced for refusing access to the records.

86 Section 46 of PAIA provides:

*"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."*

87 This general override provision is mandatory and does not vest any discretion in the information officer.

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- 88 In other words, even if any one of the grounds of refusal relied upon by the second respondent were valid, the second respondent nevertheless was required to make the records available in the public interest. There is no evidence that the respondents considered adequately or at all, the question of the public interest contemplated by section 46.

***The Public Interest in disclosure***

- 89 The contents of the records are of profound public interest and importance, as described above, particularly as they form part of a body of work that relate to past and contemporary struggles for justice in South Africa. The TRC has been recognised globally as a shining example of using restorative justice to deal with the atrocities of a repressive and authoritarian regime. The work of the TRC however laudable, was by its own admission, only part of a broader, long term process.
- 90 This process would of necessity include the archiving of the enormous body of material, on paper, digital and audio-visual that was generated by the TRC. The importance of this process is outlined in the publications annexed hereto:
- 90.1 Paper Wars Chapter 2, attached hereto marked "CMK 23".
- 90.2 Paper Wars Chapter 6, attached hereto marked "CMK 24".
- 91 These publications underscore in numerous case studies, the inability and often unwillingness of the various government departments to fulfil their obligations to archive.

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- 92 The right to access information is embodied in legislation such as PAIA. Yet, as is evident from these publications, many government departments have failed to implement the infrastructure to allow them to fulfil their obligations under PAIA. Many of them have neither a PAIA unit nor budget.
- 93 A nation that has understanding of its past is better placed to avoid repeating the mistakes of the past. In this context, the importance for the people of South Africa to have access to a record of documents such as the TRC documents that form the basis of this application, is paramount. The TRC process was itself central to the early successes of our democracy. South Africans are entitled to know the full extent of the atrocities committed under apartheid in order that they may move forward and ensure that such atrocities are never repeated within our borders and beyond.
- 94 Moreover, the respondents have all but conceded that the records concerned fall within the purview of section 46:
- 94.1 In the refusal for access, the second respondent states that the "*the disclosure could reasonably be expected to facilitate (sic) the contravention of the law . . .*" What would appear to be meant by this is that the information concerned could reasonably be expected to reveal a contravention of the law.
- 94.2 It is trite that the information supplied to the TRC in section 29 proceedings, by its very nature, could reasonably be expected to disclose contraventions of the law. I have set out above why the public interest in the disclosure of the records clearly outweighs any harm

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contemplated by the grounds of refusal. Therefore, I am advised and submit that section 46 of PAIA is triggered and the records must be disclosed.

## SECTION 80 OF PAIA

95 Section 80(1) of PAIA makes provision for what our courts have termed "a judicial peek". It provides:

*"Despite this Act and any other law, any court hearing an application, or an appeal against a decision on that application, may examine any record of a public or private body to which this Act applies, and no such record may be withheld from the court on any grounds."*

96 Should this Court wish to examine the records concerned with a view to determining whether there is any basis for refusing access to the records concerned, it is empowered to do so *mero motu*.

## CONCLUSION

97 For all the reasons set out in this affidavit, I am advised and submit that:

97.1 The respondents have failed to give effect to their constitutional obligations and their obligations under PAIA; and

97.2 There is no justifiable basis for the blanket refusal of access to the information requested or for the subsequent decision to grant access subject to the blanket redaction of all personal information contained therein.

98 In the circumstances, I ask this Honourable Court for an order in terms of the

*[Handwritten signature]*

notice of motion.

  
 CATHERINE MOIRA KENNEDY

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of her knowledge both true and correct. This affidavit was signed and sworn to before me at **JOHANNESBURG** on this the 11<sup>th</sup> day of **SEPTEMBER 2014**, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended, have been complied with.

  
 COMMISSIONER OF OATHS

Full names:

Address:

Capacity:

**Innocentia Reholegile Moele**  
 155 - 5th Street  
 Sandown, Sandton, 2196  
 Commissioner of Oaths  
 Ex-Officio / Practising Attorney R.S.A.

  
 Certified True Copy


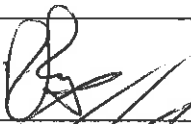
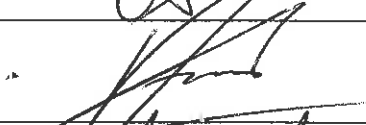
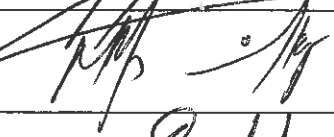


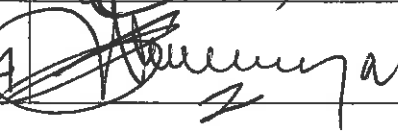
DELANO Louw  
 KOMMISSARIS VAN EDE  
 COMMISSIONER OF OATHS EX OFFICIO  
 AMP/RANK Sne Registrar's Clerk  
 CONSTITUTIONAL COURT / KONSTITUSIONELE HOF S.A.  
 1 HOSPITAL STREET  
 CONSTITUTIONAL HILL  
 BRAAMFONTEIN 2017

## RESOLUTION BY THE TRUSTEES OF SOUTH AFRICAN HISTORY ARCHIVE TRUST

It is resolved that:

1. The South African History Archive Trust ("SAHA") launch an application in the High Court of South Africa, Pretoria, with regard to a request for information in terms of section 75 of the Promotion of Access to Information Act 2 of 2000. The information requested pertains to the transcripts of all hearings conducted by the Truth and Reconciliation Commission under section 29 of the Promotion of National Unity and Reconciliation Act 34 of 1995, as amended.
2. Attorneys Cliffe Dekker Hofmeyr be appointed to represent SAHA in the proceedings to be instituted against the Minister of Justice and Constitutional Development and the National Deputy Information Officer: the Department of Justice and Constitutional Development and that the said attorneys do all things necessary in the application on behalf of SAHA.
3. That Catherine Moira Kennedy be authorised to depose to such affidavits in the said proceedings on behalf of SAHA, as may be required and further Catherine Moira Kennedy be authorised to give instructions from time to time as she may deem necessary to the said attorneys in relation to the proceedings.

Signed on this the 15<sup>th</sup> day of January 2014.

TRUSTEE	SIGNATURE	DATE OF SIGNATURE
ANTHONY MANION		15-01-2014
Piers Hugo		15-01-2014
VERNE HARRIS		15.01.2014
Noor Nieftagodien		15/01/14
Razia Saleh		15/01/2014
Sello Hatang		16/01/2014
DUMISA NISEBEZA		16/01/2014

FORM A

REQUEST FOR ACCESS TO RECORD OF PUBLIC BODY

Commissioner of Oaths  
Ex-Officio / Practising Attorney R.S.A.

(Section 18(1) of the Promotion of Access to Information Act, 2000

(Act No. 2 of 2000))

[Regulation 2]

"CMK 2"

FOR DEPARTMENTAL USE

Reference number: \_\_\_\_\_

Request received by: \_\_\_\_\_

(state rank, name and surname of information officer/deputy information officer)

on \_\_\_\_\_ (date) at \_\_\_\_\_ (place).

Request fee (if any): R.....

Deposit fee (if any): R.....

Access fee: R.....

SIGNATURE OF INFORMATION  
OFFICER/DEPUTY  
INFORMATION OFFICER

A. Particulars of public body

MS MARLYN RASWISWI

DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

Email: [MRaswiswi@justice.gov.za](mailto:MRaswiswi@justice.gov.za)

B. Particulars of person requesting access to the record

- (a) The particulars of the person who requests access to the record must be recorded below.  
(b) Furnish an address and/or fax number in the Republic to which information must be sent  
(c) Proof of the capacity in which the request is made, if applicable, must be attached.

Full names and surname

South African History Archive

Identity/Passport number:

Non-Profit Organisation Registration No. 031-807-

NPO/PBO

Non-Profit Trust No. 2522/93

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Innocentia Reholegile Moele  
155 - 5th Street  
Sandown, Sandton, 2196

Commissioner of Oaths  
Executive Council, South Africa

Postal address: PO Box 31719, Braamfontein, 2017, South Africa  
Fax number: 011 718 2663  
Telephone number: 086 649 1491  
E-Mail Address: foip@saha.org.za

**C. Particulars of person on whose behalf request is made**

*This section must be completed ONLY if a request for information is made on behalf of another person.*

Full names and surname:

Identity number:

**D. Particulars of record**

- (a) *Provide full particulars of the record to which access is requested, including the reference number if that is known to you, to enable the record to be located.*
- (b) *If the provided space is inadequate please continue on a separate folio and attach it to this form. **The requester must sign all the additional folios.***

1. Description of record or relevant part of the record:

**Transcripts of all hearings conducted by the Truth and Reconciliation Commission under section 29 of the Promotion of National Unity and Reconciliation Act, 2003.**

2. Reference number, if available:

3. Any further particulars of record:

**See annexure A**

**E. Fees**

- (a) *A request for access to a record, other than a record containing personal information about yourself, will be processed only after a request fee has been paid.*
- (b) *You will be notified of the amount required to be paid as the request fee.*
- (c) *The **fee payable for access** to a record depends on the form in which access is required and the reasonable time required to search for and prepare a record.*
- (d) *If you qualify for exemption of the payment of any fee, please state the reason for exemption.*

Reason for exemption from payment of fees:

**F. Form of access to record** Commissioner of Oaths  
Ex-Officio / Practising Attorney R.S.A.

If you are prevented by a disability to read, view or listen to the record in the form of access provided for in 1 to 4 hereunder, state your disability and indicate in which form the record is required.

Disability: _____ _____	Form in which record is required: _____ _____
----------------------------	--

Mark the appropriate box with an "X".

**NOTES:**

- (a) Your indication as to the required form of access depends on the form in which the record is available.
- (b) Access in the form requested may be refused in certain circumstances. In such a case you will be informed if access will be granted in another form.
- (c) The fee payable for access to the record, if any, will be determined partly by the form in which access is requested.

**1. If the record is in printed form:**

<input checked="" type="checkbox"/>	Copy of record*	<input type="checkbox"/>	Inspection of record
-------------------------------------	-----------------	--------------------------	----------------------

**2. If record consists of visual images:**

(this includes photographs, slides, video recordings, computer-generated images, sketches, etc).

<input type="checkbox"/>	view the images	<input checked="" type="checkbox"/>	copy of the images*	<input type="checkbox"/>	transcription of the images*
--------------------------	-----------------	-------------------------------------	---------------------	--------------------------	------------------------------

**3. If record consists of recorded words or information which can be reproduced in sound:**

<input type="checkbox"/>	Listen to the soundtrack (audio cassette)	<input checked="" type="checkbox"/>	transcription of soundtrack* (written or printed document)
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**4. If record is held on computer or in an electronic or machine – readable form:**

<input type="checkbox"/>	Printed copy of record*	<input checked="" type="checkbox"/>	Printed copy derived from the record*	<input type="checkbox"/>	copy in computer readable form*(stiffy or compact disc)
--------------------------	-------------------------	-------------------------------------	---------------------------------------	--------------------------	---

* If you requested a copy or transcription of a record (above), do you wish the copy or transcription to be posted to you?	YES	NO
		X
A postal fee is payable.		

Innocentia Reholegile Moele  
155 - 5th Street  
Sandown, Sandton, 2196

Commissioner of Oaths  
Ex-Officio / Practising Attorney R.S.A.

  
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*Note that if the record is not available in the language you prefer, access may be granted in the language in which the record is available.*

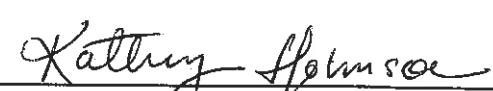
In which language would you prefer the record? **English**

**G. Notice of decision regarding request for access**

You will be notified in writing whether your request has been approved/denied. If you wish to be informed thereof in another manner, please specify the manner and provide the necessary particulars to enable compliance with your request.

How would you prefer to be informed of the decision regarding your request for access to the record? **By email to foip@saha.org.za**

Signed at JOHANNESBURG this 24th day of July 2013



KATHRYN L JOHNSON  
ADVOCACY & TRAINING  
OUTREACH

FREEDOM OF INFORMATION  
PROGRAMME

SOUTH AFRICAN HISTORY  
ARCHIVES



**Annexure A**

1. SAHA has been advised by Commissioners of the Truth and Reconciliation Commission (TRC) that the Commission decided at a meeting in March 2003 to allow the public to access the material obtained at hearings conducted under section 29 of the Promotion of National Unity and Reconciliation Act, 2003 (TRC Act), subject to certain conditions. This determination was made in accordance with section 29(5) of the TRC Act.
2. Affidavits signed by the following Commissioners evidencing the decision taken by the Commission are attached:
  - (a) Yasmin Sooka dated 30 April 2012;
  - (b) Dumisa Ntsebeza dated 30 May 2013;
  - (c) Maria Macdiarmid Burton dated 6 June 2013;
  - (d) Bongani Blessing Finca dated 10 June 2013;
  - (e) Lavinia Crawford-Browne dated 12 June 2013;
  - (f) Glenda Wildschut dated 18 July 2013;
  - (g) Richard Michael Lyster dated 19 July 2013.
3. SAHA is aware that transcripts of some of the hearings under section 29 of the TRC Act have been made publicly available and are published on the TRC website, which is controlled and administered by the Department of Justice and Constitutional Development. In particular, SAHA notes the following examples:
  - (a) the transcript of the special investigation and hearings (in camera) into the Helderberg Flight;
  - (b) a transcript of evidence given by Joe Verster;
  - (c) a transcript of evidence given by Andrew Masondo;
  - (d) a transcript of evidence given by Hertzog Lerm; and
  - (e) a transcript of evidence given by Joe Mamasela.
4. Furthermore, SAHA is aware that the report published by the TRC in October 1998 quotes excerpts of the evidence given in the course of investigations under section 29 of the TRC Act. In particular, SAHA notes the following examples:
  - (a) George Meiring, page 202;
  - (b) Joe Verster, pages 134 to 141 and 609;
  - (c) Martin Dolincheck, pages 100, 160 to 162 and 223;
  - (d) Phillip Powell, pages 359 and 363; and
  - (e) Walter Felgate, pages 343, 354, 460, 638, 641, 641 and 722.
5. Additionally, section 29(5) of the TRC Act provides that information furnished at an investigation is not to be made public until it is used at a hearing under the TRC Act or before any court. SAHA notes that it is aware of the following examples in which persons that were summoned to give evidence in an investigation under section 29 of the TRC Act subsequently applied for amnesty, and as such their evidence was furnished at the amnesty hearing:
  - (a) Wouter Basson (Basson's evidence was also furnished in criminal proceedings in the North Gauteng High Court);
  - (b) Christo Nel;
  - (c) Craig Williamson;
  - (d) Hendrik Mostert;
  - (e) Adriaan van Niekerk;
  - (f) Johannes van der Merwe;
  - (g) Jacobus Conradie;

- (h) Wilhelm Bellingan;
- (i) Charles Zeelie;
- (j) Johan le Roux;
- (k) Willem Schoon;
- (l) Nicolaas van Rensburg; and
- (m) James Taylor.

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46.



**Innocentia Rehlegile Moele**  
155 - 5th Street  
Sandown, Sandton, 2196

Commissioner of Oaths  
Ex-Officio / Practising Attorney R.S.A.

"CMK 3"  
"47"

# SOUTH AFRICAN HISTORY ARCHIVE

"SAHA"

## DEED OF TRUST

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## 1. ORIGINAL MOTIVATION

- 1.1 There is a need to collect, preserve and catalogue materials of historical and contemporary political, social, economic and culture importance.
- 1.2 There is a need to promote awareness of the importance of preserving records of contemporary events of historical significance.
- 1.3 There is a need to make the above-mentioned materials accessible to the public, to historians and to researchers.
- 1.4 There is a need to promote public awareness of recent historical events.

## 2. ESTABLISHMENT OF A TRUST

- 2.1 A trust is hereby constituted to be known as the South African History Archive ("SAHA") Trust for the purpose herein set out and otherwise on the terms and conditions of this Trust Deed.
- 2.2 SAHA is a body corporate and has an identity and existence distinct from its members and office bearers.
- 2.3 SAHA continues to exist despite changes in the composition of its trustees and director.
- 2.4 Trustees or directors have no rights in the property or other assets of the organisation solely by virtue of holding those positions.

## 3. OBJECTIVES OF THE TRUST

- 3.1 The main objective of the Trust is to document, support and promote greater awareness of past and contemporary struggles for justice through archival practices and outreach, and the utilisation of access to information laws.
- 3.2 It is not the objective of the Trust to make a profit or gain and the income and assets of the Trust may not be distributed to any person save for the payment of reasonable remuneration for services actually rendered in furtherance of the objects of the Trust.

## 4. ANCILLARY OBJECTIVES OF THE TRUST

- 4.1 In furtherance of its primary objectives the Trust shall:
  - 4.1.1 Recapture lost and neglected histories;
  - 4.1.2 Record aspects of South African democracy in the making;
  - 4.1.3 Bring history out of the archives and into schools, universities and communities

in new and innovative ways;

4.1.4 Extend the boundaries of freedom of information in South Africa;

4.1.5 Raise awareness, both nationally and internationally, of the role of archives and documentation in promoting and defending human rights.

## 5. GALA

5.1 It is recorded that in 1996 SAHA established the Gay and Lesbian Archives (GALA) as a project of SAHA.

5.2 In 2007, GALA formed a separate and independent trust. However, the work of SAHA and GALA remains closely aligned and the organisations continue to work in close collaboration.

## 6. INTERPRETATION

In this Deed, unless the context otherwise requires, words importing the singular shall include the plural. The following expressions used in this Deed shall have the meaning hereinafter assigned to them unless the context shall clearly otherwise require:

6.1 "Trust Fund" : shall mean the assets or funds held and administered by the Trustees from time to time, that is to say, the Trust capital together with donations and any additions or accruals thereto, including bequests from time to time from any sources and in any form.

6.2 "Trust Capital" : shall mean the capital of the Trust consisting of the Trust Fund and including that part of the net income which is not distributed and is accumulated as part of the capital after deducting:

6.2.1 the aggregate of the liabilities of the Trust, both actual and contingent, and

6.2.2 the sum of all provisions for depreciation, renewals or diminution in value of assets or for liabilities (actual or contingent) the amount of which cannot be determined with substantial accuracy.

6.3 "Fund Raising Act" : shall mean the Fund Raising Act 107 of 1978 as amended from time to time.

6.4 "Nonprofit Organisations Act" : shall mean the Nonprofit Organisations Act 71 of 1997 as amended from time to time.

6.5 "Income Tax Act" : shall mean the Income Tax Act 58 of 1962 as amended from time to time.

6.6 "Trust" : shall mean the Trust created under this Deed of Trust.

6.7 "Trustees" : shall mean the signatories to this Deed as Trustees and any other persons appointed to that office in terms of this Trust Deed from time to time for so long as they hold office as such, who shall be deemed to be members of the trust for all purposes

under the Fund Raising Act and the Nonprofit Organisations Act.

## 7. THE AFFAIRS OF THE BUSINESS

- 7.1 The affairs and business of the Trust shall be conducted from Johannesburg.

## 8. TRUSTEES PROVISIONS

- 8.1 The parties listed in Annexure A of this Trust Deed were the first Trustees of the Trust;
- 8.2 The parties listed in Annexure B of this Trust Deed are the Trustees of the Trust at the date of amendment of this Trust Deed.
- 8.3 Upon the death, permanent incapacity, removal or resignation of anyone of the Trustees, the Trustees then remaining shall, as soon as possible, appoint another Trustee to the office of Trustee, which person shall be decided upon by the remaining Trustees as they in their sole and absolute discretion may determine, it being the intention of the parties hereto that there shall always be a minimum of 5 Trustees and not more than 15 Trustees of the Trust in office. Between 2 and 4 Trustees shall serve as members of the Management Committee, as nominated by the Trustees on an annual basis.
- 8.4 Where the death, permanent incapacity, removal or resignation of one of the Trustees results in the number of remaining Trustees being less than 5, those remaining Trustees may appoint a further Trustee in the manner outlined in clause 8.3 but may take no other action in relation to the operation of the Trust until such appointment has been made, restoring the number of Trustees to at least 5;
- 8.5 The Trustees shall at any time from time to time be entitled to accept the resignation of any other Trustee;
- 8.6 The Trustees shall at any time from time to time have unlimited power of co-option of further Trustees, subject to the maximum referred to in 8.3 above, which shall be exercised on such terms and conditions and for such period as they in their sole discretion may determine;
- 8.7 Any appointment, removal or resignation, delegation of powers or co-operation shall not be valid unless recorded in writing;
- 8.8 A Trustee shall vacate his/her office if:
- 8.8.1 he/she commits any Act of insolvency as defined in the insolvency law from time to time in force;
- 8.8.2 he/she becomes of unsound mind or is declared incapable of managing his/her own affairs;
- 8.8.3 he/she resigns his/her office by written notice to the other Trustees;

- 8.8.4 he/she fails to attend three (3) consecutive meetings of the Trustees without the leave of the remaining Trustees;
- 8.8.4 he/she is removed from office by the decision of the majority of the remaining Trustees after he/she has been given written notice of the intention of the remaining Trustees to remove him/her and given an opportunity to address the remaining Trustees or furnish them with reasons in writing why he/she should not be removed as a trustee.

## 9. PROCEEDINGS OF TRUSTEES

- 9.1 A quorum for a meeting of the Trustees shall be 50 per cent of the Trustees, at least one of whom shall be a member of the Management Committee. In the event of the meeting being inquorate thirty (30) minutes after the time of commencement, it shall stand adjourned to a date which all Trustees shall be notified of in writing, but which shall be not less than seven (7) days after the date of the inquorate meeting, and at such adjourned meeting all those Trustees present shall constitute a quorum.
- 9.2 Subject to the Trustees giving effect to the terms and conditions of this Deed, administering the Trust and its affairs, they shall adopt such procedures and take such administrative steps as they shall, from time to time, deem necessary and advisable including the appointment of a management committee from amongst themselves which shall be responsible for the disbursement of monies, application by criteria for such disbursement, reporting to funders on a quarterly basis, and control an administration of activities;
- 9.3 The Trustees shall meet together for the despatch of business, adjourn and otherwise regulate their meetings as they think fit, but not less than twice a year. The date and the place of the meetings shall be as determined by the Trustees. The Chairperson shall, however, have the power to call a meeting of the Trustees when in his or her opinion circumstances justify such a step and will be obliged to do so on receipt of a written request signed by not less than three (3) Trustees specifying the business to be transacted at such a meeting. Reasonable notice will be given to Trustees of all meetings of the Trustees, which notice may be given by letter, telegram, telex, telefax, electronic mail, or orally.
- 9.4 A notice dispatched to the last address of a Trustee as made known to the Secretary of the Trust when appointed shall be valid;
- 9.5 Decisions are made by majority vote indicated by way of a show of hands;
- 9.6 A resolution in writing signed or approved by other written means, such as by email, by majority vote is valid and effectual as if it had been passed at a meeting of the said Trustees and shall be noted at the next meeting. Such a resolution is constituted at the time of the last signature or approval of the resolution and may consist of several documents in like form each signed by one or more of the Members. If a resolution is written by email, an actual signature is not required. Emails from the Trustees are sent



to the Director, who will then inform all the Trustees of the outcome of the resolution

- 9.7 The Trustees shall elect from amongst their number a chairperson who shall remain in office until he/she resigns as a Trustee or as chairperson or if the remaining Trustees remove him/her from office by resolution to that effect;
- 9.8 The Director shall provide written notice to the Director of Nonprofit Organisations of the names, physical business and residential addresses of the Trustees and Director of the Trust one month after any appointment or election of such persons, even if their appointment or election did not result in any changes to the persons occupying those positions , in accordance with section 18(1)(b) of the Nonprofit Organisations Act.
- 9.9 If the chairperson is absent from any meeting the remaining Trustees shall elect a chairperson for the purposes of that meeting;

## 10 DISPENSATION OF SECURITY

- 10.1 The Trustees or any of them shall not be required to furnish security for any reason or under any circumstances whatsoever for their duties as such and accordingly no person hereby or subsequently appointed or co-opted or to whom powers are delegated shall be required to furnish security to any state or any official under the provisions of any law which may now or which may in the future be in force. Insofar as it may be necessary, the said state or other official is hereby directed to dispense with the requirement that any Trustee or subsequent Trustees shall furnish security in terms of the Trust Property Control Act or any other law.
- 10.2 If despite the provisions of clause 10.1 hereof, security is lawfully required to be furnished, then the costs of providing the same shall be borne by the Trust.

## 11 VESTING, COLLECTION, UTILISATION OF FUNDS AND CONTRIBUTIONS

- 11.1 The Trustees are hereby empowered to accept for the purposes of the Trust any gift, bequest or payment of any nature whatsoever from any person which may be given or paid to them with the intention that it form part of the Trust Fund. Any assets so accepted shall be administered and dealt with subject to the terms of this Deed of Trust. All donations of the Trust shall be irrevocable and subject to the terms and conditions of the Trust.
- 11.2 Contributions may be collected in and from any portion of the Republic of South Africa and outside its borders provided that the contributions from outside the Republic of South Africa shall be actually received in the Republic of South Africa.
- 11.3 The funds of the Trust shall be utilised solely for investment or for the objects for which it has been established.

- 11.4 No portion of the income or assets of the Trust shall accrue for the benefit of the Trustees, office bearers, or their relatives or any employee but nothing herein before contained shall limit the right of the trustees to be reimbursed in respect of any reasonable expenses incurred on behalf of the Trust or to be paid a reasonable remuneration for any services rendered on behalf of the Trust including under any contract of employment.

## 12. TAX ISSUES

If the Commissioner approves SAHA as a "public benefit organisation" and for as long as such status is renewed, then the SAHA Trust will-

- 12.1 in the year of assessment preceding the year of assessment in which the donation is received, distribute at least 75% of its S18A (of the Income Tax Act, 1962) donations received;
- 12.2 issue a receipt for the donation on which the following details are provided-
- 12.2.1 the reference number issued by the Commissioner;
  - 12.2.2 the name and address of the SAHA Trust;
  - 12.2.3 the date of receipt of the donation;
  - 12.2.4 the amount of the donation
  - 12.2.5 the name and address of the donor;
  - 12.2.6 a certificate to the effect that the receipt is issued for purposes of Section 18A of the Income Tax Act, 1962 and that the donation has been or will be used exclusively for the object of the SAHA Trust;
- 12.3 on dissolution transfer its assets to any similar approved public benefit organisations;
- 12.4 not accept any donation-
- 12.4.1 which is revocable at the instance of the donor for reasons other than a material failure to conform to the designated purposes and;
  - 12.4.2 conditions of such donation, including any misrepresentation with regard to the tax deductibility thereof in terms of section 18A; or
  - 12.4.3 in circumstances where a donor has imposed conditions which could enable that donor or any connected person in relation to such donor to derive some direct or indirect benefit from the application of such donation,
- 12.5 submit to the Commissioner a copy of any amendments to the Deed of Trust.

### 13 DUTIES OF TRUSTEES

- 13.1 The Director of SAHA and the members of the Management Committee accept the fiduciary responsibility of the organisation. In addition to any duties imposed upon them under law enforced from time to time, the Trustees shall have the following duties:

- 13.1.1 The Trustees shall appoint a person as Director. The Director shall have responsibility for the day to day management of the accounts of the Trust and such other responsibilities as delegated to the Director from time to time by the Trust. The Director shall be at all times subject to the direction and control of the Management Committee in the performance of their duties.
- 13.1.2 The Trustees shall take and maintain written minutes of the meetings held pursuant to the provisions of clause 9 above. An official minute book shall be retained at the Trust's principal office.
- 13.1.3 The Trustees shall, at the expense of the Trust, cause proper books of accounts to be kept, which books of account together with all other papers and documents connected with or relating to the Trust shall be kept as such place as may be agreed upon by the Trustees.
- 13.1.4 The Trustees at the expense of the Trust shall be entitled to cause accounts of the Trust to be audited by an auditor appointed by the Trustees from time to time, which auditor shall be charged with drawing up the financial statements of the Trust at the end of each and every year. The first financial statements of the Trust shall be prepared on 31 December following the date of resignation of this Trust Deed in terms of the Trust Property Control Act. The auditor may be one of the Trustees or a firm of which he is a member and he/she or his/her firm may charge their reasonable fee for such services.
- 13.1.5 The financial statement shall be prepared as at the last day of each succeeding year for this purpose every year shall commence on 1 January and shall end on 31 December of each succeeding year.
- 13.1.6 All monies received on behalf of the Trust shall be paid by the Trustees into a banking account or other account maintained by the Trustees at a registered commercial bank or building society or other financial institution in terms of the Financial Institutions (Investment of Funds) Act 1984 and all payments made on behalf of the Trust shall be drawn from such account. All withdrawals may be made on the signature of such persons as the Trustees may determine from time to time.
- 13.1.7 All charges, expenses and disbursements including reasonable travelling expenses reasonably incurred by the Trustees in or arising from their administration of the Trust (including the costs of attending meetings of the Trust) shall be a first charge on the income of the Trust and the Trust Assets and shall be paid on demand.

## 14 INDEMNIFICATION OF THE TRUSTEES

- 14.1. Subject to the foregoing a Trustee shall in performance of his/her duties and in the exercise of his/her power act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another;
- 14.2 No Trustee shall be liable for any loss of the Trust arising by reason of any investment made on behalf of the Trust whether authorised in terms of the Trust Deed or not, or for negligence or fraud of any agent employed by such Trustee (although the employment of such agent was not strictly necessary or expedient) , or by any other Trustee or by reason of any mistake or omission made in good faith by any Trustee hereof or by reason of any matter or thing whosoever, except as is occasions by such Trustees own personal, wilful act of dishonesty.
- 14.3 The Trustees shall be indemnified out of the Trust Assets against all claims or demands of whatever nature that may be made upon them arising out of the exercise, purported exercise or omission to exercise any of the powers conferred upon them by this Deed of Trust. Nothing herein contained shall be deemed to exempt a Trustee from or indemnify him/her against liability for breach of trust where he/she failed to show the degree of care diligence and skill referred to above.

## 15 TRADING ACTIVITY

- 15.1 SAHA will not carry on any business undertaking or trading activity, otherwise than to the extent that-
- 15.1.1 if the undertaking or activity—
    - 15.1.1.1 is integral and directly related to the sole or principal object of that public benefit organisation as contemplated in paragraph (b) of the definition of “public benefit organisation ” in section 30 of the Income Tax Act 1962 (as amended)<sup>1</sup>;
    - 15.1.1.2 is carried out or conducted on a basis substantially the whole of which is directed towards the recovery of cost; and
    - 15.1.1.3 does not result in unfair competition in relation to taxable entities;
  - 15.1.2 if the undertaking or activity is of an occasional nature and undertaken substantially with assistance on a voluntary basis without compensation;
  - 15.1.3 if the undertaking or activity is approved by the Minister by notice in the *Gazette*, having regard to—
    - 15.1.3.1 the scope and benevolent nature of the undertaking or activity;
    - 15.1.3.2 the direct connection and interrelationship of the undertaking or

<sup>1</sup> <http://www.sars.gov.za/lnb/mylnb.asp?jilc/kilc/alrg/ulrg/vlrg/72k0a#ag>

- activity with the sole or principal object of the public benefit organisation;
- 15.1.3.3 the profitability of the undertaking or activity; and
- 15.1.3.4 the level of economic distortion that may be caused by the tax exempt status of the public benefit organisation carrying out the undertaking or activity; or
- 15.1.4 other than an undertaking or activity in respect of which item (aa) , (bb) or (cc) applies and do not exceed such amount as specified under the Income Tax Act 1962 or applicable legislation from time to time'

## 16. POWERS OF TRUSTEES

- 16.1 The Trustees in their discretion shall have plenary powers to perform all acts and execute all documents relevant to the carrying out of the objects of the Trust and the administration thereof. Without derogating from the generality of the foregoing, the Trustees shall have the power to open and operate any banking account and/or building society account and to draw and issue cheques and promissory notes and to endorse any of the same for collection. The Trustees shall determine the manner of operating the banking or other accounts of the Trust.
- 16.2 The Trustees shall be subject to a majority resolution, have the power to acquire, lease, renovate, restore immovable property in pursuance of the objectives of the Trust. In addition, to buy or sell and transfer Trust Assets and invest the proceeds (including dividends accruing on the Trust Fund) and sign and execute any agreement in regard thereto provided that the Trustees shall not have the power to:
  - 16.2.1 enter into any transactions of a patently speculative nature in relation to property;
  - 16.2.2 carry on business including inter alia ordinary trading operations in the commercial sense as well as the administration of any immovable property acquired by the Trust.
- 16.3 The Trustees shall have the power to:
  - 16.3.1 hold the whole or any part of the Trust Fund or any investments made by them from time to time during the administration of the Trust in their own names or in the name of any person or institution which is nominated by them from time to time for that purpose or, in the name of the Trust; and
  - 16.3.2 exercise the voting power attached to any share, stock or debenture in such manner as they may deem fit, exercise and take up or realise any rights of conversion or subscription appertaining to any or debenture forming part of the Trust;
  - 16.3.3 From time to time to borrow such monies on such terms and conditions as they

deem fit:

- 16.3.3.1 for the payment of any liability (including taxes payable in respect of the Trust); or
- 16.3.3.2 which may be required from time to time for the protection or better or further investment of all or any of the Trust Assets; or
- 16.3.3.3 generally for such other purposes in connection with all or any of the assets forming part of the Trust Fund.
- 16.3.4 Invest any funds that are not required for immediate use of the Trust, provided that investments may only be made in:
  - 16.3.4.1 a financial institution as defined in section 1 of the Financial Institutions (Investment of Funds) Act, 1984;
  - 16.3.4.2 securities listed on a licensed stock exchange as defined in section 1 of the Stock Exchanges Control Act, 1985;
  - 16.3.4.3 in other prudent investments in financial instruments and assets as the Commissioner may determine after consultation with the Executive Officer of the Financial Services Board and Director of Non-Profit Organisations.
- 16.3.5 Obtain such legal advice from time to time as the said Trustees in their discretion require and in which event all costs of and in connection therewith shall be borne by the Trust.
- 16.3.6 Engage the service of financial advisers, brokers, property administrators, consultants, accountants, auditors, architects and experts of all kinds and to make payment of their fees.
- 16.3.7 Institute or defend any proceedings in any court of law or arbitration proceedings in the name of the Trust.
- 16.3.8 Decide (which decision shall be final and binding and shall not be subject to dispute or challenge) whether any monies or assets received by them from time to time as part of the Trust Assets constitutes "capital" or "income" and for the purpose they shall be entitled to make such apportionment in the Trust's account.
- 16.3.9 Apply all or any of the Trust assets or monies held by them towards payment of any tax levied on the Trust or the income of the Trust, if any.
- 16.3.10 Leave the capital of the Trust or any part thereof invested as it may be when it is handed over to them.
- 16.3.11 Sell, realise, call in or convert into cash so much of the Trust assets as the Trustees may from time to time deem fit and make such further investments of the same in such form and in such manner as the Trustees may determine from time

to time vary any of such investments as the Trustees may determine.

16.3.12 Enter into contracts in the name of the Trust in furtherance of the interests of the Trust and to nominate one or more of them or to delegate their authority to any person selected by them for the purpose of management of the Trust and the execution of all documents or other activities of any nature relating to the carrying out of the purposes of this Trust, including documents in connection with the investment and realisation of the Trust assets which realisation shall be in whatever manner they deem fit.

16.3.13 Permit any premises owned by the Trust to be occupied free of rental or for a rental to be determined by the Trustees.

16.3.14 Engage and discharge employees and to set their terms and conditions of employment.

16.3.15 Do all things necessary to achieve the objects of the Trust.

## 17 BOOKS OF ACCOUNTS, RECORDS OR OTHER DOCUMENTS

17.1 Any books of account, records or other documents must be retained and preserved by SAHA for a period of 4 years –

17.1.1 after the date of the last entry in any book; or

17.1.2 after completion of financial transaction, acts or operations; and

17.2 Trustee may not without the written consent of the Master destroy any document which serves as proof of an investment, safe custody, control, administration, alienation or distribution of SAHA property before the expiry of a period of five years from the termination of the SAHA.

17.3 The Trust is to keep accounting records of its income, expenditure, assets and liabilities, and

17.3.1 Within six month after the end of its financial year, draw up financial statements, which must include at least

17.3.1.1 A statement of income and expenditure for that financial year; and

17.3.1.2 A balance sheet showing its assets, liabilities and financial position as at the end of that financial year.

17.4 Within two months after drawing up its financial statements, the Trust must arrange for a written report to be compiled by an accounting officer and submitted to the Trustees stating whether or not-

17.4.1 The financial statements of the organisation are consistent with its accounting records;

17.4.2 The accounting policies of the organisation are appropriate and have been appropriately applied in the preparation of the financial statements;

- and,
- 17.4.3 The Trust has complied with the provisions of the Nonprofit Organisations Act and this Deed of Trust which relate to financial matters.
- 17.5 The Trust must, in writing, provide the Director of Nonprofit Organisations with
  - 17.5.1 a narrative report of its activities together with its financial statements and the accounting officer's report as set out in clause 17.4 above, within nine months after the end of its financial year; and
  - 17.5.2 a physical address in the Republic for service of documents and notices, and advice of any change of such address.

## 18 AMENDMENTS

- 18.1 A Resolution approved by at least two thirds of the Trustees then in office shall be required for any amendment to this Deed of Trust.
- 18.2 Any amendments to this deed of Trust shall be submitted to the Commissioner of the South African Revenue Service.
- 18.3 In addition, the Trust must send to the Director of Nonprofit Organisations a copy of the resolution and a certificate signed by a duly authorised office-bearer stating that the resolution complies with its constitution and all relevant laws.

## 19. TERMINATION OF TRUST AND DISTRIBUTION OF ASSETS

- 19.1 The Trust shall continue indefinitely but the Trustees shall have the right, in their sole and absolute discretion passed by two-thirds of the Trustees, to terminate the Trust.
- 19.2 Upon its termination the remaining assets of the Trust, after satisfaction of its liabilities shall be given or transferred to one or more trusts or associations not for gain with objects similar to the objects of the Trust which have been approved in terms of section 30 of the Income Tax Act, 1962.
- 19.3 The Trust must provide the Director of Nonprofit Organisations with at least two months' written notice of the intention of the Trustees to terminate the Trust.

## 20 DISPUTES

Should any question arise as to whether the interpretation of this Deed or any of the provisions hereof as to the true construction thereof or as to the administration of the Trust or otherwise howsoever, the Trustees shall have the power to decide such questions either acting on their own judgement or upon the advice of attorneys and/or counsel and any such decisions shall be final and binding on all parties affected thereby and shall be carried into effect by them.



## 21 COSTS

All costs of and incidental to the negotiations and finalisation of this Deed of Trust and its registration in terms of the Trust Property Control Act shall be paid by the Trust out of the Trust assets.

ANNEXURE "A" : ORIGINAL TRUSTEES

HORST GERHARD HERMANN KLEINSCHMIDT  
(BORN: 17/10/1945)

AND

SUSAN J BOOYSEN  
(born: 17/9/1954)

AND

JEAN DE LA HARPE  
(born: 3/9/1960)

AND

GIBSON THEMBA SIRAYI  
(born: 12/10/1953)

AND

SAM MAHOSHA MKHABELA  
(born: 23/10/1960)

AND

LULI CALLINICOS  
(born: 10/11/1936)

AND

MICHELE PICKOVER  
(born: 1/8/1959)

AND

NOEL FRANCIS STOTT  
(born: 28/12/1958)

AND

JOHANNES MAFODI MANAMA  
(born: 16/3/1949)

*APPENDIX B: CURRENT TRUSTEES*

HORST GERHARD HERMANN KLEINSCHMIDT  
(born: 17/10/1945)

AND

LULI CALLINICOS  
(born: 10/11/1936)

and

MARLENE MERCER POWELL  
(born: 07/27/1959)

AND

DUMISA BUHLE NTSEBEZA  
(born 31/10/1949)

AND

NKOSINATHI BIKO  
(born 11/03/1971)

AND

CIRAJ SHAHID RASSOOL  
(born 27/12/1961)

AND

MOHAMED NOOR NIEFTACODIEN  
(born 25/10/1964)

AND

RAZIA SALEH  
(born 08/08/1962)

AND

ANTHONY ANDREW MANION  
(born 13/04/1976)

AND

VERNE SHELDON HARRIS  
(born 21/04/1958)

AND

PIERS ASHLEY PIGOU  
(born 30/05/1967)

AND

SELLO KOOS HATANG - 7504285846089  
(born 28/04/1975)

(hereinafter collectively referred to as "the Trustees")

SOUTH AFRICAN HISTORY ARCHIVES TRUST

and

DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

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**AFFIDAVIT**

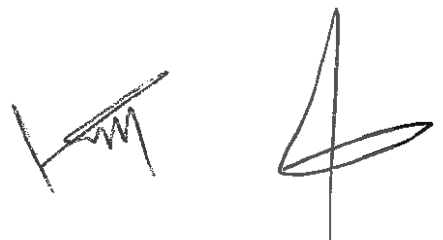
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I, the undersigned

**YASMIN SOOKA**

do hereby make oath and say that –

1. I am the Executive Director of the Foundation for Human Rights in South Africa.
2. Save where otherwise stated, or where the contrary appears from the context, the facts contained in this affidavit are within my personal knowledge and are, to the best of my knowledge and belief, true and correct.
3. I was previously a Commissioner of the Truth and Reconciliation Commission (TRC), as provided for in the Promotion of National Unity and Reconciliation Act 34 of 1995 (The Act).
4. I was the deputy chairperson of the Human Rights Violations Committee of the TRC which was responsible for a number of activities undertaken by the Commission, including the section 29 in camera hearings in terms of section 29 of the Act.

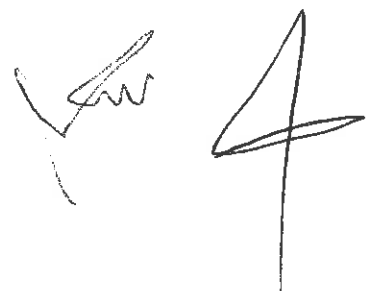


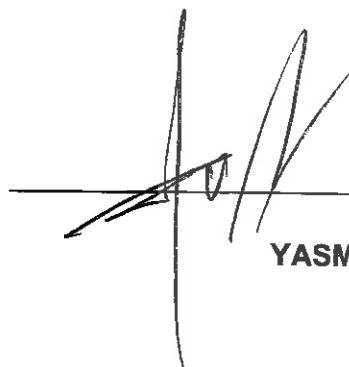
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5. The Commission had an open and transparent approach with regard to access to information which encouraged public access to TRC proceedings wherever possible.
6. In a meeting of the Commissioners held in June 1998, the Commissioners unanimously agreed that all information gathered by the TRC, including section 29 hearings, would remain confidential until such time as the Commission decided otherwise. This agreement was noted in verified minutes of the Commission's meeting.
7. In a meeting of the Commissioners held on 6 August 1998, the Commission noted that a number of requests had been received by the TRC for transcripts of section 29 hearings. The Commission noted further that a policy decision would need to be made with regard to public access to such transcripts. Both of these notations were recorded in verified minutes of the Commission's meeting.
8. At the meeting held on 6 August 1998 I noted that the issue of section 29 hearings was a sensitive matter and that all such transcripts needed to be scrutinized on a case by case basis to determine whether persons were named therein or whether sensitive information would be released. However, I expressly cautioned against a 'blanket policy' on access, or denial of access, to such documents. It was then decided that I, and some of the other Commissioners, would meet again to discuss the issue of access to section 29 files and draft a recommendation thereon. These notations were recorded in verified minutes of the Commission's meeting.



9. At the final meeting of the Commissioners held in March 2003, though written recommendations had not been drafted, I spoke to the policy issues and verbally recommended to all the Commissioners present that they adopt as official policy a recommendation that the section 29 hearing records be opened to the public subject to the usual privacy conditions which protect victims and witnesses. This suggestion met the broad approval of the other Commissioners present at the meeting; Dr Alex Boraine, Mary Burton, Richard Lyster, Dumisa Ntsebeza, Wendy Orr and Dr Faizel Randera. The Commission noted this as official policy which was then verified in the minutes of the Commission's meeting. To my knowledge, though minutes of this meeting were taken by Archbishop Tutu's assistant, Ms Lavinia Crawford-Browne, such minutes were lost when the laptop on which they had been stored was subsequently stolen.
10. The TRC and its Commissioners thus held a principled position of allowing access to section 29 hearing documents generally, though we supported conditions which would limit access in respect of certain conditions and the acknowledgment of competing rights. I had recommended a position which called for those in charge of the section 29 hearing documents to apply their minds in each instance of request for access whilst appreciating the rights of the public to know. This aligned with the TRC's vision of assisting truth and reconciliation in South Africa through openness and discovery.
11. I can also confirm that the TRC did not enter into confidentiality agreements with those who were subpoenaed and/or appeared voluntarily before the TRC in section 29 in camera hearings.

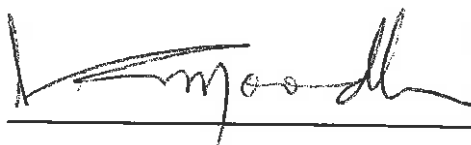
Handwritten signature and the number 4.

  
YASMIN SOOKA

I HEREBY CERTIFY THAT THE DEPONENT HAS ACKNOWLEDGED THAT SHE:

- (a) knows and understands the contents of this affidavit;
- (b) has no objection to taking the oath;
- (c) considers the oath to be binding on her conscience.

THUS signed and sworn to before me, at JOHANNESBURG on this 30<sup>th</sup> day of  
*April* 2012, the Regulations contained in Government Notice No. R1258  
of 21 July 1972 (as amended) having been fully complied with.

  
COMMISSIONER OF OATHS

FULL NAMES:

BUSINESS ADDRESS:

DESIGNATION:

AREA/OFFICE:

**Mogambai Cupusamy Moodliar**  
Commissioner of Oaths  
Attorney at Law  
8th Floor - 209 Smit Street  
Braamfontein  
2017





the doj & cd

Department:  
Justice and Constitutional Development  
REPUBLIC OF SOUTH AFRICA

Private Bag X 81, Pretoria, 0001 – Momentum Centre, 329 Pretorius Street, Pretoria, 0001

Tel: (012) 315 1730, Fax: (012) 357 8004

Please quote our full reference number in all correspondence

Our reference: 7/6/9 SAHA (Johnson K L)  
Enquiries: Ms M Raswisi  
E-mail: MRaswisi@justice.gov.za

Date: 06 August 2013

Ms Kathryn L Johnson  
P. O Box 31719  
BRAANFONTEIN  
2017

Tel: 011 718 2663  
Fax: 086 649 1491

Dear Ms Johnson

**APPLICATION FOR ACCESS TO INFORMATION IN TERMS OF THE PROMOTION OF  
ACCESS TO INFORMATION ACT, 2000 (ACT NO. 2 OF 2000)**

Your request to have access to documents held by the Department of Justice and Constitutional Development specified by yourself as:

*"the transcript of the special investigation and hearings (in camera) into the Helderberg Flight, a transcript of evidence given by Joe Verster, a transcript of evidence given by Andrew Masondo, a transcript of evidence given by Hertzog Lerm, a transcript of evidence given by Joe Mamasela, George Meiring, page 202, Joe Verster, pages 134 to 141 and 609, Martin Dolincheck, pages 100, 160 to 162 and 223, Phillip Powell, pages 359 and 363, Walter Felgate, pages 343, 354, 460, 638, 641, 641 and 722, Wouter Basson, Christo Nel, Craig Williamson, Hendrik Mostert, Adriaan van Niekerk, Johannes van der Merwe, Jacobus Conradie, Wilhelm Bellingan, Charles Zeelie, Johan le Roux, Willem Schoon, Nicolaas van Rensburg and James Taylor" was unsuccessful.*

Having carefully considered your application and having applied my mind thereto. I regret to inform you that I am unable to provide the documents requested for the reasons set out below in terms of the transcripts of section 29 hearings of the abovementioned individuals, the requested documents contains personal information which implicates various parties in alleged unlawful activities. Its disclosure could be defamatory to the individuals implicated and could also infringe their dignity which is protected under the Constitution.

I consider that the disclosure of these documents could be highly detrimental to the individuals involved and could reasonably be expected to endanger their lives or physical safety. Notwithstanding the need for disclosure in the light of the factors already referred to.

I refuse this request first because, it would constitute an unreasonable, disclosure of highly personal information in terms of section 34 (1) of PAIA.

Secondly, because its disclosure could reasonably be expected to endanger the lives or physical safety of the individuals implicated.

The disclosure could reasonably be expected to facilitate a contravention of the law to the extent that the reputations and dignity of the individual names may be impaired thereby as contemplated in section 39 (i) (b) (dd) of PAIA.

Thirdly, the documents contain information that was supplied in strict confidence by various third parties. The information was supplied after their confidentiality was guaranteed, so we are unable to breach our undertaking.

Further, the nature of our work and the need to obtain information from various sources to enable us to carry out our function in the public interest may be jeopardised by the disclosure of information supplied in confidence. The request is therefore refused in terms of section 37(1) (b) of the Promotion of Access to Information Act 2 of 2000.

The above decision has been carefully considered in terms of the Promotion of Access to Information Act 2000 (Act No. 2 of 2000). Kindly be advised that you can lodge an appeal in terms of section 74(1) of the Promotion of Access to Information Act, 2000.

I trust you will find the above in order.

Yours sincerely



**M M RASWISI (Ms)**  
**DEPUTY INFORMATION OFFICER**

06/8/13

## 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: SAH-2013-DOJ-0003

#### A. Particulars of public body

The Information Officer/Deputy Information Officer:

Marlyn Raswiswi

Department of Justice and Constitutional Development (DOJ)

Private Bag X81

Pretoria 0001

Tel. +27123151715

Fax. +27123578004

Email: mraswiswi@justice.gov.za

Innocentia Rehlegile Moele  
155 - 5th Street  
Sandown, Sandton, 2196

Commissioner of Oaths  
Ex-Officio / Practising Attorney R.S.A.

  
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#### 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.

**Full names and surname:** South African History Archive (SAHA)

**Identity/Passport number:** Non-Profit Trust No. 2522/93

**Postal address:** P.O.Box 31719, Braamfontein, 2017

**Fax number:** +27866491491

**Telephone number:** +27117182563

**E-Mail Address:** foip@saha.org.za

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

#### 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:

Identity number:

## D. 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:

X	Refusal of request for access
	Decision regarding fees prescribed in terms of section 22 of the Act
	Decision regarding the extension of the period within which the request must be dealt with in terms of section 26(1) of the Act
	Decision in terms of section 29(3) of the Act to refuse access in the form requested by the requester
	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**

State any other information that may be relevant in considering the appeal:


## 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: kathryn@saha.org.za

Signed at JOHANNESBURG this 28<sup>th</sup> day of September 2013.

  
SIGNATURE OF APPELLANT  
Ms Kathryn Johnson  
Freedom of Information Programme  
South African History Archive (SAHA)

Innocentia Reholegile Moele  
155 - 5th Street  
Sandown, Sandton, 2196  
Commissioner of Oaths  
Ex-Officio / Practising Attorney R.S.A.

  
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**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):

Innocentia Reholegile Moele  
155 - 5th Street  
Sandown, Sandton, 2196  
Commissioner of Oaths  
Ex-Officio / Practising Attorney R.S.A.

  
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## Annexure A

### Reasons for Internal Appeal

#### 1. Factual Background

- 1.1 On 26 July 2013 the South African History Archive (SAHA) submitted a request to the Department of Justice and Constitutional Development (**Department**) for information under the Promotion of Access to Information Act, 2000 (**PAIA**), requesting transcripts of all hearings conducted by the Truth and Reconciliation Commission (**TRC**) under section 29 of the Promotion of National Unity and Reconciliation Act 34 of 1995, as amended (**TRC Act**) (**PAIA request**).
- 1.2 In summary, section 29 of the TRC Act provides statutory authority for notices to be issued by the TRC to persons to attend hearings/investigations or produce evidence. Subsection 29(5) of the TRC Act provides that evidence should not be made public until the TRC has determined that it should be made public, or in absence of a determination by the TRC, until it was furnished at a TRC hearing or in another Court.
- 1.3 All of the transcripts requested in the PAIA request were created from evidence furnished at the TRC hearings.
- 1.4 However, the TRC Commissioners made a determination during March 2003 regarding section 29 hearing transcripts which accords with subsection 29(5) of the TRC Act.
- 1.5 The PAIA request had seven affidavits attached. The affidavits included six affidavits from former TRC Commissioners and one affidavit from the assistant to Archbishop Desmond Tutu, Chairman of the TRC.
- 1.6 In general terms the affidavits confirm that a decision was taken during March 2003 to allow public access to the material obtained at the TRC hearings, subject to certain limited conditions. Those conditions were that the records should be generally available, subject to consideration of privacy issues on a case-by-case basis.
- 1.7 On 29 August 2013 SAHA received via email a letter dated 6 August 2013 signed by Ms M M Raswisi, the Deputy Information Officer of the Department, refusing the request for records required in the PAIA request (**PAIA decision**) on the basis that:
  - a) *'disclosure would constitute an unreasonable, disclosure of highly personal information in terms of section 34(1) of PAIA',*
  - b) *'disclosure would facilitate a contravention of the law to the extent that the reputations and dignity of the individual names may be impaired thereby as contemplated in section 39(i)(b)(dd) of PAIA' (sic)<sup>1</sup>,*
  - c) *'information was supplied after confidentiality was guaranteed',* and so disclosure would be a breach of the Department's undertaking,
  - d) the nature of the Department's work and the need to obtain information from various sources to carry out the Department's function in the public interest *'may be jeopardised by the disclosure of information supplied in confidence',* leading to a refusal under section 37(1)(b) of PAIA.

<sup>1</sup> The word 'sic' is used here as this section is quoted from the PAIA decision, but the section is incorrectly cited by the Department. It should be noted that this section does not exist in PAIA. SAHA's reference to this incorrect section is merely by way of a quote from the PAIA decision.

## 2. Issues

- 2.1 It is submitted that consideration of the transcripts on a case-by-case basis under PAIA is consistent with the TRC Committee's determination during March 2003, and meets the current legal requirements that apply to those transcripts.
- 2.2 SAHA contests the refusal of all of the requested transcripts under PAIA, and submits this appeal on a number of bases.
- 2.3 First, the PAIA decision summarises the PAIA request in a manner that indicates that the scope of the PAIA request has been misconstrued by the Department, and that the PAIA request was not fully considered by the decision-maker. The PAIA decision is clearly defective for this reason, and is appealed on this basis.
- 2.4 Specifically, the PAIA decision states that:

"Your request to have access to documents held by the Department of Justice and Constitutional Development specified by yourself as:

*"the transcript of the special investigation and hearings (in camera) into the Helderberg Flight, a transcript of evidence given by Joe Verster, a transcript of evidence given by Andrew Masondo, a transcript of evidence given by Hertzog Lerm, a transcript of evidence given by Joe Mamasela, George Meiring, page 202, Joe Verster, pages 134 to 141 and 609, Martin Dolincheck, pages 100, 160 to 162 and 223, Phillip Powell, pages 359 and 363, Walter Felgate, pages 343, 354, 460, 638, 641, 641 and 722, Wouter Basson, Christo Nel, Craig Williamson, Hendrik Mostert, Adriaan van Niekerk, Johannes van der Merwe, Jacobus Conradi, Wilhelm Bellingan, Charles Zeelie, Johan le Roux, Willem Schoon, Nicolaas van Rensburg and James Taylor" was unsuccessful (sic).*

Having carefully considered your application and having applied my mind thereto.(sic) I regret to inform you that I am unable to provide the documents requested for the reasons set out below in terms of the transcripts of section 29 hearings of the abovementioned individuals, the requested documents contains (sic) personal information which implicates various parties in alleged unlawful activities."

- 2.5 At Part D of the PAIA request, SAHA specifically set out the description of the record or relevant part of the record as follows:

*'Transcripts of all hearings conducted by the Truth and Reconciliation Commission (TRC) under section 29 of the Promotion of National Unity and Reconciliation Act 34 of 1995, as amended'.*

- 2.6 As noted at Part D of the PAIA request, SAHA sets out further particulars of the record which were provided in an annexure A to the PAIA request. In summary, the annexure to the PAIA request noted what were clearly stated to be 'examples' of information that could be disclosed. The PAIA request did not confine the PAIA request to those examples only. The specific cases cited were examples of cases where:

- a) transcripts of some of the hearings have been made public and are published on the TRC website (currently controlled by the Department),

- b) excerpts of evidence given during investigations were quoted in the public and published report of the TRC, and
  - c) excerpts of evidence have been furnished at amnesty hearings in other courts, in order to assist the Department to consider whether those transcripts could be made public under section 29(5) of the TRC Act.
- 2.7 It is clear that the decision-maker has not fully applied her mind to the full scope of the request, and has limited the PAIA decision to the specific examples provided in the annexure to the PAIA request.
  - 2.8 Accordingly, the request for all transcripts (ie all those beyond a request for transcript of person named as examples in the annexure to the PAIA request) has not been determined in accordance with section 25(1) of PAIA, which requires a consideration of PAIA in relation to the full PAIA request. It is clear that this has not occurred, and the PAIA decision is therefore appealed for full consideration of the entirety of the PAIA request.
  - 2.9 **Secondly**, at no stage in the PAIA decision has there been any attempt to consider if any part of a transcript can be released, which is required by section 28 of PAIA. In summary, section 28 of PAIA clearly provides that information **must** be disclosed where information that may or must be refused can reasonably severed from any part that does **not** contain information that may or must be refused.
  - 2.10 The PAIA decision makes no decision as to whether any part of any of the requested transcripts can be released. The PAIA decision is also appealed on this basis.
  - 2.11 **Thirdly**, the decision-maker has indicated a concern that disclosure of the documents *"could be highly detrimental to the individuals involved and could reasonably be expected to endanger their lives or physical safety."* While no reference is made to PAIA in making this claim, as required by section 25 of PAIA, it is assumed that this is a reference to section 38 of PAIA as a ground for refusal.
  - 2.12 It appears that this ground for refusal has been determined at a global level, without considering the facts and circumstances of each individual's evidence in each transcript, and without considering if part of a transcript could be made available, as required by section 28 of PAIA.
  - 2.13 The reasoning in the PAIA decision is very unlikely to be true for all the evidence of all the individuals that appeared before the TRC, where that evidence is recorded in the transcripts requested by the PAIA request. Accordingly, this internal appeal seeks a more considered decision, made on a case-by-case basis, before a decision to refuse release of information is made on that ground.
  - 2.14 **Fourthly**, the decision-maker has not considered as a relevant factor, section 34(2)(a) of PAIA which states that a record containing personal information about a third party may not be refused insofar as it consists of information about an individual who has consented in writing in terms of section 48 of PAIA (or otherwise) to its disclosure to SAHA. In summary, section 48 of PAIA requires that a person be informed of the request for access under section 47(1) of PAIA.
  - 2.15 The decision-maker makes clear in the PAIA decision that she refused the request after considering section 34(1) of PAIA.
  - 2.16 Section 47(1) of PAIA states that an information officer who is considering a record under section 34(1) of PAIA **must** take all reasonable steps to inform a third party to whom the record relates of the PAIA request.
  - 2.17 There is no evidence that this has occurred.
  - 2.18 If the appropriate notices to third parties had been sent, then there is a reasonable likelihood that some, or all, of the transcripts might have been released by consent



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under section 34(2)(a) of PAIA. Not following this process is a clear and obvious breach of the requirements of PAIA, and this internal appeal is made to ensure that this breach is now remedied by the Department.

- 2.19 Fifthly, the decision-maker has not considered as a relevant factor, section 34(2)(b) of PAIA which, in summary states that a record containing personal information about a third party may not be refused insofar as it consists of information that belongs to a class of information, in circumstances where the individual was informed, before it was given, that the information might be made available to the public.
- 2.20 To consider disclosure of information on this basis would require an analysis of the factual circumstances on which the evidence provided at the hearing was provided to the TRC.
- 2.21 The PAIA request provided clear evidence from Ms Yasmin Sooka, former deputy chairperson of the Human Rights Violations Committee of the TRC in her affidavit dated 30 April 2012 that the TRC Commissioners had not agreed that a person's evidence would be treated confidentially. This evidence suggests that individuals would have had some expectation that their evidence, as a class of information, might be made public.
- 2.22 There is no evidence that this important factor in determining whether to refuse release of personal information was considered in the PAIA decision, and weighed against the other concerns. This issue should now be considered as part of the consideration of this internal appeal.
- 2.23 Sixthly, the decision-maker has not considered as a relevant factor, section 34(2)(c) of PAIA which states that a record containing personal information about a third party may not be refused insofar as it consists of information already publicly available.
- 2.24 In the annexure to the PAIA request, SAHA specifically drew to the attention of the Department a range of information that had been made public. At a minimum the whole, or part, of the transcripts relating to personal information that was already made public was able to have been released by the Department. Disclosure of that information, where it is part of the transcript, should have been considered by the Department.
- 2.25 There is no evidence that the decision-maker considered whether release should be provided where the transcripts contain information already publicly available. If those matters had been considered it seems likely that at least some, or some part of, the transcripts would have been released, including where those transcripts already contain public information given that disclosure of that public information is unlikely to be refused based on the reasoning set out in the PAIA decision. It is submitted that the reasoning in the PAIA decision is defective.
- 2.26 This internal appeal is made on the basis that it is unlikely that release of transcripts containing the currently public information would:
- 'constitute an unreasonable, disclosure of highly personal information in terms of section 34(1) of PAIA', given it is already publicly available;
  - 'facilitate a contravention of the law to the extent that the reputations and dignity of the individual names may be impaired thereby as contemplated in section 39(i)(b)(dd) (sic)<sup>2</sup> of PAIA', given it is already publicly available;

<sup>2</sup> As noted above, the use of the word 'sic' is used here as this section is quoted from the PAIA decision, but the section is incorrectly cited by the Department. The section quoted does not exist in PAIA.

- be a breach of the Department's confidentiality undertaking, given it is already publicly available; and
- jeopardise future disclosure leading to a refusal under section 37(1)(b) of PAIA, given it is already publicly available.

- 2.27 **Seventhly**, the decision-maker has not considered section 34(2)(f) of PAIA which, in summary, states that a record containing personal information about a third party may not be refused insofar as it consists of information about an individual who is, or was, an official (that is, an employee) of a public body and the information relates to the position or functions of the individual in that capacity.
- 2.28 Some individuals that gave evidence that was recorded in the transcripts at the TRC hearings conducted under section 29 of the TRC Act are likely to be persons that can be defined as officials under PAIA, on the basis that they were formerly employed by the government or a public body.
- 2.29 However, the decision-maker has not indicated in the PAIA decision that they turned their mind to whether this was a factor in favor of release in relation to any or all of the requested transcripts. Accordingly, this ground needs further consideration as part of the internal appeal.
- 2.30 **Eighthly**, a reference is made in the PAIA decision to a contravention of the law to release information that might affect reputations and dignity under section 39(i)(b)(dd) (sic)<sup>3</sup> of PAIA.
- 2.31 There is no legislative citation for that ground of refusal. It is unfortunate that reliance on this ground of refusal citing legislation incorrectly may have been confusing to a requester and limited their ability to challenge this ground of refusal.
- 2.32 It is possible that the Department intended the ground of refusal to refer to section 39(1)(b)(iii)(dd) of PAIA, on the basis that disclosure could reasonably be expected to facilitate the commission of a contravention of the law, including but not limited to, escape from lawful detention.
- 2.33 It is submitted that this provision is not intended to encourage a refusal to release information on the basis of a potential defamation or other claim relating to the loss of reputation or dignity of a person. In this internal appeal it is submitted that this is a tenuous basis for refusal to release all transcripts requested in the PAIA request, and needs to be reconsidered.
- 2.34 **Ninethly**, the reliance on section 37(1)(b) of PAIA is an insufficient ground to deny the release of the requested information.
- 2.35 In summary, section 37(1)(b) of PAIA provides that information can be refused if the record consists of information that was supplied in confidence by a third party and the disclosure could reasonably be expected to prejudice the future supply of similar information, or information from the same source **and** it is in the public interest that similar information, or information from the same source, should continue to be supplied.
- 2.36 Again, disclosure may not be refused where the information is publicly available, which the PAIA request noted was the case for a range of information in some transcripts. There is no evidence that this counterbalancing factor was considered in the PAIA decision, in relation to disclosure of all, or some part, of the transcripts requested in the PAIA request.

<sup>3</sup> As noted above, the use of the word 'sic' is used here as this section is quoted from the PAIA decision, but the section is incorrectly cited by the Department. The section quoted does not exist in PAIA.

- 2.37 Additionally, the notice to third parties and request for consent procedure should also have been applied before this ground for refusal process was applied. Again, this reason stands alone as a basis for appeal against the PAIA decision.
- 2.38 Importantly, the information that was supplied in the transcripts requested in the PAIA request was supplied to the TRC, and not the Department. The TRC no longer has any need for further information from the same sources or of similar information. Accordingly, it is submitted that disclosure of information should not be refused on the grounds that the disclosure would raise issues with the Department's relationship with those individuals that are sources of information.
- 2.39 In any event, it is submitted that there is no evidence from any person of expertise, indicating that the Department would:
- continue to require the kind of information set out in the transcripts; or
  - the release of information in the transcripts would affect the release of similar information by similar people to the Department particularly noting the original information was provided to the TRC, and the Department is merely acting as custodian of that information, and is bound by decisions of the TRC in relation to the release of information in those transcripts.
- 2.40 **Tenthly**, it appears that the refusal to release information based on the grounds of confidentiality and breach of an undertaking was not made by reference to section 37(1)(a) of PAIA. For clarity, this second ground for refusal is dealt with by reference to the specific legislative provision.
- 2.41 In summary, section 37(1)(a) of PAIA provides that a PAIA request must be refused if the disclosure of the record would constitute an action for breach of a duty of confidence owed to a third party in terms of an agreement.
- 2.42 However, as noted in relation to other grounds of refusal above, this may not be refused where the information is publicly available, which the PAIA request noted was the case for a range of information in some transcripts.
- 2.43 Additionally, the notice to third parties and request for consent procedure should also have been applied before this ground for refusal process was applied. There is no evidence that this was undertaken, and the PAIA decision is clearly defective on this ground alone.
- 2.44 In any event, there is evidence which was provided with the PAIA request from Ms Yasmin Sooka, former deputy chairperson of the Human Rights Violations Committee of the TRC in her affidavit dated 30 April 2012 that no confidentiality agreement was entered into by the TRC and any person subpoenaed or voluntarily appearing at the TRC hearings.
- 2.45 Accordingly, there is no evidence of any undertakings that would give rise to a legal action against the Department for a breach of a duty of confidence. That is, the evidence supplied with the PAIA request by SAHA gives no indication that there was any agreement to hold the information in confidence in a way that would lead to any breach of confidence. Therefore, it is submitted that this is a baseless ground for refusal of the PAIA request. This ground of refusal is contested in this internal appeal.
- 2.46 **Finally**, in the PAIA decision reference is made to the right of South Africans to have their dignity respected and protected under the Constitution of the Republic of South Africa (see section 10).
- 2.47 However, no reference is made to the countervailing constitutional right given to all South Africans, to access any information held by the state. The importance of that

right has been considered in *Brummer v Minister for Social Development and Others* 2009 (6) SA 323 (CC) as follows:

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

2.48 Similarly, the PAIA decision did not consider the purpose and objectives of the TRC Act which was established to, amongst other matters, report to the nation about violations of human rights and their victims. The TRC's ability to undertake its core functions including to:

- report to the nation,
- grant amnesty to those who made full disclosure, and
- allow victims to relate the violations they suffered and restore human and civil dignity to victims of human rights violations,

relies on all information ultimately becoming public. It is only on a clear case-by-case analysis of the transcripts of in-camera hearings for release to the public that the TRC's final objective of the reconciliation and the ongoing prevention of human rights violations can be fully achieved.

2.49 It is submitted that the PAIA decision has not undertaken an appropriate weighing of all counterbalancing factors for and against release of the information, particularly in relation to the constitutional rights that are raised by the PAIA request. That weighing of all appropriate factors is sought as part of a new decision in response to this internal appeal.

### 3 Submission

- 3.1 Section 11 of PAIA provides that a requester must be given access to a record of a public body if the requester complies with the procedural requirements in PAIA and access to the record is not refused in terms of any ground for refusal contemplated in Chapter 4 of PAIA.
- 3.2 SAHA has complied with the procedural requirements of PAIA and the requestee has not offered any justifiable ground for refusal in Chapter 4 for refusing access to the requested records. The requestee has therefore unlawfully refused access to the requested records.
- 3.3 Furthermore, there is no justifiable basis on which the requestee could refuse access to the requested records.
- 3.4 SAHA therefore respectfully submits that the relevant authority should order that SAHA be given access to the requested records pursuant to section 77(2) of PAIA, which empowers the relevant authority to substitute the information officer's decision with a new decision.



**DLA CLIFFE DEKKER  
HOFMEYR**

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**Attention: Ms M Raswiswi**

Department of Justice and  
Constitutional Development

**BY EMAIL: MRaswiswi@justice.gov.za**

**No. of pages: 2 pages**

Our Reference Christine Jesseman / T Erasmus  
Account Number 01954103  
Your Reference SAH-2013-DOJ-0003  
Direct Line (011) 562 1162  
Direct Telefax (011) 562 1514  
Direct e-mail Christine.Jesseman@dlacdh.com  
Date 19 November 2013

Innocentia Rehlegile Moele  
155 5th Street  
Sandown, Sandton, 2196

**Certified True Copy**

Commissioner of Oaths  
Ex-Officio / Practising Attorney R.S.A.

Dear Madam

**PROMOTION OF ACCESS TO INFORMATION ACT ("PAIA") REQUEST FOR TRANSCRIPTS OF ALL HEARINGS CONDUCTED BY THE TRUTH AND RECONCILIATION COMMISSION UNDER SECTION 29 OF THE PROMOTION OF NATIONAL UNITY AND RECONCILIATION ACT 34 OF 1995 ("TRANSCRIPTS").**

- 1 We wish to confirm that we act for the South African History Archive Trust ("SAHA") in the above matter.
- 2 We further wish to confirm that SAHA submitted a request to the Department of Justice and Constitutional Development ("the Department") for access to the abovementioned transcripts on 26 July 2013. On 6 August 2013 SAHA received a response from the Department, with reference number 7/6/9 SAHA (Johnson KL) confirming that the request was refused in terms of sections 34(1), 37(1)(b) and 39 of PAIA and SAHA subsequently lodged an internal appeal on 28 September 2013 in terms of section 75 of PAIA. The deadline for the internal appeal was 29 October 2013. However, SAHA has to date failed to receive a response to its internal appeal.
- 3 Consequently, should you not provide SAHA with a favourable response to its internal appeal within fourteen (14) calendar days of the date hereof, namely on or before 3 December 2013, we hold instructions to pursue this matter through appropriate legal means including approaching the relevant court for an order compelling the Department to do so.

**CHAIRMAN** CH Ewing **CHIEF EXECUTIVE OFFICER** B Williams **CHIEF OPERATING OFFICER** MF Whitaker **CHIEF FINANCIAL OFFICER** ES Burger

**DIRECTORS: JOHANNESBURG** A Abro N Altini CA Barclay R Beerman E Bester P Bhagatjee R Bonnet CJ Botes TE Brincker CWJ Charter M Chenia PJ Conradie AR Curnow CJ Daniel S de Vries ML du Preez L Erasmus CH Ewing BV Faber JJ Feris TS Fletcher L Franca TG Fuhrmann MZ Gatto S Gill SB Gore MJ Gwanzura PJ Harvey AJ Hofmeyr Q Honey HS Jackson WH Jacobs WH Janse van Rensburg CM Jesseman JCA Jones TTM Kall J King LJ Kruger J Latsky AM le Grange FE Leppan BC Maasdorp Z Malinga B Meyer WJ Midgley M Mongoi R Moodley AL Morphet MG Mphahudi BP Ntsha BP O'Connor SJ Oosthuizen A Patel JS Pennington GH Pienaar V Pillay DB Pinnock AM Potgieter AV Pretorius PH Prinsloo AG Reid KA Rice M Serfontein L Smith JL Stolp HR van der Merwe JJ van Dyk WPS van Wyk NJ von Ey JG Webber MF Whitaker JG Whittle KB Whyte DA Wilken B Williams JM Witts-Hewinson MP Yeates

**DIRECTORS: CAPE TOWN** RD Barendse TJ Brewis CM Britain-Renecke MA Bromley MR Collins A de Lange LF Egypt GT Ford S Franks DF Fyfer SAP Gie JW Green AJ Hannie AM Heiberg PB Hesselberg CI Hindley RC Horn JH Jacobs R Jaga A Kariem PJ Krusche IJ Lessing GC Lumb RE Marcus A Moolman NW Muller J Naser FT Newham G Orrie L Rhodie BT Rubinstein GJ Stansfield BPA Strauss DM Thompson CW Williams TJ Winstanley

**DIRECTORS: DURBAN** J Govender NTY Siwendu

**CONSULTANTS:** A Abercrombie HS Coetzee HC Dagut JMA Evenhuis JJ Gomes MB Jackson RSK Jarvis EJ Kingdon FF Kolbe CJ Wiggett

**SENIOR ASSOCIATES:** JA Aukema G Barkhuizen-Barbosa B Brown KM Carew E Chang J Da Conceição EF Dempster L Horsley S Immelman T Jordaan Y Kleitman JA Krige H Laing AG Lewis CJ Lewis BJ Majola G Masina N Mchunu HW Mennen SI Meyer CP Muller DG Muller DJ Naidoo L Naidu CM O'Connor L Pillay KS Plots NA Preston JR Ripley-Evans BJ Scriba AE Seaber M Sibanda P Singh-Dhulam LV Stansfield T Sullman RL Thomson F Valli-Gatto LD Wilson

**CLIFFE DEKKER HOFMEYR SERVICES PROPRIETARY LIMITED DIRECTORS:** ES Burger Z Omar NJ van der Walt R van Eeden MF Whitaker B Williams

\*British \*Dutch \*Zimbabwean \*Cape Town Managing Partner

Cliffe Dekker Hofmeyr Inc. Reg No 2008/018923/21

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an alliance of legal practices

Christine Jesseman  
19 November 2013

2


- 4 We await your urgent response confirming receipt hereof and the Department's intention to comply with our client's request.

Yours faithfully,



**CHRISTINE JESSEMAN**  
**DIRECTOR: PRO BONO AND HUMAN RIGHTS**  
**CLIFFE DEKKER HOFMEYR INC**

Certified True Cop,



**Innocentia Renolegile Mosela**  
155 - 5th Street  
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Commissioner of Oaths  
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**Tricia Erasmus**

**From:** Raswiswi Marlyn <MRaswiswi@justice.gov.za>  
**Sent:** 25 November 2013 02:04 PM  
**To:** Tricia Erasmus  
**Subject:** RE: SAHA - Request for Transcripts of all hearings conduct by TRC - Ref SAH-2013-DOJ-0003 [CDH-JHBDocs.FID3322319]

"UmK 8"

**Importance:** High

Good day

Your letter dated 19 November 2013 on the above subject has reference.

Apologies I only got your e-mail when I came back today. Contents whereof have been noted. Please expect further communication from our offices in due course.

Regards

Marlyn Raswiswi



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**From:** Tricia Erasmus [<mailto:Tricia.Erasmus@dlacdh.com>]  
**Sent:** 19 November 2013 03:35 PM  
**To:** Raswiswi Marlyn  
**Cc:** Christine Jesseman; Vincent Manko  
**Subject:** SAHA - Request for Transcripts of all hearings conduct by TRC - Ref SAH-2013-DOJ-0003 [CDH-JHBDocs.FID3322319]  
**Importance:** High

Dear Madam

We refer to the above matter.

Kindly find attached hereto correspondence for your urgent attention.

Kindly confirm receipt hereof.

Thank you.

Kind Regards

**Tricia Erasmus**

Associate - Pro Bono and Human Rights

Cliffe Dekker Hofmeyr Inc

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1 Protea Place, Cnr of Fredman and Protea Place, Sandton, Johannesburg, 2196

Tel. +27 11 562 1358 Mobile. +27 71 355 7402 Fax. +27 11 562 1669

[Tricia.Erasmus@dlacdh.com](mailto:Tricia.Erasmus@dlacdh.com) | [www.cliffedekkerhofmeyr.com](http://www.cliffedekkerhofmeyr.com)



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**Attention: Ms M Raswiswi**

Department of Justice and  
Constitutional Development

**BY EMAIL: MRaswiswi@justice.gov.za**

**No. of pages: 1 page + 2 page Annexure**

Our Reference Christine Jesseman / T Erasmus  
Account Number 01954103  
Your Reference SAH-2013-DOJ-0003  
Direct Line (011) 562 1162  
Direct Telefax (011) 562 1514  
Direct e-mail Christine.Jesseman@dlacdh.com  
Date 4 December 2013

Dear Madam

**PROMOTION OF ACCESS TO INFORMATION ACT ("PAIA") REQUEST FOR TRANSCRIPTS OF ALL HEARINGS CONDUCTED BY THE TRUTH AND RECONCILIATION COMMISSION UNDER SECTION 29 OF THE PROMOTION OF NATIONAL UNITY AND RECONCILIATION ACT 34 OF 1995 ("TRANSCRIPTS").**

- 1 We refer to the above matter along with our correspondence of 19 November 2013, which we attach hereto as Annexure "A" for your convenience.
- 2 Kindly note that the Department of Justice and Constitutional Development ("the Department") has to date not only failed to respond to the abovementioned correspondence but has also failed to provide our client, the South African History Archive Trust ("SAHA"), with the requested response to its internal appeal.
- 3 Consequently, we wish to inform you that we now hold instructions to pursue this matter through appropriate legal means including approaching the relevant court for an order compelling the Department to comply with SAHA's PAIA request.

Yours faithfully,

*p.p.*

**CHRISTINE JESSEMAN  
DIRECTOR: PRO BONO AND HUMAN RIGHTS  
CLIFFE DEKKER HOFMEYR INC**

**Innocentia Reholegile Moele**  
155 - 5th Street  
Sandown, Sandton, 2193

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Ex-Officio / Practising Attorney R.S.A.

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\*British \*Dutch \*Zimbabwean \*Cape Town Managing Partner

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**Attention: Ms M Raswiswi**

Department of Justice and  
Constitutional Development

**BY EMAIL: MRaswiswi@justice.gov.za**

**No. of pages: 2 pages**

Our Reference Christine Jesseman / T Erasmus  
Account Number 01954103  
Your Reference SAH-2013-DOJ-0003  
Direct Line (011) 562 1162  
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Direct e-mail Christine.Jesseman@dlacdh.com

19 November 2013  
Innocentia Renhalegile Moele  
155 - 5th Street  
Sandown, Sandton, 2196  
Commissioner of Oaths  
Ex-Officio / Practising Attorney R.S.A.

Dear Madam

**PROMOTION OF ACCESS TO INFORMATION ACT ("PAIA") REQUEST FOR TRANSCRIPTS OF ALL HEARINGS CONDUCTED BY THE TRUTH AND RECONCILIATION COMMISSION UNDER SECTION 29 OF THE PROMOTION OF NATIONAL UNITY AND RECONCILIATION ACT 34 OF 1995 ("TRANSCRIPTS").**

- 1 We wish to confirm that we act for the South African History Archive Trust ("SAHA") in the above matter.
- 2 We further wish to confirm that SAHA submitted a request to the Department of Justice and Constitutional Development ("the Department") for access to the abovementioned transcripts on 26 July 2013. On 6 August 2013 SAHA received a response from the Department, with reference number 7/6/9 SAHA (Johnson KL) confirming that the request was refused in terms of sections 34(1), 37(1)(b) and 39 of PAIA and SAHA subsequently lodged an internal appeal on 28 September 2013 in terms of section 75 of PAIA. The deadline for the internal appeal was 29 October 2013. However, SAHA has to date failed to receive a response to its internal appeal.
- 3 Consequently, should you not provide SAHA with a favourable response to its internal appeal within fourteen (14) calendar days of the date hereof, namely on or before 3 December 2013, we hold instructions to pursue this matter through appropriate legal means including approaching the relevant court for an order compelling the Department to do so.

CHAIRMAN CH Ewing CHIEF EXECUTIVE OFFICER B Williams CHIEF OPERATING OFFICER MF Whitaker CHIEF FINANCIAL OFFICER ES Burger

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DIRECTORS: CAPE TOWN RD Barendse TJ Brewis CM Brittain-Rencke MA Bromley MR Collins A de Lange LF Egypt GT Ford S Franks DF Fyfe SAP Gie JW Green AJ Hannie AM Heiberg PB Hesseling CI Hindley RC Horn JH Jacobs R Jaga A Karlem PJ Krusche JJ Lessing GC Lumb RE Marcus A Moolman NW Muller J Naser FT Newham G Orris L Rhoadie BT Rubinstein GJ Stansfield BPA Strauss DM Thompson CW Williams TJ Winstanley

DIRECTORS: DURBAN J Govender NTY Siwundu

CONSULTANTS: A Abercrombie HS Coetzee HC Dagut JMA Evenhuis JJ Gomes MB Jackson RSK Jarvis EJ Kingdon FF Koibe CJ Wiggitt

SENIOR ASSOCIATES: JA Aukema G Barkhuizen-Barbosa B Brown KM Carew E Chang J Da Conceição EF Dempster L Horsley S Immanuel T Jordaan Y Kleitman JA Krige H Laing AG Lewis CJ Lewis BJ Majoja G Masina N Mchunu HW Mannen SI Meyer CP Muller DG Muller DJ Naidoo L Naidu CM O'Connor L Pillay KS Plots NA Preston JR Ripley-Evans BJ Scribe AE Seaber M Sibanda P Singh-Dhulam LV Stansfield T Suliman RL Thomson F Vaili-Gatto LD Wilson

CLIFFE DEKKER HOFMEYR SERVICES PROPRIETARY LIMITED DIRECTORS: ES Burger Z Omar NJ van der Walt R van Eaden MF Whitaker B Williams

\*British \*Dutch \*Zimbabwean \*Cape Town Managing Partner

Cliffe Dekker Hofmeyr Inc. Reg No 2008/018923/21

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8L  
"A"

Handwritten signature

Christine Jesseman  
19 November 2013

2

- 4 We await your urgent response confirming receipt hereof and the Department's intention to comply with our client's request.

Yours faithfully,



**CHRISTINE JESSEMAN**  
**DIRECTOR: PRO BONO AND HUMAN RIGHTS**  
**CLIFFE DEKKER HOFMEYR INC**

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Sandown, Sandton, 2196

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88

Tricia Erasmus

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"CMK 10"

**From:** Raswiswi Marlyn <MRaswiswi@justice.gov.za>  
**Sent:** 04 December 2013 04:24 PM  
**To:** Tricia Erasmus  
**Subject:** Auto Response

Thank you for your email.

I acknowledge receipt of your communication and advise that I will respond to your request shortly.

Kindly note that I put high value on all communications sent to me, and will to ensure your satisfaction in my responses.

With warm Regards

Marlyn Raswiswi



**MINISTER  
JUSTICE AND CONSTITUTIONAL DEVELOPMENT  
REPUBLIC OF SOUTH AFRICA**

Private Bag X276, PRETORIA, 0001. Selu Building, C/O Thabo Sehume and Francis Baard Street, PRETORIA. Tel: (012) 406 4869  
Fax: (012) 406 4880. [www.doi.gov.za](http://www.doi.gov.za)

Private Bag X256, CAPE TOWN, 8000. 6<sup>th</sup> Floor, Room 510, 120 Plain Street, CAPE TOWN. Tel: (021) 467 1700, Fax: (021) 467 1730.  
[www.doi.gov.za](http://www.doi.gov.za)

*Please quote our full reference number in all correspondence*

Our reference: 3/29/4  
Enquiries: Ms T Ratshibvumo  
E-mail: [tratshibvumo@justice.gov.za](mailto:tratshibvumo@justice.gov.za)

Ms Kathryn Johnson  
South African History Archive (SAHA)  
P O Box 31719  
BRAAMFONTEIN  
2017

Tel: 011 718 2563  
Fax: 086 649 1491  
Email: [foip@saha.org.za](mailto:foip@saha.org.za)

Dear Ms Johnson

**INTERNAL APPEAL ARISING FROM A REQUEST FOR ACCESS TO INFORMATION IN  
ACCORDANCE WITH THE PROMOTION OF ACCESS TO INFORMATION ACT, 2000 (ACT NO. 2  
OF 2000): TRUTH AND RECONCILIATION COMMISSION SECTION 29 HEARINGS**

I refer to the above matter and your appeal in terms of Section 74 of the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000).

After carefully considering the grounds upon which you base your appeal, I have pleasure to inform you that I have decided to overturn the Deputy Information Officer's decision to refuse you the requested information.

As stated in your appeal, the information you requested regarding transcripts of all hearings conducted by the Truth and Reconciliation Commission (TRC) under Section 29 of the Promotion of National Unity and Reconciliation Act 34 of 1995, as amended, I have therefore instructed the Department to sever from the records to be made available to you, individuals personal details. This process may take a while as the TRC in camera hearings are quite a voluminous document.



Kindly contact Ms M Raswisi, the Department's Deputy Information Officer, at the telephone number 012 315 1730, for further information regarding the collection of the requested information. Kindly also note that there is a production fee payable and the abovementioned official will inform you how much is payable for the requested documents.

I hope that you will find the above in order.

Kind regards

*J-Radebe*  
Mr JT RADEBE, MP

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

DATE: 08/04/14

The Office of the Minister of Justice and  
Constitutional Development

**BY EMAIL: tratshibvumo@justice.gov.za**

No. of pages: 3 + 103 page annexure

**Innocentia Reholegile Moele**  
155 - 5th Street  
Sandown, Sandton, 2196

Commissioner of Oaths  
Ex-Officio / Practising Attorney R.S.A.

Dear Sir

Our Reference T Erasmus / C Jesseman  
Account Number 01954103  
Your Reference 3/29/4  
Direct Line (011) 562 1358  
Direct Telefax (011) 562 1669  
Direct e-mail Tricia.Erasmus@dlacdh.com  
Date 02 May 2014

  
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**PROMOTION OF ACCESS TO INFORMATION ACT 2 OF 2000 ("PAIA") REQUEST FOR  
TRANSCRIPTS OF ALL HEARINGS CONDUCTED BY THE TRUTH AND RECONCILIATION  
COMMISSION ("TRC") UNDER SECTION 29 OF THE PROMOTION OF NATIONAL UNITY AND  
RECONCILIATION ACT 34 OF 1995 ("TRANSCRIPTS")**

1 We wish to confirm that we act for the South African History Archive Trust ("SAHA"). Your letter dated 8 April 2014 refers.

- 1.1 For purposes of clarity, we will provide you with a brief history of the matter:
- 1.2 SAHA submitted a request to the Department of Justice and Constitutional Development ("the Department") for access to the transcripts on 26 July 2013. On 6 August 2013, SAHA received a response from the Department, with reference number 7/6/9 SAHA (Johnson KL) confirming that the request was refused in terms of sections 34(1), 37(1)(b) and 39 of PAIA. SAHA subsequently lodged an internal appeal against this decision on 28 September 2013 in terms of section 75 of PAIA. The deadline, in terms of the requirements of PAIA, for the Department to provide SAHA with a response regarding the outcome of the internal appeal was 29 October 2013. No response to the internal appeal was received by this date.
- 1.3 On 19 November 2013, SAHA had still not received a response from the Department relating to its internal appeal. As a courtesy a letter was sent to the Department providing it with a reasonable period of time to respond to SAHA's requests failing which the matter would be pursued through the appropriate legal means.

**CHAIRMAN** AW Pretorius **CHIEF EXECUTIVE OFFICER** B Williams **CHIEF OPERATING OFFICER** MF Whitaker **CHIEF FINANCIAL OFFICER** ES Burger

**DIRECTORS: JOHANNESBURG** A Abro N Altni CA Barclay R Beerman E Bester P Bhagattjee R Bonnet CJ Botes TE Brincker CM Britain CWJ Charter M Chenia PJ Conradie CJ Daniel S de Vries ML du Preez L Erasmus BV Faber JJ Feris TS Fletcher L Franca TG Fuhrmann MZ Gattoo S Gill SB Gore J Govender MJ Gwanzura AJ Hofmeyr Q Honey WH Jacobs WH Janse van Rensburg CM Jesseman JCA Jones TTM Kali J King LJ Kruger J Latsky AM le Grange FE Leppan AG Lewis BC Maasdorp Z Malinga G Masina B Meyer WJ Midgley R Moodley MG Mphahudi BP O'Connor SJ Oosthuizen A Patel JS Pennington GH Pienaar V Pillay DB Pinnock AM Potgieter AW Pretorius PH Prinsloo AG Reid M Serfontein NTY Siwendu L Smith JL Stolp HR van der Merwe JJ van Dyk WPS van Wyk NJ von Ey JG Webber MF Whitaker JG Whittle KB Whyte DA Wilken B Williams LD Wilson JM Wits-Hewinson MP Yeates

**DIRECTORS: CAPE TOWN** AC Alexander RD Barendse TJ Brewis MA Bromley MR Collins HC Dagut A de Lange LF Egypt GT Ford S Franks DF Fyfer SAP Gie JW Green AJ Hannie AM Heiberg PB Hesselberg CI Hindley RC Horn S Immelman JH Jacobs R Jaga A Kariem PJ Krusche IJ Lessing GC Lumb RE Marcus SI Meyer A Moolman NW Muller J Naser FT Newham G Orrie L Rhoadie BT Rubinstein GJ Stansfield BPA Strauss DM Thompson CW Williams TJ Winstanley

**EXECUTIVE CONSULTANTS:** HS Coetzee CH Ewing HS Jackson MB Jackson

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- 1.4 Due to the fact that no response was received from the Department to SAHA's internal appeal, SAHA was forced to engage the services of attorneys and counsel on a *pro bono* basis to draft an application to the High Court for access to the records requested. On the eve of the launching of that application, on 8 April 2014, SAHA received a response from the Minister of Justice and Constitutional Development ("the Minister") regarding the abovementioned internal appeal. In this response the Minister confirmed his decision to overturn the Deputy Information Officer's ("DIO") decision to refuse SAHA the requested information. However, the Minister further confirms that he instructed the Department to sever individuals' personal details from the records which are to be made available to SAHA.
- 2 SAHA would like to make the following submissions with regard to the Minister's abovementioned response:
  - 2.1 The blanket application of redaction procedures in respect of the transcripts cannot be accepted. There is no need to remove personal information in many, if not all, of the transcripts as the information contained in same has already been made public through various forms such as amnesty applications. We attach hereto a summary document in support of this, which extensively details examples where the transcripts have been made public, marked as annexure "A". We further attach pages from the TRC's final report that mentions the section 29 (also referred to as "in camera" hearings) that details further examples of the transcripts falling in the public domain, marked as annexure "B".
  - 2.2 Furthermore, the DIO of the Department is obliged to send out third party notifications, in relation to those issues not subsequently covered in amnesty hearings or prosecutions. The above summary document serves as clear evidence that the majority of the contents of the transcripts have subsequently been made available to the public. Therefore, the DIO must consider each transcript in relation to other relevant TRC documentation such as the amnesty hearing transcripts and decisions.
  - 2.3 The DIO is obliged under section 46 of PAIA to consider the contents of each transcript and determine whether the disclosure of the transcript in question falls within the public interest. The need for such consideration is especially important when the provisions of section 46 are read in conjunction with the provisions of the Promotion of National Unity and Reconciliation Act 34 of 1995.
  - 2.4 The Minister has provided no clear indication as to the period of time the Department requires in order to provide SAHA with the information and SAHA fears that this lack of clarity would inevitably lead to them not receiving the requested information.
- 3 We therefore request that the Department considers the abovementioned submissions before merely severing individuals' details from the transcripts.
- 4 Furthermore, and in light of the protracted legal process undertaken as well as the length of time that has already lapsed since the initial request was made, we hereby request that a response is received to this letter by 9 May 2014 indicating whether the Minister still intends to persist in the instruction to the DIO to sever information before providing us with the records so that we can consider our legal position. Should the Minister not persist in such instruction to the DIO, we hereby request that all records are provided to us within 21 (twenty one) business days of date hereof.
- 5 We await to hear from you and we wish to thank you your decision to grant access to the requested information.

Innocentia Reholegile Moele  
155 - 5th Street  
Sandown, Sandton, 2196

Commissioner of Oaths  
Ex-Officio / Practising Attorney R.S.A.

Certified True Copy



Tricia Erasmus  
02 May 2014

93  
3

Yours faithfully,



**TRICIA ERASMUS**  
**SENIOR ASSOCIATE: PRO BONO AND HUMAN RIGHTS**  
**CLIFFE DEKKER HOFMEYR INC**

**Innocentia Reholegile Moele**  
155 - 5th Street  
Sandown, Sandton, 2196  
Commissioner of Oaths  
Ex-Officio / Practising Attorney R.S.A.



**Certified True Copy**

SOUTH AFRICAN HISTORY ARCHIVES TRUST

and

DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

---

**CONFIRMATORY AFFIDAVIT**

---

I, the undersigned,

**DUMISA NTSEBEZA**

declare on oath as follows :

1. I am an adult male businessman currently residing at ....
2. I am duly authorised to depose to this affidavit.
3. I have read the affidavit deposed to by Yasmin Sooka.
4. I confirm that in my capacity as a TRC Commissioner, I had no objection to the transcripts of, and information pertaining to, the hearings held *in camera* in terms of section 29 of the Promotion of National Unity and Reconciliation Act 24 of 1995 being made available to the public subject to the conditions referred to in Ms Sooka's affidavit.

Innocentia Reholegile Moele  
155 - 5th Street  
Sandown, Sandton, 2196

Commissioner of Oaths  
Ex-Officio / Practising Attorney R.S.A.

Certified True Copy

  
**DUMISA NTSEBEZA**

I HEREBY CERTIFY THAT THE DEPONENT HAS ACKNOWLEDGED THAT SHE:

- (a) knows and understands the contents of this affidavit;
- (b) has no objection to taking the oath;
- (c) considers the oath to be binding on her conscience.

THUS signed and sworn to before me, at JOHANNESBURG on this 30<sup>th</sup> day of MAY 2013, the Regulations contained in Government Notice No. R1258 of 21 July 1972 (as amended) having been fully complied with.

  
 \_\_\_\_\_  
 COMMISSIONER OF OATHS

FULL NAMES: MATTHEW CHASKALSON  
 BUSINESS ADDRESS: VICTORIA MXENGE GROUP  
 SANDOWN VILLAGE, 81 MAUDE ST  
 DESIGNATION: SANDTON  
 AREA/OFFICE: COMMISSIONER OF OATHS EX OFFICIO  
 (PRACTISING ADVOCATE)

Innocentia Reholegile Moele  
 155 - 5th Street  
 Sandown, Sandton, 2193  
 Commissioner of Oaths  
 Ex-Officio / Practising Attorney R.S.A.

  
 Certified True Copy

96  
"CMK 14"

SOUTH AFRICAN HISTORY ARCHIVES TRUST

and

DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

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**CONFIRMATORY AFFIDAVIT**

---

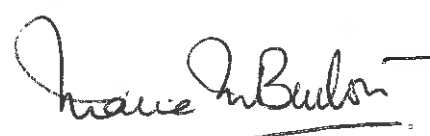
I, the undersigned, Maria Macdiarmid Burton

declare on oath as follows :

1. I am an adult female residing at 4 Kedah Road, Rondebosch, 7700, Western Cape.
2. I am duly authorised to depose to this affidavit.
3. I have read the affidavit deposed to by Yasmin Sooka.
4. I confirm that in my capacity as a TRC Commissioner, I had no objection to the transcripts of, and information pertaining to, the hearings held *in camera* in terms of section 29 of the Promotion of National Unity and Reconciliation Act 24 of 1995 being made available to the public subject to the conditions referred to in Ms Sooka's affidavit.

Innocentia Reholegile Moale  
155 - 5th Street  
Sandown, Sandton, 2196  
Commissioner of Oaths  
Ex-Officio / Practising Attorney R.S.A.

  
Certified True Copy

  
\_\_\_\_\_  
Maria Macdiarmid Burton



98  
"CMK15"

SOUTH AFRICAN HISTORY ARCHIVES TRUST

and

DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

---

**CONFIRMATORY AFFIDAVIT**

---

I, the undersigned,

**BONGANI BLESSING FINCA**

declare on oath as follows :

1. I am an adult male currently residing at 38 Camden Road, Sunnyridge, East London, 5201.
2. I am duly authorised to depose to this affidavit.
3. I have read the affidavit deposed to by Yasmin Sooka.
4. I confirm that in my capacity as a TRC Commissioner, I had no objection to the transcripts of, and information pertaining to, the hearings held *in camera* in terms of section 29 of the Promotion of National Unity and Reconciliation Act 24 of 1995 being made available to the public subject to the conditions referred to in Ms Sooka's affidavit.

**Innocentia Rehlegile Moele**  
155 - 5th Street  
Sandown, Sandton, 2196  
Commissioner of Oaths  
Ex-Officio / Practising Attorney R.S.A.

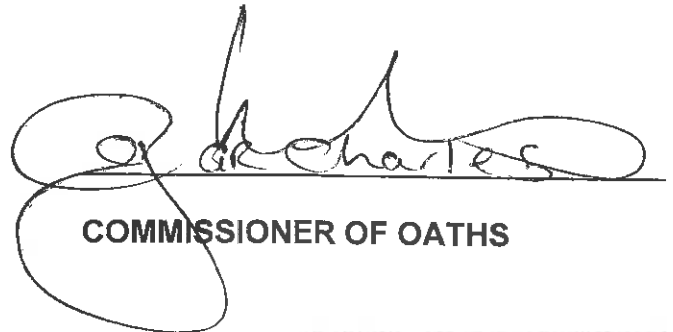
  
**Certified True Copy**

  
2  
**BONGANI BLESSING FINCA**

I HEREBY CERTIFY THAT THE DEPONENT HAS ACKNOWLEDGED THAT  
[S/HE]:

- (a) knows and understands the contents of this affidavit;
- (b) has no objection to taking the oath;
- (c) considers the oath to be binding on her conscience.

THUS signed and sworn to before me, at East London on this 10<sup>th</sup> day of  
June 2013, the Regulations contained in Government Notice No. R1258 of  
21 July 1972 (as amended) having been fully complied with.

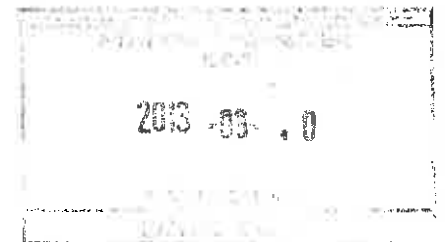
  
**COMMISSIONER OF OATHS**

FULL NAMES: C. R. CHARLES

BUSINESS ADDRESS: 3 FLEET STREET

DESIGNATION: Constable

AREA/OFFICE: EAST LONDON



**Innocentia Rehologile Moele**  
155 - 5th Street  
Sandown, Sandton, 2196  
Commissioner of Oaths  
Ex-Officio / Practising Attorney R.S.A.

  
**Certified True Copy**

100  
"CMK16"

SOUTH AFRICAN HISTORY ARCHIVES TRUST

and

DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

---

**CONFIRMATORY AFFIDAVIT**

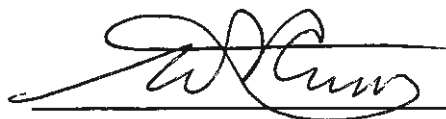
---

I, the undersigned,

**DR WENDY ORR**

declare under oath as follows :

1. I am an adult female businesswoman currently residing at 86 Muirfield Rd, Greenside, Johannesburg.
2. I am duly authorised to depose to this affidavit.
3. I have read the affidavit deposed to by Yasmin Sooka.
4. I confirm that in my capacity as a TRC Commissioner, I had no objection to the transcripts of, and information pertaining to, the hearings held *in camera* in terms of section 29 of the Promotion of National Unity and Reconciliation Act 24 of 1995 being made available to the public subject to the conditions referred to in Ms Sooka's affidavit.



---

**Wendy Orr**

Innocentia Ref: eg. 10  
**Innocentia Rehlegile Moele**  
155, 5th Street  
Sandown, Sandton, 2196  
Commissioner  
Ex-Officio / Commissioner of Oaths  
Ex-Officio / Practising Attorney R.S.A.

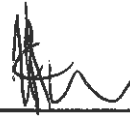
**Certified True Copy**



I HEREBY CERTIFY THAT THE DEPONENT HAS ACKNOWLEDGED THAT SHE:

- (a) knows and understands the contents of this affidavit;
- (b) has no objection to taking the oath;
- (c) considers the oath to be binding on her conscience.

THUS signed and sworn to before me, at Johannesburg on this 25<sup>th</sup> day of January 2014, the Regulations contained in Government Notice No. R1258 of 21 July 1972 (as amended) having been fully complied with.



COMMISSIONER OF OATHS

FULL NAMES: Khashifa Hoosain  
BUSINESS ADDRESS: 5 Simmonds Street, JHB  
DESIGNATION: Ex-officio (non practicing attorney)  
AREA/OFFICE: JHB

Innocentia Rehlegile Moele  
155 - 5th Street  
Sandown, Sandton, 2196

Commissioner of Oaths  
Ex-Officio / Practising Attorney R.S.A.



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102  
"CMK 17"

SOUTH AFRICAN HISTORY ARCHIVES TRUST

and

DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

**CONFIRMATORY AFFIDAVIT**

I, the undersigned,

**DR ALEX BORAINÉ**

declare on oath as follows:

1. I am an adult male businessman currently residing at No. 30 Constantia Place, Southern Cross Drive, Constantia, 7806
2. I am duly authorised to depose to this affidavit.
3. I have read the affidavit deposed to by Yasmin Sooka.
4. I confirm that in my capacity as a TRC Commissioner, I had no objection to the transcripts of, and information pertaining to, the hearings held *in camera* in terms of section 29 of the Promotion of National Unity and Reconciliation Act 24 of 1995 being made available to the public subject to the conditions referred to in Ms Sooka's affidavit.

**SHARON PENTZ**

COMMISSIONER OF OATHS  
MANAGER: OLD AGE HOME / VILLAGE  
CAPE PENINSULA ORGANISATION FOR THE AGED

10/2/14



**DR ALEX BORAINÉ**

Innocentia Reholegile Mole  
155 - 5th Street  
Sandown, Sandton, 2196  
Commissioner of Oaths  
Ex-Officio / Practising Attorney R.S.A.

Certified True Copy

I HEREBY CERTIFY THAT THE DEPONENT HAS ACKNOWLEDGED THAT HE:

- (a) knows and understands the contents of this affidavit;
- (b) has no objection to taking the oath;
- (c) considers the oath to be binding on his conscience.

THUS signed and sworn to before me, at CONSTANTIA on this 11th day of February 2014, the Regulations contained in Government Notice No. R1258 of 21 July 1972 (as amended) having been fully complied with.

SHARON PENTZ

COMMISSIONER OF OATHS

MANAGER: OLD AGE HOME / VILLAGE

CAPE PENINSULA ORGANISATION FOR THE AGED

COMMISSIONER OF OATHS

FULL NAMES:

BUSINESS ADDRESS:

DESIGNATION:

AREA/OFFICE:

Innocentia Rehlegile Moele  
155 - 5th Street  
Sandown, Sandton, 2196

Commissioner of Oaths  
Ex-Officio / Practising Attorney R.S.A.

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"CMK 18"  
104

SOUTH AFRICAN HISTORY ARCHIVES TRUST

and

DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

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**CONFIRMATORY AFFIDAVIT**

---

I, the undersigned,

**GLEND A WILDSCHUT**

declare on oath as follows :

1. I am an adult female currently residing at 9 Wembley Avenue, Plumstead
2. I am duly authorised to depose to this affidavit.
3. I have read the affidavit deposed to by Yasmin Sooka.
4. I confirm that in my capacity as a TRC Commissioner, I have no objection to the transcripts of, and information pertaining to, the hearings held *in camera* in terms of section 29 of the Promotion of National Unity and Reconciliation Act 24 of 1995 be made available to the public subject to the conditions referred to in Ms Sooka's affidavit.

**Innocentia Reholegile Moele**  
155 - 5th Street  
Sandown, Sandton, 2196  
Commissioner of Oaths  
Ex-Officio / Practising Attorney R.S.A.

  
Certified True Copy

  
**GLEND A WILDSCHUT**

I HEREBY CERTIFY THAT THE DEPONENT HAS ACKNOWLEDGED THAT SHE:

- (a) knows and understands the contents of this affidavit;
- (b) has no objection to taking the oath;
- (c) considers the oath to be binding on her conscience.

THUS signed and sworn to before me, at Cape Town on this 10 day  
of February 2014, the Regulations contained in Government Notice  
No. R1258 of 21 July 1972 (as amended) having been fully complied with.



COMMISSIONER OF OATHS

**FRANCOIS BOTHA**

Commissioner of Oaths - ex officio  
Director: Discrimination and Harassment Office  
University of Cape Town  
Private Bag, Rondebosch  
7701

FULL NAMES:

BUSINESS ADDRESS:

DESIGNATION:

AREA/OFFICE:

**Innocentia Reholegile Moele**  
155 - 5th Street  
Sandown, Sandton, 2196

Commissioner of Oaths  
Ex-Officio / Practising Attorney R.S.A.



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106  
"CMK 19"

SOUTH AFRICAN HISTORY ARCHIVES TRUST

and

DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

---

**CONFIRMATORY AFFIDAVIT**

---

I, the undersigned,

[INSERT NAME]

MAHMOUD FAZEL RANDERA

declare on oath as follows :

1. I am an adult [male / ~~female businessman / woman~~] currently residing at ....  
33 ESCOMBE AVE, PARKTOWN WEST JH
2. I am duly authorised to depose to this affidavit.
3. I have read the affidavit deposed to by Yasmin Sooka.
4. I confirm that I was in attendance at the meeting of the TRC Commissioners held during March 2003 wherein it was agreed that the transcript of, and information pertaining to, the hearings held *in camera* in terms of section 29 of the Promotion of National Unity and Reconciliation Act 24 of 1995 be made available to the public subject to the conditions referred to in Ms Sooka's affidavit.

Innocentia Reholegile Moele  
155 - 5th Street  
Sandown, Sandton, 2196

Commissioner of Oaths  
Ex-Officio / Practising Attorney R.S.A.

Certified True Copy

MFR  
KX

*[Signature]*

[INSERT NAME]

I HEREBY CERTIFY THAT THE DEPONENT HAS ACKNOWLEDGED THAT  
[S/HE]:

- (a) knows and understands the contents of this affidavit;
- (b) has no objection to taking the oath;
- (c) considers the oath to be binding on her conscience.

THUS signed and sworn to before me, at [LOCATION] on this 12 day of  
February 2013, the Regulations contained in Government Notice No. R1258 of  
21 July 1972 (as amended) having been fully complied with.

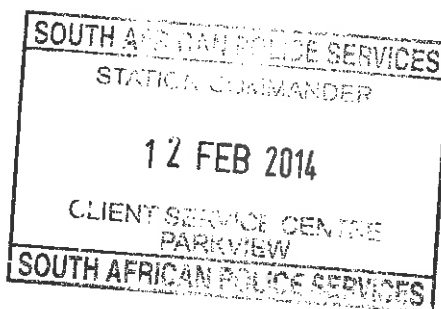
*[Signature]*

COMMISSIONER OF OATHS

FULL NAMES: *Thababho Khumalo*  
BUSINESS ADDRESS: *71 Pinecliff Ave, Parkview*  
DESIGNATION: *CA*  
AREA/OFFICE: *JHR*

Innocentia Reholegile Moele  
155 - 5th Street  
Sandown, Sandton, 2196  
Commissioner of Oaths  
Ex-Officio / Practising Attorney R.S.A.

*[Signature]*  
Certified True Copy



*[Signature]*  
*[Signature]*

108  
"UMK 20"

SOUTH AFRICAN HISTORY ARCHIVES TRUST

And

DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

---

**CONFIRMATORY AFFIDAVIT**

---

I, the undersigned, **RICHARD MICHAEL LYSTER**, declare under oath as follows:

1. I am a practicing attorney currently residing at 72 Hunt Road Glenwood 4001 Durban.  
I am duly authorized to depose to this affidavit.
2. I have read the affidavit deposed to by Yasmin Sooka.
3. I confirm that in my capacity as a TRC Commissioner, I had no objection to the transcripts of, and information pertaining to, the hearings held *in camera* in terms of section 29 of the Promotion of National Unity and Reconciliation Act 24 of 1995 being made available to the public subject to the conditions referred to in Ms Sooka's affidavit.

  
Certified True Copy

**Innocentia Rehlegile Moele**  
155 - 5th Street  
Sandown, Sandton, 2196

Commissioner of Oaths  
Ex-Officio / Practising Attorney R.S.A.

  
**RICHARD MICHAEL LYSTER**

I HEREBY CERTIFY THAT THE DEPONENT HAS ACKNOWLEDGED THAT HE:

- (a) knows and understands the contents of this affidavit;
- (b) has no objection to taking the oath;
- (c) considers the oath to be binding on his conscience.

THUS signed and sworn to before me, at Durban on this 19th day of July 2013, the Regulations contained in Government Notice No. R1258 of 21 July 1972 (as amended) having been fully complied with.

  
**COMMISSIONER OF OATHS**

FULL NAMES: **GERARD DANASEKERANA VEDAN**

BUSINESS ADDRESS: **JULIE'S COURT, 103 KILARWATER ROAD**

DESIGNATION: **ATTORNEY, COMMISSIONER OF OATHS R.S.A.**

AREA/OFFICE: **DURBAN, KWA-ZULU NATAL, SOUTH AFRICA**



109  
"CMK21"

SOUTH AFRICAN HISTORY ARCHIVES TRUST

and

DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

---

**CONFIRMATORY AFFIDAVIT**

---

I, the undersigned,

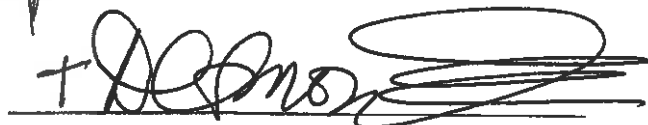
**DESMOND MPIOLO TUTU**

declare on oath as follows :

1. I am an adult man currently residing at 11 Lupin Crescent, Milnerton, 7945.
2. I am duly authorised to depose to this affidavit.
3. I have read the affidavit deposed to by Yasmin Sooka.
4. I confirm that in my capacity as a TRC Commissioner, I had no objection to the transcripts of, and information pertaining to, the hearings held *in camera* in terms of section 29 of the Promotion of National Unity and Reconciliation Act 24 of 1995 being made available to the public subject to the conditions referred to in Ms Sooka's affidavit.

Innocentia Reholegile Moele  
155 - 5th Street  
Sandown, Sandton, 2196  
Commissioner of Oaths  
Ex-Officio / Practising Attorney R.S.A.

4  
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**DESMOND MPIOLO TUTU**

USK

I HEREBY CERTIFY THAT THE DEPONENT HAS ACKNOWLEDGED THAT HE:

- (a) knows and understands the contents of this affidavit;
- (b) has no objection to taking the oath;
- (c) considers the oath to be binding on his conscience.

THUS signed and sworn to before me, at the Waterfront, Cape Town on this 11<sup>th</sup> day of February 2014, the Regulations contained in Government Notice No. R1258 of 21 July 1972 (as amended) having been fully complied with.



COMMISSIONER OF OATHS

FULL NAMES:

BUSINESS ADDRESS:

DESIGNATION:

AREA/OFFICE:

**UMAYMAH SALASA-KHAN**  
Commissioner of Oaths  
Practising Attorney, R.S.A.  
22 Bree Street, Cape Town

**Innocentia Reholegile Moele**  
155 - 5th Street  
Sandown, Sandton, 2196  
Commissioner of Oaths  
Ex-Officio / Practising Attorney R.S.A.

  
Certified True Cop.



CMK22"  
III

SOUTH AFRICAN HISTORY ARCHIVES TRUST

and

DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

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**CONFIRMATORY AFFIDAVIT**

---

I, the undersigned,

**LAVINIA CRAWFORD-BROWNE**

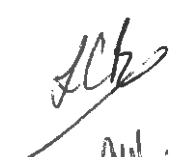
declare on oath as follows :

1. I am an adult female businesswoman currently residing at E105 Sandown Crescent, Grand National Blvd. Milnerton
2. I am duly authorised to depose to this affidavit.
3. I have read the affidavit deposed to by Yasmin Sooka.
4. I confirm that I was in attendance at the meeting of the TRC Commissioners held during March 2003 wherein it was agreed that the transcript of, and information pertaining to, the hearings held *in camera* in terms of section 29 of the Promotion of National Unity and Reconciliation Act 24 of 1995 be made available to the public subject to the conditions referred to in Ms Sooka's affidavit.

Innocentia Reholegile Moela  
155 - 5th Street  
Sandown, Sandton, 2195

Commissioner of Oaths  
Ex-Officio / Practising Attorney R.S.A.

  
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12/6/2013

5. I confirm that, in my capacity as assistant to Archbishop Tutu, I took minutes of this meeting. These minutes were lost when the laptop on which they had been stored was subsequently stolen

*Lavinia Crawford-Browne*

**MS LAVINIA CRAWFORD-BROWNE**

I HEREBY CERTIFY THAT THE DEPONENT HAS ACKNOWLEDGED THAT SHE:

- (a) knows and understands the contents of this affidavit;
- (b) has no objection to taking the oath;
- (c) considers the oath to be binding on her conscience.

THUS signed and sworn to before me, at Cape Town on this 12<sup>th</sup> day of JUNE 2013, the Regulations contained in Government Notice No. R1258 of 21 July 1972 (as amended) having been fully complied with.

*Adrian Winckler*

**COMMISSIONER OF OATHS**

FULL NAMES:

BUSINESS ADDRESS: **DINA JOHANNA ADRIAN WINCKLER**  
Commissioner of Oaths - ex officio  
Manager Postgraduate Administration  
University of Cape Town  
Private Bag X3, Rondebosch 7701

DESIGNATION:

AREA/OFFICE:

**Innocentia Reholegile Moele**  
155 - 5th Street  
Sandown, Sandton, 2196  
Commissioner of Oaths  
Ex-Officio / Practising Attorney R.S.A.

*[Signature]*  
Certified True Copy

# 2

## Accessing the Records of the Truth and Reconciliation Commission

Piers Pigou

### Introduction

Maybe the success of the Commission will be that we've created this incredible archive ... I would see our final report as a road map that will lead investigative journalists and scholars and politicians and critics and I hope — poets and musicians and everyone else into that body of material, so that they in turn will be able to critique it and address many of the issues that we in the commission simply do not have time to.

Charles Villa Vicencio, head of the TRC's Research Department<sup>1</sup>

The mandate of the South African History Archive (SAHA) to collect and promote the preservation of records relating to the struggle against apartheid and the infrastructure of repression inevitably meant it would give special attention to the records of South Africa's Truth and Reconciliation Commission (TRC). SAHA was especially well placed to take on this role, given that two of its former directors, Verne Harris and Sello Hatang, previously worked for the National Archives. The former, in particular, was responsible for liaison with the TRC between 1997 and 2001 and was a member of the TRC team that investigated the availability and destruction of apartheid era state security and intelligence records. Its current director and author of this chapter is a former TRC investigator, and the SAHA board of trustees' chairperson, Dumisa Ntsebeza, was the TRC commissioner who headed the investigations unit. SAHA therefore has a unique vantage point regarding what records might and should be available.

The work of the TRC has received unprecedented global attention and is held up by many as a positive example of what can be achieved using a restorative justice approach when dealing with an authoritarian and repressive past. By its own admission, however,

## Paper Wars

the commission's work was only part of a broader longer-term process of attempting to determine what happened and why in the struggle against apartheid; the commission ultimately recognised that much more could and should be done.

The TRC's processes generated an enormous paper, digital and audiovisual archive, both in terms of its own internal institutional records and an array of substantive information about violations and related contextual factors. These were collected and generated through inter-related processes of statement taking, investigation, submissions, hearings, document retrieval, research and analyses. The TRC, in its final report (1998), appropriately noted that 'this material represents one of the most remarkable collections in the country and belongs to the nation'.<sup>2</sup> It further stated that

one of the key aspects of the Commission's work has been its commitment to transparency and public scrutiny. Its records, which are in the form of documents, video and audio tapes, pictures and photographs, as well as a computerized database, are a national asset which must be both protected and made accessible.<sup>3</sup>

A series of recommendations with respect to the transfer of the archive and the subsequent facilitation of access were also included.<sup>4</sup>

It is over eight years since the TRC handed its final report to then President Mandela,<sup>5</sup> and four years since the Codicil was handed to his successor, President Mbeki.<sup>6</sup> Between 1998 and 2003, over 3,000 cubic metres of TRC records were transferred from Cape Town to Pretoria.<sup>7</sup> The TRC archive, with the exception of the records of the Reparation and Rehabilitation Committee and the database of victims compiled by the Human Rights Violation Committee, is now housed at the National Archives in Pretoria, where it remains unprocessed and therefore largely inaccessible to the general public. The seven volumes of the final report have not been widely disseminated and are only available in electronic or hard copy versions at a prohibitive cost; the promised popular report has never materialised.<sup>8</sup> Needless to say, the findings and recommendations of the TRC have been accessed by very few South Africans. While a significant amount of material from the TRC's public hearings is available on the Department of Justice's TRC website,<sup>9</sup> this material is also largely unavailable to most South Africans who do not have Internet access. Over and above this, the website does not provide a useful search engine and has not been updated for several years.

Despite assertions to the contrary, it has never been SAHA's intention to duplicate the TRC archive. It has, rather, aimed to test the parameters of South Africa's new access to information laws, and has therefore tempered its requests to certain types of records. This has deliberately included a cross section of issues that sometimes involved requests for similar records made to different government agencies. In several matters, requests have been repeatedly submitted, and in a number of cases, legal action has been taken. Requests did not usually follow a linear path, and most requests took months, or years, to finalise.

This chapter focuses on the work of SAHA's Freedom of Information Programme (FOIP)<sup>10</sup> in using the Promotion of Access to Information Act No. 20 of 2000 (PAIA) to secure access to the TRC archive and to records relating to its transfer and processing. In 2001 the TRC was still operational, and its date of completion had already been extended by over three years in order to finalise the amnesty hearing process. SAHA therefore initially focused on issues relating to the transfer of the archive, to its preservation and to maintaining the integrity of so-called sensitive records that were illegitimately severed from the main archive. Following the transfer of the archive in 2001, SAHA has increasingly focused its attention on efforts to access specific records. This chapter will therefore first consider access to records relating to the transfer and processing of the TRC archive; secondly, access to records of the archive; and, finally, requests for associated information.

## Tracking the progress of the transfer and processing of TRC archive

In its 1998 report, the TRC recommended that its records be transferred to the National Archives after the codicil to the report was made public.<sup>11</sup> During that year, the TRC's regional office records were transferred to its Cape Town headquarters, where they could be used to facilitate the writing of the final report. Although the commission's records are legally the property of the Department of Justice (DOJ), it was decided, in accordance with the recommendations in the final report, that the physical records should be located at the National Archives. The bulk of the records were subsequently boxed up and sent to Pretoria. The detail of exactly what was transferred was hazy, especially given that records from the amnesty process were still being utilised, as were records used for the processing of reparations and the writing of the codicil. Consequently, there was little, if any, public clarity on their status.

Requests for TRC records inevitably meant that some sort of protocol was required to process them. In late 2001 a committee of representatives of the National Archives, which had physical possession of the records; DOJ, which retained legal custody; and the National Intelligence Agency (NIA) was established under the chairmanship of DOJ's deputy information officer (DIO), David Porogo, to manage the records and deal with related matters, such as requests. It was this committee that made determinations on many of SAHA's earlier PAIA requests.

## Access to TRC transfer lists

The National Archives generated a transfer list of the TRC materials that it had relocated from Cape Town to its repository in Pretoria. This provided a rough overview of the materials collected from TRC units and officials. In mid-May 2002 SAHA informed DOJ that it was launching a TRC archives project that would focus on using PAIA to access the

TRC's records. SAHA explained that its intentions were rooted in the spirit of the TRC's own recommendations and that the project was intended to supplement official initiatives in this regard. DOJ was specifically asked whether it had developed a policy on public access to the archive and whether it had identified records for voluntary disclosure in terms of PAIA.<sup>12</sup> Attached to the correspondence was a formal request for a copy of the transfer list.<sup>13</sup>

This request was subsequently refused on the basis that the transfer list could not be found within the department.<sup>14</sup> Given DOJ's position as custodian of the records, this admission was remarkable. No indication was given as to whether the department would rectify the situation. SAHA appealed in late August, but was refused, and by the end of the year had lodged an application in the High Court for access to the list and other records in which the internal appeal process had brought no relief. In May 2003 SAHA secured an out-of-court settlement with DOJ on several matters; this included an agreement to provide SAHA with a copy of the detailed listing of all TRC records transferred to the National Archives.<sup>15</sup>

### Access to National Archives records on the TRC archive and related recommendations

The National Archives was the primary role player in the physical transfer of the records, and had been tasked by the TRC to take several courses of action with respect to the records. In May 2001, shortly after FOIP was initiated, SAHA submitted a PAIA request to the National Archives requesting copies of correspondence files documenting the National Archives' dealings with the TRC and other parties (in particular, DOJ) in relation to the archive of the TRC.<sup>16</sup> Despite the recommendation that the archive be transferred after the codicil was completed, SAHA was aware that work was already under way. It would be almost three years, however, before this PAIA request was finalised.

Although the National Archives was legally obliged to respond to the request by July 2001, the request was ignored. In late October 2001 SAHA submitted an appeal on the basis that a failure to respond was a deemed refusal in terms of the Act.<sup>17</sup> In early November the National Archives informed SAHA that access to non-classified records relating to the request would be granted.<sup>18</sup> No further detail was provided, and it was unclear on what basis some records would be made available and others would remain 'classified' (and therefore not available). SAHA appealed, invoking section 25(3) of PAIA and arguing that the reasons given for refusal were inadequate. The following week the national archivist, Dr Graham Dominy, informed SAHA that the records could not be released because they were in the process of 'being transferred to the National Archives in an operation that has implications for state security, the safety of staff and the security of assets'. Dominy also claimed that the appeal consequently fell away and suggested that



the request be resubmitted at a later date.<sup>19</sup> SAHA responded, arguing that the explanation for partial refusal was inadequate, as relevant sections of PAIA had not been cited, and that consequently the appeal remained in place.<sup>20</sup> The national archivist responded, now pointing out that the refusal was derived from sections 37 and 38 of the Act, which related to issues of confidentiality and security. He repeated his suggestion that SAHA reapply for the National Archives' correspondence files after the transfer was complete.<sup>21</sup>

In a separate, yet related request, SAHA sought records documenting endeavours by the National Archives to follow up on the recommendations relating to archives and record keeping in the TRC final report.<sup>22</sup> The Department of Arts and Culture (DAC)<sup>23</sup> decided to conjoin its handling of both these matters. In June 2002 the DAC director general, Dr Robert Adam, reiterated Dominy's position that the PAIA requests should be resubmitted once all the TRC records had been housed at the National Archives; he added that SAHA would not be charged for the reapplication.<sup>24</sup>

On 20 June 2002 SAHA met with the national archivist in an effort to clarify the objectives of FOIP and follow up on a number of issues relating to outstanding requests. In subsequent correspondence to the national archivist, SAHA's then director, Verne Harris, confirmed that Dominy had agreed to reconsider SAHA's requests for records documenting the National Archives' institutional endeavours to follow up on the TRC's recommendations.<sup>25</sup> In late June the National Archives informed SAHA that the committee managing the TRC records 'had identified a security threat and [had] embargoed all classified files on the TRC records until the move had been completed'.<sup>26</sup> In essence, this was the same reasoning that had been provided six months earlier in reaction to the first request.

In August 2002 SAHA submitted an internal appeal to the minister of arts and culture, Dr P.M. Maduna. In October the minister rejected the appeal, arguing that a security threat had been identified and that he would adhere to the advice of NIA and the reason for refusal put forward by the director general and the national archivist.<sup>27</sup> In late November, however, after consultation with NIA, DAC's legal services directorate offered SAHA partial access to the records requested. In fact, what was offered were records relating to the completed movement of TRC records and an undertaking to consider requests for other records on a case-by-case basis. This certainly represented progress, although SAHA was puzzled that security concerns were again being invoked as a possible reason for not releasing these materials.<sup>28</sup> It was only later that SAHA appreciated how this reasoning was linked to another matter it was pursuing in relation to the severance of 'sensitive' records (see below).

The responses to both requests (i.e. for access to records relating to the transfer of the TRC archive and actions taken in relation to the TRC's archival recommendations) were still inadequate; SAHA therefore decided to litigate and filed papers in the High Court in January 2003. Thereafter, in May that year, an out-of-court settlement was reached with DAC in terms of which SAHA accepted that its request for these records could only be finalised once cabinet had

formally accepted the TRC report.<sup>29</sup> The report was accepted later that month, but, despite its undertakings, DAC did not provide the documents as agreed.<sup>30</sup> On 13 August 2003, however, SAHA received a DAC progress report on the implementation of TRC recommendations from Dominy. The report alleged that the National Archives were responding seriously to the TRC's recommendations; that these had been scrutinised closely and that appropriate implementation action had been considered and in several instances undertaken.<sup>31</sup>

SAHA publicly raised concerns that the progress report was silent on several key TRC recommendations, including: the need to document, secure and bring under archival supervision certain surviving apartheid era security establishment records; the need to determine the status of the security establishment records in relation to national (i.e. archival) legislation (in particular, the legal status of the South African National Defence Force archives); and the need to develop a plan to locate and retrieve documents removed by operatives of the apartheid security structures.<sup>32</sup>

SAHA also spent several months trying to determine the status of the progress report and other details, including its date, its author, whether it was approved, and, if so, by whom.<sup>33</sup> SAHA argued that without contextual information, the document did not constitute a record. The national archivist responded, arguing that this was what was on file and that PAIA did not oblige him to create a new record in order to satisfy SAHA's request. Mediation by the State Attorney's Office finally led to the national archivist providing the contextual information and accepting liability for SAHA's costs.<sup>34</sup>

## The TRC's 34 boxes and two files of sensitive records

As these cases proceeded, an even more contested and complex matter unfolded. In May 2001 SAHA submitted a request to DOJ for a 'list of all TRC records taken into [its] custody'.<sup>35</sup>

### *Locating the documents*

In his previous employment at the National Archives, SAHA's then director, Verne Harris, had been informed during a meeting with the TRC about a grouping of documents contained in 34 boxes and two files that had been taken from the main TRC archive by the former chief executive officer (CEO) of the TRC, Biki Minyuku. He heard that the documents had been placed in the custody of NIA, and he had publicly raised concern about this at a conference convened in 2000, which prompted NIA to lodge a formal complaint against him.

As DOJ was the legal custodian of the archive, the request for the list was sent to it. PAIA obliged the department to respond by 16 August 2001, but it only did so in mid-December that year, claiming that it was unable to locate the records and suggesting that SAHA should instead approach the National Archives.

In October 2001 Harris had submitted a request for records in the custody of the National Archives and DAC head office that included the conference paper and the controversial reference to the severed documents. SAHA then submitted a request to the National Archives for detail on TRC records that had not been sent to it, but received no response. SAHA also wrote to NIA seeking clarification on the matter. NIA wrote back, stating that it believed that the records were in fact with DOJ. This was reiterated in correspondence dated 3 April 2002 from the minister of intelligence to independent journalist Terry Bell (see Box 2.1).

#### Box 2.1: Testimony of Terry Bell

Like so many historians, researchers and journalists, I celebrated when South Africa's freedom of information legislation came into force in March 2001. But, within months, I was disillusioned. I remain so, except that I now also celebrate the existence of SAHA, based at the University of the Witwatersrand. Without SAHA, many remaining fragments of our tortured past would have remained buried, perhaps never to surface.

Although PAIA is supposed to allow any citizen the right to seek and obtain documents of relevance to themselves or work they are doing, the process can be cumbersome, time-consuming, expensive and very often frustrating. In particular, SAHA has pursued the documentary fragments of the past that emerged because of the TRC process.

It has not been easy. Even documents that had once been in the public domain, although not properly scrutinised and analysed, disappeared. A classic case concerned 34 boxes of documentation and two files that had been secured by the TRC. According to the commissioners and the legislation governing the TRC, all this documentation should have gone to the National Archives. It did not. To all intents and purposes, 34 boxes and associated files simply disappeared.

Fortunately, the contents of the boxes and the files had been catalogued: there was a record of the general nature of the contents. I had seen some of these documents, but had not had time to examine them closely; there were several files I was keen to peruse. One concerned the murder of a former African National Congress (ANC) activist, Mziwonke 'Pro' Jack, in 1991, at the time of some bitter internecine feuding in the Western Cape. The little I knew of the contents indicated that with access to them it might be possible to establish the reason for the killing of Pro Jack and who might have suggested or even ordered it.

There were also 13 boxes containing the complete public record of the TRC hearings into the apartheid state's chemical and biological warfare programme. Although these records contained formerly classified documents, all had been vetted by the TRC and lawyers representing both the Department of Foreign Affairs and the Non-

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Proliferation Council. They had cleared the documents — which had been quoted from extensively during the hearings — for release to the National Archives.

Also in the collection were copies of various published reports, including newspaper clippings and the file relating to the assassination in 1988 of the ANC's chief representative in Paris, Dulcie September. This included material supplied by the French security services, which had not been translated by the time the TRC mandate ended. It made for a bizarre collection.

In any event, all the documents had been in the public domain and were legally required to be transferred to the National Archives. And it was to the National Archives that I directed my initial inquiries in 2000. Verne Harris, then deputy director, confirmed that he had established in 1999 that the 34 boxes had 'gone missing'. He was informed that a set of 'sensitive' documents had been taken into custody by DOJ. But inquiries initially drew a blank, before he was eventually told by DOJ that NIA would need to be consulted about the whereabouts of the missing documents.

In October 2000 Harris spoke at a post-TRC conference in Cape Town and mentioned in passing his concern that NIA had apparently taken charge of a collection of so-called sensitive documents. The statement caused a major upset in certain government quarters. Within a week, a circular arrived on the desks of all staff at the National Archives: in future, all presentations or papers delivered by officials, even in their private capacity, should be vetted by DAC, which controls the National Archives.

But Harris avoided the gag by leaving the National Archives and taking up the post of director of SAHA. I saw this move and the pending implementation then of PAIA as heralding the end of the quest for the 34 boxes of missing TRC documents. Instead, it signalled the start of months and years of frustration and lengthy delays in official responses, peppered with official claims of ignorance and characterised by deliberate disinformation and downright lies.

I was able to establish that the decision to declare the material in the boxes and files 'sensitive' had been taken by the former TRC CEO, Dr Biki Minyuku. He admitted to me that he had not personally assessed the collection of material, but had relied on the opinion of a former TRC investigator whose reputation among his peers was, to say the least, controversial.

Minyuku was also unable to say under what authority he had acted and his replacement as acting CEO of the TRC, Martin Coetzee, admitted that Minyuku had 'acted without mandate'. However, Minyuku maintained that, as a 'matter of national security', he had arranged with the then minister of justice, Dullah Omar, to take charge of the documents. They had been removed from the TRC offices 'for safekeeping'.

But DOJ denied ever having had the documents. Yet I was able to establish that Omar had written to the TRC in April 1999 stating that he had personally taken charge of them. His then administrative secretary, Johan Labuschagne, subsequently

informed some TRC officials that the boxes had been handed on to NIA.

The *Mail & Guardian* was prepared to publish the information I was able to dig up, and the pressure mounted. In May of 2002, in a statement issued by the national archivist, Dr Graham Dominy, and DOJ DIO David Porogo, an official investigation was announced. Dominy and Porogo stressed that the responsibility for TRC records rested with the National Archives, which would spearhead the investigation.

However, there had already been an admission by DOJ deputy director John Bacon that the department knew where the documents were. He also conceded that they had been sent to NIA 'for classification'.

What was not publicly known at the time was that Bacon, Dominy and Porogo had been at a meeting at the National Archives on 26 April at which it was decided to fob off my inquiries by announcing an official National Archives-led investigation. In what turned out to be an embarrassing oversight for the parties concerned, minutes of that meeting were released nearly a year later and I obtained a copy.

The minutes stated clearly that the documents were 'save (sic) in the offices of the Minister responsible for NIA' and detailed how the national archivist, DOJ and NIA intended to 'deal with the media'. However, only weeks before that meeting, the then minister 'responsible for NIA', Lindiwe Sisulu, had responded in writing to me that the missing documents 'are in the safekeeping of the Department of Justice'.

But until the minutes of the 26 April meeting became public, there was still confusion about where the missing boxes and files were being kept. In May of 2002 Intelligence Services spokesperson Lorna Daniels delivered this explanation: '[The documents] are technically in the possession of the Department of Justice, but physically held by NIA.'

Barely a month later, Sisulu told Parliament that the documents were being 'declassified in line with their status' by 'an inter-Ministerial task team'. Yet, on the same day, NIA's DIO, J.W. McKay, wrote to SAHA, explaining: 'All the TRC documents are the responsibility of the Department of Justice and are not in the custody of the agency.'

We now know that the documents were (illegally) in the custody of NIA; that they have undergone a classification process that appears not to have been properly authorised; that senior officials deliberately misled the media and the public; and that no satisfactory explanations have ever been given. Above all, some of that documentation, previously in the public domain, remains hidden.

However, the chipping away by SAHA, backed by sections of the media, has had an effect: we now know more than perhaps we might had the bureaucrats had their way completely. And some government departments have shown a degree of willingness to comply with access to information requests. In fact, the Department of Defence has received the warmest accolades in this regard, although I, for one, reserve

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my judgement.

After all, this was a department that kept most of the details of its murderous violations of human rights in a separate department, the Directorate for Covert Collection (DCC). And when investigators stumbled on the DCC's headquarters with its rows of computers and filing cabinets, they were instructed to withdraw with just three files. Twenty-four hours later, DCC headquarters was an empty shell; all the documents, files, computers and disks had vanished.<sup>36</sup>

Terry Bell

# TRC 'dark secrets' will out

## Leader Reporter

**THIRTY-four** boxes of "potentially sensitive" files - which could contain some of apartheid's darkest secrets collated by the Truth and Reconciliation Commission - may soon be available for public viewing following a dramatic legal breakthrough by the South African History Archive (SAHA).

The breakthrough came earlier this month when SAHA lawyers reached an out of court agreement with the Department of Justice, which undertook to release documents it received from the TRC or provide valid reasons for not doing so.

The documents in 34 boxes could reveal information which may expose some of the most bizarre and sinister operations of the apartheid era - and also expose the ANC government's attempts to keep them secret.

The deal sanctioned by the Transvaal High Court, ends a long-standing battle waged by SAHA for access to documents which government claim went missing after the TRC handed them to then Justice Minister Dullah Omar in April 1999.

SAHA director, Verne Harris, told *"The Leader"* this week, the costly legal battle for the files started in May 2001 but only

reached a climax with an out of court settlement early this month.

The Government, according to Harris, has until June to fulfill its obligation to release the files.

He said the Government has formed a task team to inspect the files and report to SAHA every two weeks.

"We also have a full list of the contents of the boxes. If they fail to release the contents by the end of June, we will most certainly pursue the court action."

Harris said these particular files were kept separately and secretly from the other records handed over by the TRC to Government.

"Our efforts to get access to these files were also stifled by the authorities but we have now established that these files are at the offices of the Minister of Intelligence, Dr LN Sisulu."

"We have taken this action as a matter of principle. The general public would have had serious difficulty in getting access to these files. We believe the public has a right to know what is in those files because this right is entrenched in the South African constitution," said Harris.

"It is not clear why the Government wanted to block

(Continued on page 2)

## Accessing the Records of the TRC

(From page 1)  
access to these files. Some of them could be "potentially sensitive" but according to our knowledge the majority of the files are fairly innocuous and could not cause any embarrassment to the authorities."

Harris, a former employee of the National Archives, said the authorities could have been reluctant to disclose information collected by the TRC because of a "broader paranoia" within the government.

Meanwhile, it has been learnt there are more than 7 000 intelligence files on opponents of the apartheid regime collected by members of the former government's notorious security network.

The files contain details of jailed, banned, detained and banished activists.

According to former TRC

chief investigation officer, Dumisa Ntsebeza, most of the documents have never seen the light of day, not even during the commission's hearing.

Included among the records of former Security Branch surveillance may be information provided by turncoats or informers that led to the assassination of high profile activists, such as the unsolved shooting of University of Natal academic Rick Turner in 1978.

Jody Kolappen of the Human Rights Commission, said there was strong argument for the disclosure of the information contained in the files because this would be in the public's interest.

However, he was emphatic this needed to be balanced with what he argued as "unintended consequences" as to what

this could emotionally and otherwise mean to those detained, their families and also to those connected with the informers and former intelligence operators.

However, Kolappen said the public had every right to know what happened to the detainees during the apartheid regime.

He added, however, that the issue needed to be "properly managed".

Kolappen also pointed out there were many factors which needed to be taken into consideration, including the possibility of "misinformation" that could be in the files to cause division amongst the anti-apartheid forces.

"There could also be legal implications involved but on the broader front there was a strong case against the prevention of disclosure," said Kolappen.

Figure 1. Press clipping, Leader reporter, *The Leader*, 23 May 2003

That week, Bell published an article about the mystery of the severed documents, chronicling Harris's efforts initially at the National Archives and SAHA to locate the missing documents and the confusing and contradictory claims and denials being made by government officials from DOJ, NIA and the National Archives.<sup>37</sup> The following week DOJ claimed on national radio that the 'sensitive' records were in fact in the possession of NIA; later that week, NIA finally admitted that this was the case and undertook to return the records to DOJ.<sup>38</sup>

Despite having ostensibly cleared up the matter, subsequent utterances by public officials further compounded the confusion: the minister of intelligence, Lindiwe Sisulu, claimed that the documents were 'in the safekeeping of DOJ and that NIA's involvement with these documents is to advise the Department regarding their appropriate classification before they are forwarded to the National Archives ... [and] to provide security advice'.<sup>39</sup> Meanwhile, DOJ spokesperson Paul Setsetse said that NIA held the documents.<sup>40</sup> This was particularly disturbing, as there was no provision in the TRC Act for the ad hoc classification of TRC documents; it was assumed that the apartheid enacted Protection of Information Act No. 84 of 1983 was being relied upon to justify the classification process.

Two weeks later, in late April 2002, Harris wrote in the *Natal Witness* and raised a series of disturbing questions about the whereabouts of these TRC records, the bizarre sequence of events that marked SAHA's efforts to locate the documents, the absence of accountability of responsible bureaucrats and the eventual forced admission that NIA had the documents.<sup>41</sup> Resorting to a play on words, a senior NIA official would subsequently

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explain that the documents were 'technically in the possession of DOJ, but physically held by NIA'.<sup>42</sup> A few days later, and after consultation with various NGOs, the Cape Town-based Institute for Justice and Reconciliation, headed by the former TRC director of research, Charles Villa Vicencio, submitted a request to the Office of the President for clarification as to what had actually happened to the records.<sup>43</sup>

In early May 2002 the national archivist informed SAHA that an official investigation led by the National Archives would determine where the records were and what had happened to them.<sup>44</sup> The investigation confirmed that the records were being held by NIA; the Ministry of Justice subsequently admitted that it had sent them there for classification purposes because of their purported sensitivity.

On 19 May 2002 Minister of Justice Maduna informed the Institute for Justice and Reconciliation that he was not aware of a new request to access the contested documents. He claimed that 'as far as [he] could establish', only one request had been submitted to access these documents, and that the applicant had been asked to 'identify the document for purposes of tracing it', but had not come back to the department. He dismissed the 'wild allegations' about the alleged obfuscation around identifying the documents' whereabouts, asserting they were 'totally off the mark'. He confirmed, however, that Minyuku had moved the documents because he feared that 'journalists, and perhaps others, wanted to get hold of [them] even before Government itself had seen [them]'. Maduna asserted that his predecessor, Dullah Omar, had agreed that the documents be transferred 'to protect the integrity of the process, even against journalists'.<sup>45</sup> In response to Maduna's claim that there was no pending request, SAHA submitted a PAIA request the following day to DOJ for copies of 'all records in your possession documenting the chain of custody of the records described in [an] attached list from the time they were transferred from the TRC in 1999'.<sup>46</sup> A parallel request was also submitted to NIA, which was subsequently transferred back to DOJ.

Confusion about the documents mutated into a semantic debate over who was actually in control of them. At the time that the documents were sent to Minister Omar, his portfolio was officially minister of justice and intelligence services. The two competencies were subsequently separated into distinct ministries. In early June 2002 the new minister of intelligence, Lindiwe Sisulu, reportedly confirmed that the documents were safe, telling Parliament that they were being 'assessed ... and declassified in line with their status' by an inter-ministerial task team (the Classification and Declassification Review Committee — CDRC).<sup>47</sup> No detail was provided about their whereabouts or as to why the documents were being treated separately from the main TRC archive.<sup>48</sup> On the same day, SAHA received correspondence from NIA that 'all the TRC documents are the responsibility of DOJ and are not in the custody of the agency'.<sup>49</sup> A senior DOJ official explained that 'the TRC stuff may be locked away in one of our buildings, but only NIA has the key'.<sup>50</sup> The whereabouts of the documents remained unknown.



## Accessing the Records of the TRC

The relevant government departments had effectively dismissed SAHA's concerns and consistently failed to provide adequate answers, raising suspicions about the motives of those involved. Apart from finding out exactly where these documents were, SAHA wanted to determine whether the contested records had been severed legally, and if so, on whose authority. SAHA was also worried that the records had been sent to NIA, which, it submitted, had no legal authority to remove TRC documents for classification. On top of this, SAHA was now very concerned that the responsible government departments appeared unwilling to adhere to the time lines and other provisions set out in PAIA. Former TRC commissioners and senior staff members of the commission also expressed concern that there was no legal provision for these documents to be classified by NIA or its CDRC.

SAHA had already obtained a list of what was contained in the documents and knew from interactions with former TRC staffers that many of the documents mentioned in it were not sensitive and already in the public domain. Other files contained useful leads relating to incidents and investigations that the TRC had been unable to follow up.<sup>51</sup>

SAHA approached the National Archives in May for any information it might have, but in June 2002 it also refused a request for records that documented the chain of custody of the records that had been severed by Minyuku. National Archives referred SAHA back to DOJ, pointing out that the records requested were 'currently the subject of an investigation as to their exact status and location'.<sup>52</sup> SAHA submitted an internal appeal, noting that the national archivist had failed to follow the correct PAIA procedures in terms of transferring the request and citing the relevant section/s of the Act in relation to the refusal. SAHA also noted that it was not asking for the TRC records, but the National Archives' own records relating to the severed documents.<sup>53</sup> The response from the national archivist reiterated concerns about a 'security threat' that had been identified by 'the inter-Departmental committee responsible for the secure movement of the records' and refused access.<sup>54</sup>

Exasperated, yet still unwilling to pursue litigation, SAHA submitted a complaint to the South African Human Rights Commission (SAHRC) claiming that both NIA and DOJ were flouting the law and blocking access to the constitutional right of access to information.<sup>55</sup> Inexplicably, no assistance was forthcoming from the SAHRC. Meanwhile, public pressure was mounting, and in June 2002 the Johannesburg-based NGO the Centre for the Study of Violence and Reconciliation (CSVr) wrote to Archbishop Tutu as the TRC chair proposing that clear recommendations be made to ensure that all TRC files were made public as soon as possible. CSVr urged the TRC to undertake its own assessment of section 29 files to determine what could be released for public scrutiny. In addition, CSVr also requested the TRC to locate the missing boxes of documents and make recommendations regarding access to their contents.<sup>56</sup>

In mid-August 2002, almost three months after receiving the application, DOJ refused SAHA access to the records documenting the chain of custody of TRC records,

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claiming that they could not be found.<sup>57</sup> An internal appeal was submitted to the minister of justice in late August, to which the state should have responded within 30 days. In early October, the Ministry of Justice acknowledged receipt of the appeal, dated 26 August, pointing out that it had only been received on 19 September 2002.<sup>58</sup> Meanwhile, SAHA had still received no official response from the minister of arts and culture, Dr Ben Ngubane, to the appeal that it had submitted to the National Archives and DAC in June, prompting it to alert the minister that it would be forced to make an application to court for review.<sup>59</sup> An out-of-court settlement was subsequently reached, with the result that certain National Archives records relating to the TRC archive were released to SAHA in the first quarter of 2003. No further light, however, was shed on the whereabouts of the missing records.

Amongst the 45 pages of documents received was a copy of minutes from a meeting convened at the National Archives in April 2002 at which representatives of NIA and DOJ were present, which revealed that the 34 boxes had indeed been located in the office of the minister of intelligence. No apparent progress had been made in the 11-month 'investigation' that had been launched to locate the documents. SAHA made the document public, prompting journalist Terry Bell to raise questions as to why both the national archivist and the DOJ DIO, David Porogo, had announced the launch of an investigation into the whereabouts of the documents when they knew perfectly well that they were in the office of the minister of intelligence. The national archivist vehemently denied that he had lied, pointing out that there had been an investigation that had been subsumed into the work of CDRC.<sup>60</sup>

Dominy described Bells' article as 'mischievous in deliberately misrepresenting the fact[s]', and argued that the minutes referred to had been misinterpreted. He acknowledged that a senior official from DOJ had made the assertion at the meeting that the files were at NIA, but that an investigation had been subsequently launched to determine whether this was indeed the case. Dominy also queried comments contained in the article that had been attributed to SAHA's director, Verne Harris, pointing out that Harris had never raised his concerns with the National Archives, and that he could not have been searching for the missing 34 boxes of documents for more than three years, because he had been employed at the National Archives only two years previously.<sup>61</sup>

SAHA was deeply distressed by what it perceived as the national archivist's cavalier response to its legitimate concerns. Harris reminded the national archivist that he had spent over a year trying to locate these records when still employed at the National Archives before taking up the same quest as director of SAHA. Harris also pointed out that when he had expressed his concerns at a conference in 2000, he was attacked by NIA, which denied having the records, and was threatened with disciplinary action by his superiors; something, which Harris argued, was instrumental in his decision to leave the National Archives. SAHA and Bell pointed out that it was almost a year since the 'investigation' had been launched

and that, given the lack of conclusion, something was evidently amiss.<sup>62</sup>

Despite acknowledging receipt of the appeal submitted in August 2002, the Ministry of Justice did not respond. By December 2002 SAHA decided to litigate and filed an application in the High Court claiming that neither DOJ nor its DIO had applied their minds properly to the matter, and that the exemptions, in particular that the disclosure of these documents would 'prejudice the defence, security and international relations of South Africa', had not been reasonably applied.

In late January 2003 SAHA's attorneys were informed by the State Attorney's Office that it was in possession of the transfer lists, as well as other documents relating to the chain of custody of the TRC records. At this stage, the state had not filed a notice of its intention to oppose in the case lodged against DOJ and was now requesting further time to 're-analyse' the actual records.<sup>63</sup> While this represented some progress in terms of the transfer lists, SAHA was concerned that the state was still resisting access to the so-called sensitive records. Although SAHA was legally entitled to play hardball, it recognised the importance of being flexible if this could facilitate movement towards its principle objective of access.<sup>64</sup>

In May 2003 SAHA secured out-of-court settlements with DOJ and DAC. In terms of the settlement with DOJ, SAHA was given copies of records that confirmed that the sensitive TRC records had been moved to the Ministry of Intelligence in 1999. The settlement with DOJ required a final handover of the documents to SAHA by the end of 2003 and the submission of an interim progress report in the meantime. If the matter were not finalised by that date, SAHA reserved the right to pursue action in the High Court.<sup>65</sup> The agreement confirmed that the contested documents would be transferred to the custody of DOJ, which would release the documents or provide valid reasons for not doing so.<sup>66</sup> In terms of the settlement with DAC, SAHA was given copies of National Archives records documenting the custody of the sensitive records.<sup>67</sup>

SAHA had proved its point with regard to its rights of access to records detailing the custody issue and had eventually forced some level of action and transparency, albeit reluctantly, from the responsible departments. The final capitulation by government on these matters through an out-of-court settlement had, however, ensured that no legal precedent had been set.

### *Access to the 'sensitive records'*

Having located the records, SAHA's focus now shifted to accessing the content of the contested boxes. The settlement applied not only to documents, correspondence and other records relating to the provenance, custody and movement of the records, but to the actual records themselves. The settlement also directed that the documents contained in the 34 boxes would be delivered to the National Archives in three batches, the first of which would be in late September 2003.<sup>68</sup> On the eve of the first handover, SAHA warned that if

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the deadline were missed it would be forced to take further legal action. The documents were subsequently released by NIA to the National Archives, but they remained unavailable to the public. SAHA accused DOJ of failing to honour the terms of the settlement. The department's chief director of communications and DIO denied that the department had reneged on undertakings to release the documents.<sup>69</sup>

Among the documents referred to in the settlement was an inventory; one entry in the inventory was entitled 'List of informers'. Not surprisingly, the media were particularly interested in the contents of this file.<sup>70</sup> As the TRC process had failed to lift the lid on the informer issue (a concern that resounded in the post-TRC period),<sup>71</sup> interest in this particular file was considerable. SAHA was not confident, however, that this listed document would be released;<sup>72</sup> DOJ subsequently denied there was such a list.<sup>73</sup>

In November 2003 the national archivist confirmed that the records were indeed at the National Archives, where they were being processed and scrutinised by a multi-agency team that was formulating recommendations about which records could be released and which required continued protection. SAHA was incensed that a further delay regarding access was now in the offing and another vetting process of the documents was now being undertaken. The national archivist accused SAHA of overreacting, and of not contributing to the debate on access in a balanced and professional manner.<sup>74</sup> SAHA hit back, accusing the state of reneging on three access agreements and of consistently reneging on its legal obligations.<sup>75</sup>

SAHA felt that it had no choice but to return to court to seek a final resolution regarding access. Shortly before Christmas 2003 the State Attorney's Office tried to pre-empt a court battle by offering SAHA sight of the review committee's worksheet, detailing its findings and recommendations. SAHA rejected the offer, as it would have been prohibited from publishing the contents of the worksheet, which included the committee's reasons for non-disclosure.<sup>76</sup>

In mid-January 2004, shortly before the case was scheduled to be heard in the Pretoria High Court, DOJ filed a related affidavit in which it confirmed that a TRC file catalogued as 'List of informers' no longer existed.<sup>77</sup> The department strongly defended the non-disclosure of the files and the related classification processes it had embarked on.<sup>78</sup> This time, however, government departments broke ranks when NIA's information officer asserted that the documents were 'not in the custody of the agency' and Porogo accused NIA (its co-respondent) of misleading him in June 2002.<sup>79</sup> Porogo explained that in January 2003, at a meeting between officials of the two departments, it became clear that NIA 'would not summarily release the documents' to DOJ.<sup>80</sup> He claimed that DOJ was then informed that the minister of intelligence, Lindiwe Sisulu, felt that these documents were 'sensitive'. She purportedly stated that NIA 'can only approve that the courts can come and inspect the documents. Once they are delivered to the courts we have no jurisdiction over their safety'.<sup>81</sup>

This disclosure provides a remarkable insight into NIA's approach to PAIA and its interpretation of its legal responsibilities. Porogo claimed that the situation was only rectified with the establishment of CDRC, which by January 2004 had declassified 658 of the 1,684 documents for immediate release, had given partial disclosure for another 198 documents, and was reviewing a further 512.<sup>82</sup> In its responding affidavit, SAHA accused DOJ of dealing with its request for access to the files 'with contempt and total disregard' for the Constitution. SAHA accused Porogo of 'shamelessly' lying about the CDRC review and breaking many other promises.<sup>83</sup> SAHA asserted that the classification process had no legal basis. Despite this, the state was granted a further postponement to respond to SAHA's most recent affidavit.<sup>84</sup>

The case was scheduled for 11 May 2004, but was postponed again until 17 August to allow the new minister of justice, Bridgette Mabandla, an opportunity to familiarise herself with the case. The courts granted the department a further postponement from August until 15 November 2004, and in early November the department requested another ten-day extension. Evidently, the 'classification' process had not been finalised. Exasperated, SAHA pointed out that there were several outstanding issues relating to the case, including an undertaking from DOJ that it would provide an affidavit confirming that the 'List of informers' referred to in the inventory could not be found. SAHA also pointed out that the state attorney had agreed to provide details on new documents that had been declassified by 15 October, but had failed to do so. Not surprisingly, SAHA was reluctant to accede to a further postponement, especially as the matter was now likely to be pushed over to 2005.<sup>85</sup>

On 15 November 2004 the director general of DOJ, Vusi Pikoli, wrote to SAHA's lawyers and provided a 335 page annexure that listed detail on all the documents under consideration, setting out in each case whether the document could be disclosed fully, partially or not at all, and reasons for any refusals or severance of information. In addition, another affidavit was provided in relation to the 'missing' list of informers. The department had also been specifically instructed by Pikoli to assist SAHA to access the required documents.<sup>86</sup>

After a three-year battle, it was a remarkable result — the documents were reunited with the main TRC archive in the custody of the National Archives, and over 60 per cent of the contested documents had been placed in the public domain. It was now possible to scrutinise what all the fuss had been about. Not surprisingly, the bulk of contentious documents related to the records gathered by the TRC during its investigations into Project Coast, the apartheid military's chemical and biological warfare (CBW) programme. The South African government had put tremendous pressure on the TRC not to proceed with its public CBW hearings, and, in some respects, the barriers put in the way of access to these records resonated with the problems of access experienced by the TRC during its own inquiry.<sup>87</sup>

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Indeed, most of the documents that SAHA was ultimately refused access to related to the CBW programme, and included detail on the production and deployment of substances, as well as details on individuals involved in Project Coast. Other documents related to specific criminal investigations (i.e. the murders of Dulcie September,<sup>88</sup> Pro Jack<sup>89</sup> and Alan Kidger<sup>90</sup>), gun running, investigations by General Pierre Steyn,<sup>91</sup> and several internal ANC documents, including some relating to its military tribunals.

Although SAHA believes that there are grounds to successfully challenge the ongoing refusal of access to some of these documents, it decided not to take the matter any further, believing that the point of principle had been made — namely, that government departments could not unilaterally impose blanket restrictions on access in terms of PAIA. Although SAHA had not ensured that these departments adhere to the letter or spirit of PAIA, it had forced them to employ a transparent process that ultimately compelled disclosure. Once again, no legal precedent had been set, but SAHA's actions had provided a platform from which others could begin their own inquiries. SAHA's concern regarding the legality of the classification process was, however, never resolved, and the role of NIA in assisting to determine what TRC records are in the public domain and what are not appears to be firmly entrenched.

## Access to other TRC records

Between 2001 and 2004 SAHA submitted 38 PAIA requests relating directly to the TRC archive. FOIP intended to test access to certain types of records, some of which were clearly already in the public domain and others whose status was less clear. Following the launch of its TRC project in 2002, SAHA submitted a range of requests to DOJ and the National Archives for specific files believed to be contained in the archive. At this stage, SAHA was already in dispute with DOJ, DAC and NIA regarding the matters detailed above. Rather than waiting for these matters to be resolved, SAHA undertook to submit requests that would test PAIA with respect to different types of documents. It was also SAHA's intention that the submission of requests would contribute to a decision to expedite the processing of these important records.

## Amnesty records

The TRC's conditional amnesty process required applicants to provide details of and justification for the perpetration of gross human rights violations. Applications were submitted to the commission's Amnesty Committee, which conducted an administrative process to determine whether the application was germane in terms of the set criteria for eligibility, and whether the matter constituted a gross human rights violation and therefore required a hearing. Hearings were conducted in public, and in a number of incidents, testimony was supplemented by the submission of documents and other evidence in support



Figure 2. When the Truth Commission handed over the final segment of its report to President Mbeki in March 2003, it acknowledged there was much unfinished business to be attended to. Although the Truth Commission confirmed that many apartheid era intelligence and security documents were destroyed, it revealed that many had not been. Consequently, it recommended that government undertake an archival audit of remaining documents to determine exactly what remained. To date, no such audit has been carried out

of or in opposition to the application. Transcripts of the 255 public hearings and 1,632 hearing days are available on the TRC website.<sup>92</sup>

SAHA made several attempts to access copies of amnesty applications and other documentation submitted during the public hearing process. These efforts also met with mixed results. Among the 34 boxes of sensitive documents, it emerged that there were a number of copies of amnesty applications. Having reviewed these documents, however, the director general of DOJ granted access to some and refused access to others. In general, the rationale provided for the former was that the documents were already in the public domain.<sup>93</sup> SAHA certainly agreed with this, having argued that all amnesty applications that resulted in public hearings had been put into the public domain.

In incidents of refusal, however, the director general put a variety of reasons forward. In some instances, it was argued that disclosures would be unreasonable in that they would constitute an unreasonable disclosure of personal information.<sup>94</sup> Interestingly, in some of these matters, the director general argued that the information had been provided to the TRC on a confidential basis.<sup>95</sup> It is not clear whether these applications resulted in public amnesty processes, although it is stated that the information in the applications is

not in the public domain, implying that these matters were dealt with in chambers. SAHA has yet to contest the notion introduced by the director general that the applicants and other implicated persons would have to give consent before the records can be released. In other matters, the director general asserted that non-disclosure was necessary to protect the integrity of law enforcement and legal proceedings, citing section 39 of PAIA. Other reasons included the mandatory protection of individuals whose security would be compromised by disclosure (section 38). All of these reasons, or a combination thereof, were proffered in a number of applications relating to the CBW programme, gun-running activities and certain ANC applications.<sup>96</sup> The inference that these matters are still subject to criminal investigation and possible prosecution is obvious. Nevertheless, it remains to be seen whether the politics of prosecution determines whether these matters are taken forward or left unattended.

Some of the reasoning provided for refusing access to certain 'sensitive' documents was contradicted by the fact the document was provided elsewhere. In one instance, access to an amnesty application was refused in one section of the settlement and granted in another.<sup>97</sup> This was also the case regarding the controversial 'Staff report to the Steyn Inquiry', which had large sections redacted in the Afrikaans version, but was provided without excision in the English version.<sup>98</sup> This understandably raises questions about the integrity of the decision-making process.

#### *Amnesty materials relating to the murders of the Cradock 4*

In June 2004 David Forbes, a local documentary filmmaker, submitted a PAIA request for a full transcript of the amnesty hearings into the murder of the 'Cradock 4'<sup>99</sup> and copies of all documents (annexures) submitted during the amnesty hearing process (see Box 2.2). He believed it was self-evident that these documents were already in the public domain, as the documents had been formally submitted during a public process. SAHA intervened when DOJ failed to provide a full response. The department denied access in the first instance and on appeal, arguing that the provision of these documents would constitute an unreasonable disclosure of personal information, violate third-party confidentiality protections and prejudice ongoing legal proceedings (i.e. sections 34 and 39 of PAIA). SAHA applied to the High Court for review, arguing that the state was placing an incorrect reliance on the stated sections and had failed to take into account PAIA's provisions for upholding the public interest (i.e. section 46). Prior to filing its answering affidavit, DOJ granted access to the transcripts requested; SAHA responded that access to the transcripts was not sufficient and advised the department to file its answering affidavit. It was not until the department did so that the requester was provided with a listing of documents that purportedly related to the request and reasons for refusal in relation to each. The department expanded its reasons for refusal and relied in addition on two other exemptions that protected the life and safety of third parties and agreements of confidential-



ity. The listing, however, was not clear: some documents were referred to simply as 'memo dated 16 June 1985' without any contextual information. This prompted SAHA to review the transcript, which was around 2,500 pages; SAHA discovered that the department had in fact listed just over half of the documents that applied to the request. SAHA followed up with the department's DIO, Marlyn Raswiswi, seeking clarification, and received a short response alleging that the documents were 'privileged'. Some 16 months later, on the morning of the scheduled hearing in the Pretoria High Court, the state capitulated and in an out-of-court settlement acquiesced by agreeing to give SAHA full access to all the records requested. This was an important victory, but also a frustrating one, as once again it allowed the state to prevent the setting of a legal precedent in terms of access to TRC records.

#### Box 2.2: The case of the Cradock 4

In 2003, after many years of deliberation, I began making a film about the murder of the Cradock 4 by the security forces on 27 June 1985.

Imperative to the film were two things: the participation and support of the families of the Cradock 4, in particular the widows, and access to all records that make up the story of the murder of the four men.

The widows of the Cradock 4 gave their blessing and provided support to the film. In return, I set up a fund to ensure that profits from the film would be distributed to the community through a trust managed by the widows.

With the assistance of Zenzile Khoisan, former TRC investigator, and funding secured from the National Film and Video Foundation, we set about perusing the files and photographs at the Times Media Library and SAHA. Many of SAHA's collections were donated by the Legal Resource Centre, which represented the widows at the inquests and TRC hearings into the murders.

On 2 June 2004 Zenzile and myself went to the Pretoria offices of DOJ to submit a PAIA request for access to records relating to the case. Both the inquests and the TRC hearings had been open to the public. At the time, we thought that requesting the records of these hearings would be a mere formality.

What followed was a period of obstruction and what I can only describe as incompetence and arrogance by DOJ officials. I was confronted with silence; lies; a failure to return telephone calls, faxes and e-mails; and a failure to deliver on promises; it seemed that the DOJ did everything in its power to deny us access to the records.

In short, the DOJ's behaviour stood in direct contravention of PAIA. Left with no option, I resorted to writing a letter to the director general of DOJ, but this too went unanswered.

In January 2005 I happened to be going to Port Elizabeth and decided to drive down via Cradock and visit two of the widows who still live there, Mrs Nomonde Calata and Mrs Sindiswa Mkonto. Imagine my surprise when Nomonde told me that DOJ officials had been there just two days before and intimidated them into signing affidavits that

stated that they did not consent to the release of the Cradock 4 records.

Nomonde told me that the Cradock mayor's office had called and told her that 'National Intelligence(!)' required the telephone numbers of all the widows.

Shortly afterwards, a man and a woman arrived at her house with Mrs Mkonto in tow, and said they were from the DOJ. They sat with the widows for two hours and told them that for their own protection they should not cooperate with me.

Nomonde said she felt frightened and intimidated. At no stage did DOJ representatives tell her that she had a right to legal representation at the meeting, or a period of time in which she could consider her options, as required by PAIA. The DOJ officials then gave both widows a Notice to Third Party, which had previously been signed by Advocate Piko-li on 18 January 2005, and instructed them to come to the police station to make statements that would be used to deny any access to the files of their deceased husbands.

DOJ's tactics are hard to believe and appear to be the work of incompetent officials. The third-party regulation of PAIA requires that an individual whose personal information is contained in a record must be consulted before the record is released so that the individual has an opportunity to argue against release or express his/her consent to access. The fact remains, however, that the widows have few rights under PAIA to make any representations, as they are not third parties as contemplated by PAIA. Was the error a result of incompetence on behalf of the department, or an attempt to avert any further pursuit of the records?

I discussed the situation with Nomonde, who felt that she had been unfairly pressured and intimidated, and wished to continue cooperating with me. I told her to take her time in making a decision and to consult her family.

After several weeks, both widows made a second affidavit laying out the scenario as it had occurred and repudiating their earlier statements to the DOJ lawyers. This new statement stipulated that I should have complete access to all the files concerning the Cradock 4. While these statements would not be influential in a determination of access, they constituted a clear demonstration of the lengths to which DOJ was willing to go, lengths that were unlikely to be viewed favourably by the court in our future proceedings.

I finally enlisted the help of SAHA, which had legal experience in these matters, and which set legal action in motion in June 2005. Faced with court action, DOJ released copies of the hearing transcripts, most of which were, ironically, already publicly available on its website. To bolster our case, we closely read through the thousands of pages that made up the transcripts, making a note of every document utilised as evidence in the hearings.

Filming was delayed beyond the day of the twentieth anniversary of the activists' deaths on 27 June 2005. At the outset of the project, this had been set as the date on which we had planned the release. By this stage, completing the film against all odds

had become a matter of principle.

The date marked another interesting progression in the case, at which the privacy interest of the deceased men, and therefore the widows, ceased. The affidavits obtained by DOJ were, as a consequence, no longer of any value.

The legal process dragged on through a protracted filing process, and despite all efforts by SAHA to obtain clarification of the reasons for refusal and the ill-conceived answering affidavit raised in their defence, no response was forthcoming. A court date was finally set for 14 September 2006; more than two years had passed since I had made the initial PAIA request to DOJ.

Less than 24 hours before the High Court hearing, DOJ indicated that it wished to settle out of court. I was not keen to settle, and wanted the legal process to take its course so that our case could set a precedent for future PAIA requests.

On the day of the hearing I discussed my concerns with our advocate; as DOJ was finally offering us everything we requested, we were forced to accept. In the five minutes prior to the scheduled hearing, DOJ agreed to the terms of our settlement and we entered the courtroom only to leave five minutes later with a settlement that ordered that DOJ give unrestricted access to the records within 30 days. Left with no choice DOJ showed the first signs of cooperation.

There was wide media interest in the case, which was reported in the *Pretoria News*, *The Star*, *The Sowetan*, *The Citizen*, *EP Herald*, *Weekend Post*, *SA Press Association*, *South African Broadcasting Corporation* (SABC) TV and *SAFM* (the English-language SABC radio station).

It was disappointing that following settlement, SAHA was told by the State Attorney's Office that DOJ was seeking counsel's advice as to the validity of the terms of settlement. We were never told of the outcome of this advice and were given full access to the records as agreed in court.

I was amazed at the interest in the murder of the Cradock 4. Our court order was a victory for democracy, for free speech and freedom of information, a victory for the principles for which the Cradock 4 died.

**David Forbes**

**Independent South African film producer/director**

# Paper Wars



**Figure 4.** Scene photographed in bushy area near Bluewater Bay area, Port Elizabeth. Photographer: W/O Leerink. Original album prepared by W/O Els. Shows foot print as observed on scene). At the scene where Sicelo Mhali's body was found.



**Figure 5.** Scene photographed on 28/6/1985 at 15h30 in bush on the Veeplaas road, Port Elizabeth. Photographer: Warrant Officer A McKay. Shows closeups of area on the scene were an apparent blood spot and a shoe were observed. This was found at the scene where Sparrow Mkonto's body was found, near Redhouse.

## Accessing the Records of the TRC

Matthew Goniwe

A2.2.15.28

GEHEIM

EXH BB CC

(25)

CRADOCK  
GD22/2  
1985/06/24  
A/O Maokl

1985/06/23  
Wt. 11  
Tegnies

THEMBILE LUNKO SKAKELING MET  
MATTHEW GONIWE (OP4/2850)

SA/43680

1. Bogenoemde bron rapporteer dat  
Thembile LUNKO  
op 05/06/23 vanaf Hofmeyr met  
Matthew GONIWE (OP4/2850)  
in verbinding was.  
Hieronder volg 'n uittreksel uit die gesprek  
tussen Lunko en Goniwe wat van veiligheidsbe-  
lang is.

2. LUNKO: I just wanted to report to you that

Onbekend  
SA/43680

GEHEIM

2/...

**Figure 6.** Secret security police report including transcript of telephone conversation by Matthew Goniwe compiled by Major Eric Winter, commander of Cradock Security Police, the week before the abductions and murder of the Cradock 4 (Archived as SAHA Collection AL2878 – A2.2.15.28).

## Paper Wars

GEHEIM

- 2. -

the boers and the police were provoking us so we stoned them, they ran to town. We chased another black policeman here in the township, he could not run and we caught him. We've beaten him up and took his service revolver.

GOMBE: Where is the revolver now?

Lunko: It is here with me.

GOMBE: Hey man you'll be shot there by the police. I don't know what advice to give you, but as I say you are busy with a difficult battle which you will not win. What you can do try and restore peace there.

3. UITKENSING3.1 PERSONE

Matthew GOMBE (OP4/2850)

Thembile LUNKO - s/man van Hofmeyr.

SA/435/0

Onbekend

Die Afdelingsbevelvoerder  
Veiligheidstak  
AFDELING OORSTREEK PROVINSIE

1. Vir u inligting.

2. Die Takbevelvoerder, Veiligheidstak, Middelburg(Kaap)  
was op 1985/06/23 telefonies ingelig van bogenoemde  
inligting.

TAKEBEVELVOERDER : MAJOR  
GRADOCK : VEILIGHEIDSTAK  
: E.F.N. WINTER

GEHEIM

*Amnesty application of Eugene de Kock*

SAHA's inability to secure legal precedence in the Cradock 4 matter has allowed DOJ to employ similar tactics in other matters, resulting in further unnecessary obstruction and obfuscation. In 2006 SAHA submitted a request for access to the entire amnesty application presented by Eugene de Kock to the TRC.<sup>100</sup> Colonel de Kock had been the commander of the security police's crack counter-insurgency unit during the 1980s and had been arrested in March 1994, charged, and convicted of multiple murders and other crimes. In late 1996, as the TRC was getting settled into its operational mode, De Kock released a flood of allegations against colleagues and former commanders during the hearings on the mitigation of his sentencing. These allegations, coupled with other revelations that surfaced during the trial and related investigations, resulted in security policemen from all over the country submitting their own applications for amnesty.

As in so many other instances, the DIO failed to deal with the request within the time period prescribed by PAIA and requested an extension, arguing that the application was contained in various different collections and was not collated in one submission (as it had been when lodged by De Kock's lawyers in December 1996). SAHA disputed this fact, as it had been privy to viewing of boxes containing the record in the Cradock case and was aware that the record was in fact not separated as the DIO alleged, but, rather, contained in a number of boxes that were stored together. The request unfolded in much the same manner as the request for access to the Cradock 4 records. In a complaint submitted to the SAHRC in July 2007, SAHA stated:

The DIO again failed to consider that the contents of the application were aired in public hearings held by the TRC, that the application as far as we are aware was not subject to any in camera hearings, and that the TRC Act states that the confidentiality of all investigation materials and amnesty applications lapses once a public hearing is held. We submitted an internal appeal to the Minister in that same month setting out grounds upon which we relied in the Cradock case and raising our serious concern with the failure of the Department to consider the substantial similarity of the records subject to the request. Aside from several other attempts to elicit responses from the Department, we called the [DIO] on 9 May 2007, then followed up with an email confirming her advice that she would follow the matter up with the Minister. When we still did not receive a response we sent a letter to the Minister on 14 June 2007 advising her that we would commence legal proceedings if we did not receive a response. On 29 June 2007 we received a response from the Minister stating that she upholds the decision of the [DIO] on the bases that disclosure will breach the privacy of third parties (section 34(1)), may compromise the safety of third parties (section 38(1)), and may impede prosecution by the National Prosecuting Authority (section 39(1)(b)(iii)(aa)). These same grounds were utilised in the Cradock case in relation to a portion of Eugene de Kock's and other individuals' amnesty applications which we ultimately gained access to.<sup>101</sup>

Eugene de Kock's amnesty application represents the most comprehensive submission

by a former security force member of the former government. As such, it provides an unprecedented window into the world of a senior foot soldier of the regime. De Kock's activities traversed the country and the region, where he and his unit were responsible for a significant number of counter-insurgency operations. While SAHA appreciates that there may be aspects of the De Kock application that can be legitimately redacted, the organisation rejects the notion of blanket refusal, and at the time of writing was again preparing for litigation to establish a precedent in this regard. In many instances, aspects of the De Kock amnesty application are already in the public domain. Indeed, SAHA has secured fragments of the application from legal representatives of victims mentioned in some of these matters, as well as from the department itself as a result of the settlement in the Cradock matter. SAHA has made this very clear to the department and the minister, but such reasoning has apparently fallen on deaf ears.

### Section 29: In camera records

Section 29 of the TRC Act allowed the commission to subpoena individuals to appear before it to answer questions in camera. Several dozen persons were subpoenaed by the Human Rights Violation Committee during 1996 and 1997 — a comprehensive listing has not been published — and the information gleaned was subsequently utilised in further investigations, research and analyses. The process also successfully solicited amnesty applications in several instances.<sup>102</sup>

In June 2003 SAHA submitted five requests to DOJ for copies of transcripts of section 29 hearings.<sup>103</sup> These included the hearings of former 'superspy' Craig Williamson, testimony from several security police officers involved in the 1988 death in custody of Mamelodi activist Stanza Bopape, the testimony of former askari<sup>104</sup> Joe Mamasela, the testimony of Winnie Madikizela-Mandela and the testimony of members of the Khumalo Gang who were involved in terrorising the East Rand community of Thokoza in the early 1990s. Five months later the department responded, denying access to all records and, citing section 37(1)(b), arguing that the testimonies had been given with undertakings of confidentiality from the TRC. SAHA immediately appealed, but the minister of justice upheld the rejection, citing the same grounds.

In March 2006 SAHA once again submitted an application for section 29 transcripts.<sup>105</sup> In its application, SAHA listed a number of transcripts that had been aired in subsequent public hearings. In April the request was denied on the basis that 'the documents contain information that was supplied in strict confidence by various third parties. The information was supplied after their confidentiality was guaranteed, so we are unable to breach our undertaking'.<sup>106</sup> In June SAHA submitted an internal appeal, arguing among other things that DOJ did not hold a duty of confidentiality to third parties, and that some of the records were already in the public domain. The following month, the rejection was upheld by the Ministry of Justice.<sup>107</sup> SAHA contested the notion that the TRC made any



agreements of this nature and subsequently submitted a PAIA request for records confirming such an undertaking.<sup>108</sup> As expected, no such records could be located. In a meeting with the DIO of the department, SAHA again pointed out that transcripts of certain in camera testimonies were already in the public domain, having been utilised in other hearings; this included the testimony of Madikizela-Mandela (disclosed in the November/December public hearings into the activities of the Mandela Football Club), as well as testimonies from amnesty applicants involved in the Bopape and Khumalo Gang cases. In addition, the Mamasela transcript was successfully secured by former security policeman Dirk Coetzee, who took the TRC to court to access the transcript as part of his criminal defence on murder charges. The DIO agreed to conduct further inquiries regarding these transcripts, but responded shortly thereafter by rejecting the application without having done so.

SAHA recognised that the transcripts of these hearings may contain sensitive information and consequently was not calling for blanket access, as has been assumed in some quarters. Instead, it argued that the records should be reviewed on a case-by-case basis. As with the records contained in the 34 boxes saga, there may well be cogent reasons for withholding certain information, but there is no justification for a blanket refusal. Such blanket refusals are contradictory to the spirit of PAIA; the TRC never intended that restrictions on access should continue for an undefined period.

In June 1998 the TRC agreed that '[a]ll information gathered by the TRC, including [section 29] hearings, remained confidential until such time as the Commission decides otherwise'.<sup>109</sup> In August the commission acknowledged that the issue of access to these records 'was a sensitive matter' and that 'all the transcripts need[ed] to be scrutinized in terms of the naming of persons etc.' There was a caution 'against a blanket policy on access', and three senior staff members were tasked with drawing up a recommendation.<sup>110</sup> No such recommendation was forthcoming at that stage, and no mention was made about access to section 29 transcripts in the TRC's November 1998 report presented to Nelson Mandela. In effect, a decision on how to proceed with this was put to one side.

In June 2002 CSVr wrote to Archbishop Tutu as TRC chair urging him to make recommendations to ensure that all TRC files were made public as soon as possible and for the TRC itself to undertake its own assessment of section 29 files to determine what could be publicly released.<sup>111</sup> No such review was undertaken, but a decision on access to the transcripts was taken at the TRC's final meeting in March 2003.<sup>112</sup> Unfortunately, the minutes of this meeting were captured on a laptop that was subsequently stolen.<sup>113</sup>

### Access to the report of the auditor general

Several other requests submitted by SAHA to DOJ for records that were also deemed to be 'sensitive' were subsequently handled as part of the '34 boxes' case. These included,

## Paper Wars

7.4.5

RR said that a number of requests were being received for transcripts of S29 hearings and asked for a policy decision. YS said that this was a sensitive matter and all the transcripts needed to be scrutinised in terms of the naming of persons etc. She said that there were many ramifications and cautioned against a blanket policy on access. It was agreed that she, DP, DN and HV would meet to discuss the issue and draft a recommendation.

YS/DP  
DS/HV

Figure 7. Extract from TRC Commissioners' minutes, 12 December 2006, stipulating recommendation for the development of a policy of access to Section 29 in-camera transcripts be developed. What the Commission ultimately recommended remains contested as the minutes of the final Commissioners' meeting in March 2003 are missing.

for example, the request to access the Dulcie September case file and the report of the auditor general to the TRC entitled *A Review by the Auditor General of the Secret Funds for the Period 1960–1994*.

The Kahn Commission had been set up in July 1991 by then President F.W. de Klerk to review active covert projects that were being run by the security and intelligence community. Where possible, cabinet was apparently keen to close these operations down, but where they were to continue, it was stipulated that 'they should not benefit from any particular political party or organization [and] they should serve the broader national interest in countering of violence, intimidation, sanctions and international isolation'.<sup>114</sup> Kahn's report provided details of funding of secret projects run by the intelligence and security community. Given the limited public disclosures relating to this aspect of security operations and its potential import for developing our understanding of specific violations and the infrastructure of apartheid repression, this was a particularly important document. SAHA made requests for this document to DOJ, NIA and the auditor general's office.

Having at first failed to locate the document, it was eventually found with related correspondence among the 34 boxes being held by NIA; once 'reviewed' by CDRC, access was refused by the director general of DOJ on the basis that

the disclosure [of] the documents referred to will reveal information pertaining to expenditure incurred with respect of military tactics or strategy or military exercises or operations undertaken in preparation of hostilities or the connection with the detection, prevention, suppression or curtailment of subversive or hostile activities as well as expenditure incurred in respect of the obtaining of information from confidential sources.<sup>115</sup>

Access was therefore denied in terms of provisions contained in section 41 of PAIA, i.e. in the interests of the 'defence, security and international relations of the Republic'. This blanket refusal is revealing, as it suggests that disclosure of apartheid era covert funding could compromise contemporary operations, which in turn raises a number of interesting

questions about the extent of the continuities from past operations in terms of strategies and tactics employed by post-1994 security agencies involved in covert operations. Curiously, SAHA received correspondence from NIA six months after Pikoli had refused access to the document, stating that the report contained information on third parties (i.e. other state departments) and that NIA was going through the process of third-party notification in terms of section 47 of PAIA. NIA undertook to revert back to SAHA on this matter, but never did.<sup>116</sup>

### The TRC's human rights violation database

The TRC developed a relational database as a way of capturing and analysing the array of data generated and collected by it. It included 'testimony from victims' statements, testimony taken at hearings, investigation material, transcripts of section 29 hearings, submissions made by institutions and individuals, and research and corroborative material'.<sup>117</sup> As with other intellectual property generated by the commission, the database is the responsibility of DOJ. As far as is known, since being handed over to the department, no effort has been made to preserve this valuable resource or make it publicly available.

In March 2006 an application for access to the database was submitted.<sup>118</sup> SAHA specifically stressed that it did not want access to any personal information, but rather to fields of data, such as types, locations and dates of violations. This would provide an opportunity for further quantitative analyses that had not been undertaken by the TRC. SAHA made it clear to DOJ that it was in contact with the individuals who had designed the database and who could advise on how to mask fields containing personal information.

The request was refused on the basis that the database contained personal information. SAHA immediately submitted its appeal, pointing out that the department had failed to apply its mind in terms of exercising this exemption, as SAHA had specifically stated that it did not want personal information. Remarkably, DOJ did not contact SAHA to discuss the request. Instead — allegedly on the advice of technical 'experts' within the department — it decided that masking these fields of data was either not possible or could jeopardise the integrity of the overall database. The DIO, Marlyn Raswiswi, proceeded to issue over 21,000 third-party notifications to everyone whose name appeared on the database. SAHA became aware of this following a series of irate communications from victims demanding to know why SAHA wanted their personal information. When SAHA subsequently secured a copy of the letter sent out by DOJ, it was shocked to find that it stated that 'Kate Allan of SAHA requests access to all your personal information'. This was, of course, in complete contradiction to the request submitted. The minister never provided a formal response to the appeal, but noted around one year later upon a complaint to the SAHRC that the request was not granted because the 'masking of information... entails creating a new customer-tailored records which is different to severing parts of the record'. DOJ had not contacted the individuals who created the database.

When SAHA contacted the DIO, she alleged that she had sent the notices some six months earlier in response to SAHA's original request: it was apparent that this was not the case, because, although she had dated the notices March 2006, they were in fact not received by the individuals until August of that year. SAHA secured a meeting with the department in late 2006, at which it was apparent that the official concerned knew that she had seriously erred, and she indicated that she would take steps to facilitate removal of the personal information with a view to providing access. Nevertheless, SAHA highlighted its concern about the ramifications of the misrepresentations contained in its third-party notifications and requested that she contact those persons who were likely to have received the notices (some thousands of notices were returned to sender as the addresses utilised would have been collected by the TRC up to ten years previously); the DIO alleged that this would be an unreasonable diversion of resources. Despite requests for the department to rectify this situation, no action had been taken almost a year after the misleading letters were sent out and no final decision with regard to accessing the database had been communicated.

### Individual TRC case files and other TRC materials

#### *Ahmed Timol, Steve Biko, the Gugulethu 7, Boikie Thlapi and Dulcie September*

The TRC made clear recommendations that victims and families of victims should have unfettered access to their own files, 'regardless of whether they are publicly available or not'.<sup>119</sup> SAHA's experience in this regard has been somewhat inconsistent. In 2002 it submitted requests on behalf of victims' families for the TRC's case files on two high-profile activists, Ahmed Timol and Steve Biko, who died in the custody of the security police in 1971 and 1977, respectively.<sup>120</sup> The file on Timol could not be located, and was refused in terms of section 23 of PAIA; this raised further concerns about the integrity of the collection. In the Biko matter, full access to over 8,000 pages of records was granted, which included comprehensive case files on Biko from DOJ's Directorate of Security Legislation.

Subsequent requests for individual case files have also had mixed results: a request for access to the case file on the murders of the Gugulethu 7<sup>121</sup> was conditionally granted, allowing SAHA to view the files and submit more specific requests for the records. A request for the case file of Boikie Thlapi, a young activist who was last seen beaten and bleeding on the floor of a police station in the Western Transvaal, was also submitted. As with the Timol case, the TRC files could not be located and were refused in terms of section 23.<sup>122</sup> In both matters, the requests were made on behalf of interested organisations and not the victims' families.

## Accessing the Records of the TRC

主編：陳伯吹 主筆：李進 編輯：徐祖慧 徐祖慧 徐祖慧 徐祖慧 徐祖慧

### Spinal Trust

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## Justice

Department  
Justice and Constitutional Development  
REPUBLIC OF SOUTH AFRICA

Private Bag X11, Pretoria, 0001 - Tel: 012 - 315 1730, Fax: 012 - 257 8904  
Monument Building, 528 Pretorius Street, Pretoria, 0002

Please quote our reference number in all correspondence.

**2.3. Third party participation**

Our reference: T&S A&S K (2)  
Enquiries: Ms M St Ratched  
E-mail: M.StRatched@tandf.co.uk  
Date: 24 March 2008

Dear Sir/Madam,

NOTICE TO THIRD PARTY OF A REQUEST IN TERMS OF SECTION 47 OF THE  
PROMOTION OF ACCESS TO INFORMATION ACT, 2006 (ACT NO. 2 OF 2006)

\$ refers to a request to have access to information in terms of the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000):

- a. You are hereby informed that the Deputy Information Officer is considering a request for access to information. This notice serves to confirm our correspondence with Ms K Allan from the South African History Archives.
- b. The description of the record(s) requested are as follows:
- \* All your personal information that is on the Truth and Reconciliation Commission's Victims database.
- c. The name of the requester is:
- \* Ms K Allan from the South African History Archives.
- d. You may within 21 days after receipt hereof inform the Deputy Information Officer at the above mentioned address/fax number/telephone number or via e-mail by:
- (i) Making a written or oral representations to the Information Officer why the requester for access should be refused; or
  - (ii) Give written consent for the disclosure of the information to the requester.

**Regarde**

MM SARNIEN (M\*)  
DEPUTY INFORMATION OFFICER

**NINJA 05** is a **murdering S&E** bring it to justice

**Figure 8.** Correspondence sent by the Department of Justice to 22,000 South Africans who submitted statements to the TRC, claiming that SAHA wanted access to their personal data in the TRC database - something SAHA had explicitly stated it did not want.

A request for access to the TRC investigation file on Dulcie September on behalf of the September family was rejected<sup>123</sup> on the basis that information contained in the files had been supplied in confidence (in terms of section 37 of PAIA); this was a direct reference to the materials supplied to the TRC by the French authorities. The matter was subsequently dealt with as part of the '34 boxes' saga and, once again, a decision was taken as part of the out-of-court settlement to deny access. It is evident that the materials requested did indeed include statements and other evidence collected during the official French police investigation, which includes statements containing untested allegations. Whether or not this justifies the blanket refusal to access all the documents in the TRC, however, remains moot.

In another case, SAHA was initially refused access to a TRC case file relating to the murder of an Umkhonto we Sizwe member in KwaZulu-Natal in the early 1990s.<sup>124</sup> In this matter, the related criminal investigation remains (at least in theory) live. Details of the criminal investigation were divulged to the TRC investigators, and it was this information that family now wanted to access. However, as in the September matter, the investigation file allegedly contained information and untested allegations about third parties, and the request was rejected in terms of sections 37 and 38 of PAIA (i.e. the protection of confidential information and the protection of the safety of individuals). SAHA appealed the case and, to its surprise, in late June 2007 the Ministry of Justice overturned the appeal, granting access to the file. It is not clear what sections of the file (and investigation materials) have been withheld or whether access to the file can be interpreted as indicative that no further investigation will be conducted into the murder.

### *Listing of video recordings of TRC hearings*

In October 2001 a request for a listing of video recordings of TRC hearings that were in the custody of the National Archives was submitted. Some eight months later, SAHA was informed by the director general of DAC that the lists had been compiled by TRC staff, but that SAHA should approach DOJ for these records.<sup>125</sup> The request was not transferred by DAC as required by PAIA, and relevant sections of the Act were not quoted in correspondence. The national archivist subsequently undertook to provide a more detailed response in writing,<sup>126</sup> which he did. He pointed out that DAC was not refusing the request, but advised that an approach be made to DOJ. He also pointed out that this request touched on 'difficulties with the intellectual copyright claims of the SABC'.<sup>127</sup> As an aside, five years later, questions about copyright and the related utilisation of the TRC's audiovisual records remain contested and unresolved.

In late July 2002 SAHA submitted an internal appeal to Minister Ngubane, pointing out that DAC had responded to the initial request five months after the due date and had failed to transfer the request as required (even though SAHA contested that the matter should have been transferred). SAHA insisted that the National Archives was the compe-

tent authority to deal with the request, as the materials requested were located there.<sup>128</sup>

No response was received within the stipulated time period, prompting SAHA's attorneys to warn Minister Ngubane that SAHA would be forced to litigate in an instance of a 'deemed refusal' (i.e. if the Ministry of Arts and Culture did not respond) and urged him to deal with the appeal.<sup>129</sup> The Ministry responded in early September 2002, saying the minister had referred the matter to DAC,<sup>130</sup> which in the following week informed SAHA that the matter had been referred to the Office of the State Attorney.<sup>131</sup>

In early October 2002 the minister responded, granting SAHA full access to the video listing. By doing so, he implicitly acknowledged that the decision to access these records was vested in the National Archives and that the suggestion to approach DOJ in this instance was unnecessary. This would accord with the TRC's own recommendations that only 'in the case of record categories identified as requiring protection, [should] the National Archivist refer requests for access to the Department of Justice'.<sup>132</sup> The minister, however, defended the national archivist's initial response, pointing out that while technically his failure to use the correct procedure could be interpreted as a refusal, this was not the intention.<sup>133</sup>

### *TRC administrative records and testimony and submissions to public hearings*

It is important to note before concluding that, while the restrictions were minimal, SAHA did gain unfettered access to records contained in the TRC archives. Several requests for TRC administrative records were submitted by SAHA during 2002; these included a request for access to the first sets of minutes of TRC commissioners meetings<sup>134</sup> and a request for the human resources policy adopted by the commission. These requests were granted in both instances, albeit not within the stipulated decision-making time frames. SAHA also secured access to records that were generated through public hearing processes. These include testimonies made at the human rights violation hearings into the January 1991 Sebokeng Night vigil massacre,<sup>135</sup> as well as submissions that were made to the TRC during the public hearing processes.<sup>136</sup> This includes a full set of submissions made to the business hearings.<sup>137</sup>

## The 'politics' and practicalities of accessing the TRC archive

In line with TRC recommendations, SAHA has consistently promoted an opening of the TRC archive and called for widening access to related apartheid era records that have remained undisclosed. The records of the commission and its report provide a framework for further engagement, for taking the work of the TRC and its recommendations forward. Ef-

ficient and effective access to the archive is in the national interest and of critical importance if South Africa is to deepen its understanding of what happened in the past and why.

Despite its importance, there has been remarkably little support for this call, which in turn reflects a general disaffection towards dealing with the TRC's unfinished business. Some aspects of this, especially those relating to reparation and prosecution, have generated considerable public attention and debate. In terms of the archive, however, there has been only very limited interest; most of the attention in the immediate post-TRC era has come from foreign academics and researchers.

SAHA's efforts in trying to access TRC records have had some positive results, but have too often resulted in unnecessarily lengthy, hostile and litigious engagements. In all such instances, SAHA has secured favourable settlements, forcing DOJ and DAC to provide records that they had previously refused to disclose. Despite this, last minute out-of-court settlements have ensured that no legal precedents have been set, enabling continued employment of the blocking tactics. In each settlement, it was understandable to assume that, at least, some clear guidelines had been established on access to particular categories of documents; however, recent decisions indicate that little progress has been made. Problems experienced with several access requests to DOJ constitute the bedrock of an official complaint about the department submitted in July 2007 to the SAHRC. Given the department's point role in mainstreaming access to justice throughout government, these shortcomings in relation to how it handles requests for TRC records suggest DOJ is not currently competent to fulfil this role.

DOJ retains primary control over decisions regarding access. The committee established under David Porogo no longer meets, but it is clear that although decisions are now taken without meetings, DOJ officials continue to rely on interactions with both the National Archives and NIA for advice and assistance. This experience suggests that the department is not competent to manage the access process, and SAHA supports a call for this responsibility to be officially delegated to the National Archives.

The National Archives will ultimately be responsible for processing and preserving the TRC archive. The absence of a clear mandate to proceed with this (and requisite resourcing) has left the archive in a parlous state, which in turn has clearly compounded problems in terms of determining and facilitating access. The situation is further compounded by the absence of detailed finding aids, which perhaps inevitably results in delays and failures to locate certain documents.

In October 2006 the national archivist confirmed that additional resources will be made available to revamp and resource the work of the National Archives. This will include the construction of a new building and facilities. Although this process will include the processing of the TRC archive, it is unlikely that we will see an improved access regime until 2011 or 2012 at the earliest.<sup>138</sup> The legacy of South Africa's Truth and Reconciliation Commission continues to be eroded.



## Box 2.4: Researching Desmond Tutu

Work carried out by SAHA for the newly-published biography of Desmond Tutu, *Rabble-Rouser for Peace*, shows that although meaningful access to the security files of the apartheid era is difficult, the National Archives can still produce unexpected nuggets for researchers. The author of the book, John Allen, tells the story.

When I began work on my Tutu biography, one of the questions I most wanted answers to was how many attempts the security forces had made on Desmond Tutu's life and why they had not pursued them more seriously. The archives did not get me the answers I wanted — which was not unexpected. What was unexpected was finding that Tutu had come under the scrutiny of South Africa's principal intelligence agency — the Bureau for State Security, or BOSS — a decade earlier than either he or anyone in the church had known.

The then Bishop Tutu first rose to prominence after he became general secretary of the South African Council of Churches, and during 1979 and 1980 increasingly began to confront the apartheid state. He became the target of security force harassment of various kinds, but the first clear evidence of his life being threatened was during a visit he paid to the Venda bantustan in 1981, when he and the Methodist leader, Peter Storey, were forced into the bush and roughed up while being expelled from the territory.

The best evidence I had for later attempts to kill Tutu were the sabotage of a car at Johannesburg airport in 1987, telephone calls to Tutu's office in early 1989 — during which an ex-convict said that he had been offered money to assassinate him — and a possible attempt after the funeral of Communist Party general secretary Chris Hani in 1993.

Encouraged and guided by the staff of SAHA — to whom I was pointed by the Department of Historical Papers at Wits University — I asked SAHA to submit requests for any material in security force archives that mentioned Tutu, his movements or security force activity around him in the relevant periods. I followed up with an inquiry that I thought had an even more remote chance of turning up anything useful: did the National Archives have any record of how Tutu was once refused, then granted, a passport long before he became a public figure?

We drew a blank on the first requests. SAHA told me that the archives of the old South African Defence Force (the apartheid army) 'work on requests diligently, but under-resourcing means it still takes a long time'. The South African National Defence Force eventually reported finding nothing. SAHA reported that NIA was 'hopelessly slow', and nothing came of that request. But SAHA was able to determine for me that there had once been at least three separate security police files on Tutu. If they still existed, they have not been found: SAHA emailed to me that:

## Paper Wars

The police records (which included the Security police ones) were in such a bad way that they were transferred to the National Archives and when we saw the National Archivist ... he told us that it would probably take a couple of years to get them in order ... but that if we drew our specific requests to their attention again as a group, they could take a look to see what the prospects were of recovering individual files before they've all been comprehensively organised.

In the end, the principal Tutu security files SAHA accessed were DOJ's files on Tutu, apparently kept for the purposes of determining whether he should be put under restriction orders.

The surprise came when SAHA sent me a rare find from the files of what used to be known as the Department of the Interior. I had told SAHA:

You may recall that one of the issues I was looking into was why, after Tutu was refused a passport to work for the World Council of Churches in 1971, the government changed its mind when he wrote to [prime minister John] Vorster and asked him to reconsider the decision. I have just dug up a file I received on a visit to the National Archives in 2000, which indicates that he applied for the passport on July 21, 1971, in Ladybrand in the Free State, and Pretoria refused the application on August 20. Of most interest is that the Bantu Affairs Dept recommended the issue of a passport, but Interior refused it after the application was sent for a police report. It seems from the record that the police issued an 'unfavourable report' on Tutu between July 20 and mid-August. Tutu then wrote to Vorster later in the year, the matter was referred to the Interior Minister, and he got his passport early in 1972.

The document that SAHA's inquiries turned up in the Department of the Interior's archives was a letter of 22 December 1971 from Vorster's intelligence adviser at BOSS. It revealed that BOSS had advised against the issue of a passport in August. In response to Tutu's letter to Vorster, BOSS reiterated its opposition:

Tutu wants to give the impression in his letter to the Honourable the Prime Minister that he can be an asset to South Africa if he is allowed to take up the TEF post [the Theological Education Fund was associated with the World Council of Churches]. Given his political attitude to the South African system so far, I very much doubt he will employ his energy in favour of the Republic of South Africa.

There was no indication of what BOSS believed Tutu's 'political attitude' to be or how it had established his views. However, as I write in *Rabble-Rouser*, it appeared that summer holiday fever came to Tutu's rescue — the letter arrived at the Department of the Interior between Christmas and New Year, and by the time it received attention, the interior minister had approved Tutu's passport.

The discovery of the BOSS letter added useful perspective to how the apartheid

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## Accessing the Records of the TRC

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government saw Tutu, long before he developed a high-profile political role. More than that, it showed how diligent work in archives can produce the most unexpected evidence from the most unlikely sources, which, when pieced together with material from other sources, can provide vivid insights into the past.

**John Allen**

**Author of *Rabble-Rouser for Peace***

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# 6

## Applying PAIA: Legal, Political and Contextual Issues

Kate Allan

### Introduction

In 2001 the South African History Archive (SAHA) uncovered the existence of 38 groups of military intelligence records that had been withheld from the Truth and Reconciliation Commission (TRC) by the Department of Defence (DOD).<sup>1</sup> The revelation immediately generated suspicions that the bulk of DOD's intelligence files had been deliberately withheld from the commission.<sup>2</sup> The military denied culpability and (former) TRC officials insisted that DOD had misled them,<sup>3</sup> but no call was made from any quarter for an examination of the records by the TRC, which was still operative at the time.<sup>4</sup> When SAHA sought access to the lists of records and the records referred to therein, a dispute ensued regarding the interpretation of the provisions of the Promotion of Access to Information Act No. 2 of 2000 (PAIA) and the intersecting operation of the Protection of Information Act No. 84 of 1982. The records were disclosed only after a protracted court battle challenging the notion that release would prejudice the defence, security and international relations of South Africa. The South African Human Rights Commission (SAHRC) and the minister of defence, who publicly stated that he would conduct an inquiry, did nothing. Access was granted only after the institution of court proceedings.

This case reveals that a number of factors hamper access to information, factors that are reflected in the chapters of this book. Pigou discusses the intersection of the Promotion of National Unity and Reconciliation Act No. 34 of 1996, the misconstrued application of exemptions, the inability of the bodies concerned to appoint competent decision makers, and the deflection of requests, which led to costly and lengthy disputes and, in some cases, court battles. Fig discusses the decentralised record-keeping practices of the Nuclear Energy Corporation of South Africa, which, coupled with that body's inherent secrecy and defensiveness, resulted in long delays in the provision of medical records, avoidance of requests, and little access to records regarding the environmental impact of nuclear energy. Similarly, the alleged destruction of records relating to the nuclear

weapons programme of the apartheid state, discussed by Gould, meant that PAIA yielded little information. In locating information regarding the treatment of homosexuals in the military, Pollecut was required to trawl through thousands of pages of lists and records in order to locate fragments that gave minute insights into the experience of persons labelled as deviants or with principled objection to the military programme, and into the mindset of the apartheid government.

What these chapters do not discuss in any detail, however, is the extent to which technical issues regarding the intersection of legislation and the use and interpretation of PAIA provisions has impacted on the utility of the Act and access to records. What I therefore aim to do is to discuss, firstly, the extent to which disputes regarding the interpretation of PAIA provisions have been used to avoid disclosure; secondly, the capacity for pre- and post-transition enactments to impact upon PAIA exemptions and access; and, thirdly, the extent to which prescribed appeal mechanisms have been facilitative in upholding the right of access to information. Before concluding, I will briefly consider the impact of record-keeping practices and the destruction of documents prior to and after the transition to democratic governance, and the lack of a shift from the culture of secrecy that pervaded the government during apartheid.

Before moving on to a consideration of these factors, it is important to put the work of SAHA into context. Its origins lie in documenting struggles against apartheid, a foundation that pervades and informs its contemporary work. Its points of focus are mostly historical inquiries relating to both human rights violations committed by the apartheid state and the activities of those in opposition to it. Where it steps into the contemporary arena, it does so on the basis that the issues about which it, or those it represents, needs to be informed are ones that more often than not relate to an infringement of constitutional rights. These issues around which it focuses its work tend towards sensitive, contested and controversial territory. The lens through which it views the achievement of transparency is therefore coloured by this terrain.

This chapter and this book, then, present a picture of contestation that is specific. While the experiences of SAHA will certainly be shared in many respects by other requesters and civil society organisations working in the field, I do not intend through this discussion to purport to provide a whole and finite picture of the problems encountered in exercising the right of access to information; organisations such as the Open Democracy Advice Centre (ODAC), which focuses primarily on the use of PAIA to facilitate the exercise of contemporary socioeconomic rights, will have their own specific experiences. It is also important to note that I do not attempt to provide clear recommendations for reform; the intersections of these issues are complex and require a range of interventions at parliamentary level and within public bodies. What I aim to do is to discuss the areas of influence raised throughout this book and elucidate starting points for reform that will lead to greater enjoyment of the right of access to information.

## National

The truth commission has been horrified to discover that the SANDF hid thousands of military files crucial to its investigations

# Army file shock for the TRC

### **Evidence wa ka Ngobeni**

The South African National Defence Force (SANDF) hid key apartheid-era military intelligence information from the Truth and Reconciliation Commission (TRC).

The commission had investigated the wholesale disposal of apartheid-era information and concluded that all military intelligence had kept was three series of files. Each series contains thousands of pages of records kept of military operations inside and outside South Africa during apartheid.

Last week, in answer to an archivist who submitted a Promotion of Access to Information Act request to the Department of Defence, a list was provided of 38 series of top secret documents still in the SANDF archive.

Verne Harris, director of the South African History Archive, attached to the University of the Witwatersrand, asked the department for a list of files contained in three "series" which the SANDF told the TRC was all that was left after the mass destruction of sensitive documents before 1994.

The 38 series contains thousands of classified documents on covert operations conducted by the apartheid-era government. The covert operations targeted anti-apartheid organisations in South Africa and abroad.

SANDF spokesperson Louis Kirstein said on Thursday he was unable to provide the *Mail & Guardian*

with comment as the chief of military intelligence was away.

"We have taken note of the allegations and the response is ready. But it cannot be sent to you because it has to be approved by the chief of military intelligence," Kirstein said. "The answer will come next week as we have already studied the allegations."

The South African History Archive's list of secret files still kept by the SANDF records the dates when the files were compiled. The oldest series file covers the period 1941 to 1977. One of the files was compiled from 1977 up until 1997, fuelling speculation that some apartheid-era covert operations carried on even after the 1994 general elections.

Former TRC officials expressed shock this week after being told about the new files. The TRC, they said, was only aware of three series files. This is reflected in the TRC's final report.

The report reads: "Although subjected to close scrutiny during the 1993 destruction exercise, a large volume of military intelligence files survived. The joint investigative team identified three discrete files groups from the SANDF archive."

This revelation is likely to buttress public belief that the TRC never managed to get to the truth of the apartheid-era atrocities.

Former TRC researcher Charles Villa-Vicencio, who led the TRC research team into the SANDF, said the new information shows that the

SANDF "deliberately misled the TRC".

Villa-Vicencio said the SANDF had told the TRC at the time that the three files series were the only ones that survived the systemic erasure of "sensitive" documents by the previous government.

"If these new files exist we believe that we were decidedly misled by the military. Their actions were morally reprehensible and are legally indefensible," he said.

Harris's response from the Department of Defence includes the number of boxes in which the files are kept. There are thousands of box numbers on the list.

It is highly unlikely that the South African public will ever know what is in those boxes, says Harris. The TRC, he says, "was the only window of opportunity to have access to those files".

The Promotion of Access to Information Act, he says, is one option the public can use to access information from the government. But there will be a problem. As the series files are classified "top secret" the SANDF will only release a "declassified" version to the public.

Villa-Vicencio said the TRC final report recommended, among other things, that a comprehensive audit of the military intelligence information be conducted.

This new information, he says, "demonstrates the necessity of such

an audit. We cooperated with the military in good faith and from this it seems that they did not do so. Maybe they were seeking to hide the information, which of course undermined the TRC's objective to make the truth available to the public."

Villa-Vicencio said the three files, which were given to the TRC, did not "have pertinent information" and failed to serve the commission's objectives.

"The question one should be asking is; why did they hide the information?" he asked, adding the information allegedly concealed by the SANDF could have helped the TRC to present a "far more extensive report".

"The SANDF was obliged to disclose all the files to the TRC according to the law. The military did not assist the TRC in this regard."

A senior TRC researcher, who did not want to be named, said the SANDF consistently "stonewalled" the commission's requests.

"The unfortunate reality is that the SANDF always created problems for the TRC. When they granted us access to those three series files it was too late and meaningless.

"Instead what we did was check whether files were still intact. We could not do anything as we had to deal with constant difficulties created by the SANDF."

*State info not easily available, Page 51*

Figure 1. Press clipping, 'Army file shock for the TRC' *Mail & Guardian*, Evidence wa ka Ngobenei (2001, 12 to 18 October).

## The application of PAIA

This chapter appropriately starts by considering PAIA itself. Its provisions can be separated into two primary areas: substantive clauses that determine access, and procedural clauses that provide for review and enforcement. In regard to the former, I will discuss case studies in which the provisions have been broadly or incorrectly interpreted or applied, resulting in undue restrictions on access. In regard to the latter, I will discuss the limitations of the available enforcement mechanisms, as well as proposals for reform.

### Interpretation

The legislation is largely unambiguous; however, there has been little consistency in the

## Paper Wars

approach followed by public bodies, and disputes about what the legislation intended have resulted. These disputes fall into three key areas: the distinction between public and private bodies, the application of exemptions and the public interest override. It is not the aim of this chapter to offer a comprehensive analysis of the provisions, but to present a selection of case studies that demonstrate that a number of external factors determine whether the application of PAIA provisions achieves the constitutional objective of access.

### *Public versus private bodies*

We tend to think of 'public' and 'private' as mutually exclusive, as contrasting, as opposites. The Act has blurred this clean division by imposing a grey area in which a private body can be a public body or a public body private in certain circumstances. The distinction has also become distorted with the development of privatised utilities and contracted services. Not only is this confusing to requesters, but to many recipients of requests.

In 2002 SAHA assisted Mondli Hlatshwayo, a master's student at the University of the Witwatersrand, to request access to minutes of meetings held between 1965 and 1973 at Iscor's steel manufacturing plant in Vanderbijlpark.<sup>5</sup> Iscor refused to process the request on the basis that it did not comply with procedural requirements in that the form submitted was for a public rather than a private body. When the Wits Law Clinic argued on the student's behalf that the records sought were from the period when Iscor was a public body and therefore the public body provisions applied, Iscor responded the following day by stating that no records could be found. Wits Law Clinic rejoined that Iscor could not have conducted a search for records almost 40 years old in one day.<sup>6</sup> When ODAC agreed to represent Hlatshwayo and applied to the High Court for intervention, Judge van der Westhuizen held that, while Iscor had been privatised, the meetings in question occurred during the period of Iscor's exercise of power or performance as a public body. In reaching his decision, he considered the objectives of the company and the power wielded through government by virtue of its large shareholding and the provisions of the Iron and Steel Industry Act No. 11 of 1928 and the Conversion of Iscor, Limited, Act No. 57 of 1989. Iscor was unsuccessful in its appeal in the Supreme Court of Appeal.<sup>7</sup>

In early 2007 SAHA submitted requests to Bosasa Operations (Pty) Ltd<sup>8</sup> in the belief that it was contracted to manage the operation of the Lindela Detention Centre for undocumented migrants. In response, the head of Bosasa's legal group, Sonia Jonker, alleged that Bosasa had not been responsible for management at any time (despite numerous media reports regarding allegations of corruption in the awarding of the contract to the company in around 1996), that Leading Prospect Trading 111 (Pty) Ltd was the contracted party, and that SAHA could not obtain information from it because it was a private body and the records were subject to a contract with the Department of Home Affairs, which determined that they were confidential. Jonker stated that she did not have the contact details



for Leading Prospect Trading.<sup>9</sup>

When SAHA rebutted that Leading Prospect Trading was privately incorporated, but was contracted by a public body to fulfil a public function, and therefore its records were regarded as being records of a public body,<sup>10</sup> and threatened legal action, Jonker revealed that she was in fact the legal representative for both Bosasa and Leading Prospect Trading, and that the records belonged to the Department of Home Affairs, which would be responding to the requests. No further mention was made of the company's private body status or that she had made misleading statements about her knowledge of Leading Prospect Trading's contact details. Following SAHA's letter of demand and expression of its intention to pursue the matter in court, Bosasa and Leading Prospect Trading agreed to provide access to records they had in their possession.<sup>11</sup>

In both of these cases, the bodies concerned have attempted to exploit the subtleties of the division between public and private bodies; and they have attempted to hide behind private body provisions despite their clear present or past engagement in public operations. Iscor in particular presents a disturbing case of a body so intent on preventing access that it appealed to the Supreme Court. In all fairness, it had a right to do so. However, given its initial response that it could not find records from the 1960s and 1970s after searching for all of 24 hours, the intent behind its pursuit of judicial interpretation is questionable. Could it have been an attempt to deter a student from litigating against a well-resourced company? In any event, both bodies failed to consider that requesters have a right of access if they 'require' the information to exercise or protect another right.<sup>12</sup> The confidence displayed by private bodies in this regard may be attributed to judicial determinations that have narrowly interpreted the term 'require' and imputed an element of 'reasonableness', so as to set the bar impossibly high.<sup>13</sup> While the Supreme Court's interpretation is yet to be tested in the Constitutional Court, it has made requesters nervous about litigating against private bodies.

### *Exemptions*

There are a few key points to make about the exemptions before going on to consider their application. They are objective grounds, which may be broken down into three categories:

- exemptions that require the information to fall within a specified category;
- exemptions that require particular consequences to flow from disclosure; or
- exemptions with both content and consequence requirements.<sup>14</sup>

They also place on the recipient of the requests the onus to justify that the information is of a type considered by the exemption; that, where necessary, harm will result from

disclosure; and that, where discretion is exercised to refuse access, it was appropriately applied. It is important to note that the grounds are limitations that must be read narrowly; ambiguities must be determined in favour of access.<sup>15</sup>

*i. Privacy and protection from harm*

PAIA provides that access must be refused where it involves an unreasonable disclosure of personal information about a third party, i.e. a breach of privacy,<sup>16</sup> or where disclosure could reasonably be expected to endanger the life or physical safety of an individual.<sup>17</sup> These exemptions require, where an exception to the exemption does not apply, that the public body afford any third parties affected by the request an opportunity to consent to or oppose disclosure.<sup>18</sup>

These exemptions have been the most frequently utilised in requests for apartheid era records. Pigou discusses the use of the exemptions by the Department of Justice (DOJ) to refuse access to TRC records. The privacy exemption was also used by the national archivist to refuse access to listings of security police files, a decision that was upheld on appeal to the minister of arts and culture, Pallo Jordan. The response was perplexing, as SAHA had been provided with a list of security police records in the possession of the South African Police Service (SAPS) in 2002, and the records listed on the document now being refused had been transferred by SAPS to the National Archives in around 2004. SAHA was also somewhat confused, given, at an earlier meeting at the Nelson Mandela Foundation, that the national archivist had advised that he held a list of security police files that would be useful for a proposed apartheid victims database. When SAHA appealed on the basis that at least some, if not all, of the information must be 'publicly available', as it had been released pursuant to a request only a few years earlier, it was again refused.

The application of the exemptions raises three key issues. Firstly, the exemptions are being applied to all records, irrespective of whether the document/s had been aired in public hearings or were in the public domain in some other manner (such as the amnesty applications and evidence utilised in hearings related to the Cradock 4), or whether the person who furnished the information was aware that it was of a class that was likely to made publicly available (such as the amnesty application of Eugene de Kock). The privacy exemption specifically provides for exceptions in these instances,<sup>19</sup> and it is arguable that where information is already in the public domain, it is not reasonable to expect that disclosure could endanger the life or physical safety of an individual.

Secondly, the third-party notification provisions are being inappropriately and inconsistently applied. In matters where the documents have been aired in public hearings or are in the public domain and privacy rights have therefore lapsed, DOJ persists in providing third parties mentioned in such documents with an opportunity to consent to or oppose release. In the case of the Cradock hearing records, notification was taken one

step further by DOJ when it sought affidavits from the widows of the deceased, who had no privacy rights to protect (see chapter 2 of this volume), because the information did not relate to them.<sup>20</sup> Any right that they may have held regarding their husbands expired 20 years after their husbands' deaths, which was some four months after the obtaining of the affidavits.<sup>21</sup> In another disturbing case, DOJ sent approximately 22,000 third-party notices to addresses up to ten years old, despite the fact that SAHA specified in its request that it did not want access to personal information.<sup>22</sup> Conversely, upon a request for access to in camera hearing testimonies of the TRC, where DOJ should have issued third-party notices, it failed to do so.

Thirdly, the utilisation of the privacy exemption by DOJ has often been framed in terms of the disclosure of the perpetration of offences, indicating that the persons protected may often be informers or perpetrators. In this context, where some members of the public want to know who informed on, or committed crimes against, them or their families, the privacy of individuals is a difficult issue to balance. The right to privacy does discriminate to a certain extent: a high-profile and influential individual espousing 'say no to drugs' campaigns has been found to have her right to privacy limited when it concerned her treatment for drug addiction.<sup>23</sup>

However, should access to information be used to expose informers, and thereby serve as a form of justice? In 2006 Poland passed a law opening communist era files revealing the names of large numbers of informers. There was debate in the media regarding the integrity of the files and the fact that many people lost their jobs as a result of unsubstantiated allegations.<sup>24</sup> In some cases, the public interest override (discussed later) may compel disclosure if, for example, the record revealed that the informer was involved in a plot to murder. However, simply being an informer without evidence of a resultant link to a criminal offence is not sufficient to satisfy the override. The balancing of these competing interests will never be subject to clear rules: the side upon which the determination falls is largely determined by shifting societal objectives and norms. In terms of protection from harm, the exemption's application in these circumstances commences from an assumption that persons will commit a criminal offence following disclosure; that is, they will threaten the life of the person being protected or commit some violent act against him/her. This is a grave presumption and one that would be difficult to prove if the matter proceeded for judicial determination.

## ii. Confidentiality

The confidentiality exemption prevents disclosure where:

- an agreement of confidentiality binds the parties; or
- information was supplied in confidence; and
- disclosure will prejudice the future supply of information and it is in the public

- interest that information continues to be supplied;<sup>25</sup>
- the person supplying the information does not consent to its disclosure; and
- the information is not already in the public domain.<sup>26</sup>

In 1975 South Africa and Israel entered into a confidentiality agreement regarding the exchange of supplies for the development of South Africa's nuclear weapons programme. The agreement was designed to prevent disclosure of information regarding their relations. It may not be off the mark to speculate that the agreement aimed to avoid scrutiny for engaging in nuclear weapons development without complying with international monitoring requirements, and for breaching international sanctions against trade of goods with South Africa. The agreement is still being relied upon to prevent access to records relating to the now defunct programme. When SAHA gained access to it pursuant to a PAIA request to DOD, it was so heavily masked that it revealed little about the information being secreted, and therefore little grounds upon which to challenge refusals relying on it.

DOJ applied the confidentiality provision to TRC records without distinguishing among the records themselves; that is, whether they record testimony given in public or during in camera hearings, or whether they are applications made with knowledge of the likelihood of their public disclosure. In the request relating to the hearings about the death of the Cradock 4, the department alleged that the records could not be released because, among other things, the amnesty applicants provided the information subject to an agreement of confidentiality. It failed to demonstrate, however, that 'agreements' of confidentiality exist (see the discussion regarding the Promotion of National Unity and Reconciliation Act below and chapter 2 of this volume). DOJ is therefore limited to the second discretionary limb of the exemption. This limb may only apply, however, where information is not in the public domain, which can only be the case where the information was provided through in camera hearings and was not later disclosed at the TRC's discretion in public hearings.<sup>27</sup> It can also only apply where it is likely that the person who provided the information will be called upon to provide further information, and it is in the public interest that he/she does so.

While the public interest in evidence regarding human rights violations committed during apartheid cannot be contested, DOJ has not demonstrated that it has a need for further information from all persons who deposed to affidavits requested by SAHA.<sup>28</sup> In the case of information provided in camera, it is questionable whether the information was supplied in confidence in any event. Sections 28 and 29 of the TRC Act specifically provide that no article or information collected by the TRC investigators or the TRC itself in connection with a hearing should be made public until a public hearing commenced. The persons who provided the information in such forums were witnesses or the deponents of amnesty applications who submitted to the jurisdiction without knowledge of whether their application or testimony would be aired in subsequent public hearings.<sup>29</sup> While a

mechanism to apply to provide information in confidence existed, it was in fact the case that, in most instances, the TRC unilaterally determined that the information should be held in confidence at that time.

The exemption raises a number of issues. The confidentiality exemption is being inappropriately used in a blanket fashion to prevent access to records without giving due consideration to their substantive content. The Durban High Court in *The State v Dirk Johannes Coetzee & 5 others*<sup>30</sup> held that the TRC was not permitted to prevent Dirk Coetzee from gaining access to Joseph Tshepo Mamasela's in camera testimony. In refusing the TRC's application seeking a declaration that the head of the investigating unit was not required to release the document, Justice Combrink stated that:

[W]hat the Commission is enjoined to do by the legislation is to consider each case where a person seeks access to the information obtained by the Commission through its investigating unit and, in the light of the principles of openness and transparency and, having regard to the inherent right of the person seeking the information to a fair trial, decide, after weighing up the interests sought to be reached by this Act and the rights of the individual, make [sic] a value judgment as to whether the information should be made available or not.

The case, while not yet confirmed in a court of higher authority, provides good grounds for challenging DOJ and its blanket application of this and other exemptions to in camera hearings and other records.

The legislation also fails to provide a suitable mechanism for inquiry into an agreement or undertaking to ascertain its legitimacy and ensure that its aims are not to prevent disclosure where the public has a right of access. The requester must therefore challenge the applicability of the agreement to the records in question or argue that the public interest override (considered later) applies without actual knowledge of the records or, in most cases, the content of the agreement. The content of the record should attract confidentiality rather than its classification.

Finally, the exemption fails to provide a mechanism for limiting the duration of confidentiality, except where the information is not subject to a specific agreement and it can be demonstrated that the ongoing provision of information is not required or not in the public interest.<sup>31</sup> The TRC Act is also silent as to the duration of the confidentiality of records. It does provide, however, that the TRC was empowered to authorise that members of the public be given access to documents not produced at a hearing. Pigou notes that the TRC made such a determination regarding in camera hearing records; however, the National Archives and DOJ have viewed the claim as an urban myth without ascertaining its veracity.

## Paper Wars

## Box 6.1: South African-Israeli agreement

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2006-05-30  
DEFENCE INTELLIGENCE

**DECLASSIFIED**  
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J. J. DE WAAL  
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This AGREEMENT is made and entered into by and between:

THE HONOURABLE MINISTER OF DEFENCE OF THE REPUBLIC OF SOUTH AFRICA  
of the one part,

AND

THE HONOURABLE MINISTER OF DEFENCE OF THE STATE OF ISRAEL  
(hereinafter referred to as the MOD) of the other part.

WHEREBY IT IS AGREED AS FOLLOWS:

1. [REDACTED]
2. [REDACTED]

listed in Annex "A" attached hereto and to every agreement to be made or signed in the future and will also apply to all information, know-how and materials, [REDACTED] and to schematics, plans and drawings supplied or transmitted or to be supplied or transmitted in the course of negotiations or in pursuance of any of the aforesaid agreements, and [REDACTED]

(4) [REDACTED]

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J. J. DE WAAL  
Research...  
OR

## Applying PAIA

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NAME (ii) [REDACTED]  
[REDACTED]  
[REDACTED]

NAME (iii) [REDACTED]  
[REDACTED]

NAME (iv) [REDACTED]  
[REDACTED]

(hereinafter referred to as "secret information").

3. It is hereby expressly agreed that the very existence of this Agreement as well as any other agreement relating to the activities defined in Clause 2 hereof, including information about the terms or contents of any such agreement, shall be secret and shall not be disclosed by either party, except as hereinafter provided. The foregoing shall apply notwithstanding the fact that any particular subject of an agreement may carry a lesser classification but for this clause.

Should any subject of an agreement be accorded a higher classification than "secret" by mutual consent of both parties then the highest of such classifications shall apply.

4. The parties will agree on mutually acceptable security procedures which will be reduced to writing, signed by the appropriate agencies and such security procedures will define and determine the proper means and methods for transmittal, distribution, use and storage of secret information which may be required by either party in order to perform effectively any agreement between them. Pending signature

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of such procedures, each contracting party will apply its appropriate security measures and procedures usually applicable to secret and classified material.

5. Each party agrees and undertakes to refrain from any publicity of any kind relating to secret information as defined in paragraph 2 hereof. ~~Public announcements which~~ Any party might deem necessary on any specific item of secret information will only be made after prior co-ordination with the other party; however, a disclosure by either party as to areas of achieving self-sufficiency without disclosing the source of know-how or information - shall not be deemed to be an infringement of SECRET.

6. Each party will nominate a duly authorized security officer who will supervise the implementation and coordination of the steps which will be required in the performance of this agreement by the parties hereto as well as by any person, body or company performing any function or obligation for or on behalf of any party to this Agreement.

7. The security officers of the parties will mutually cooperate and coordinate the following activities:

- defining and drafting the security procedures envisaged by clause 4 hereof;
- mutual security planning and procedures relating to personnel and equipment;
- alteration, modification and adaptation of security procedures with respect to

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## Applying PAIA

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d) supervision of the implementation of the provisions of this agreement.

8. This agreement may be amended only by a written document duly signed by the parties or their authorized representatives.

9. This agreement will be ~~in force and effect for an indefinite period~~ and may not be cancelled or renounced unilaterally.

10. Each party agrees and undertakes that the provisions of this Agreement will be binding upon and duly observed by all the agencies of the respective ministries of defence as well as by the armed forces of each country.

THUS DONE AND SIGNED BY THE MINISTER OF DEFENCE

THIS 3<sup>rd</sup> DAY OF April 1975

*[Signature]*  
MINISTER OF DEFENCE

AS WITNESSES:

*[Signature]*  
*[Signature]*

THUS DONE AND SIGNED BY THE MINISTER OF DEFENCE

THIS DAY OF 1975

*[Signature]*  
MINISTER OF DEFENCE

AS WITNESSES:

*[Signature]*  
*[Signature]*

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### *iii. Ongoing prosecutions*

PAIA provides detailed discretionary grounds of refusal where the information being sought relates to ongoing investigation or prosecutions. In short, it protects police dockets in bail, law enforcement and legal proceedings.<sup>32</sup> DOJ frequently utilises subsection (1)(b)(ii) of the exemption, a discretionary ground that protects information that may affect a particular prosecution, and subsection (1)(b)(iii), a mandatory ground protecting information subject to a criminal investigation (it is the only body to have done so upon a request by SAHA), to protect information subject to ongoing investigations and prosecutions by the National Prosecuting Authority (NPA) into apartheid era violations.

There are three key factors rebutting the application of the exemption. Firstly, while the exemption does not except information already in the public domain like the privacy and confidentiality exemptions, it does require the demonstration of prejudice. Where the allegations and the identity of the person who made them, or the identity of a suspect, have been previously revealed to the public, prejudice cannot arise. Accordingly, where amnesty applications, investigation material, testimonies and any other evidence have been revealed to the public through public hearings, televised broadcasts, provision by the TRC, or in any other form, the exemption should not apply. Secondly, even in the case of in camera hearings, disclosure of information may not necessarily prejudice investigations or prosecutions. It is not guaranteed that allegations of the perpetration of offences will be investigated, or that information not aired at public hearings is not presently known to the public through other forums. Further, it is unlikely to be the case that all information contained in a record is of use in any given investigation or prosecution. Thirdly, the extent to which the NPA is in fact intending to investigate and prosecute the perpetrators of apartheid human rights violations is not clear.

At a conference held by the Institute for Justice and Reconciliation in March 2006, Dr J.P. Pretorius, an advocate in the DOJ Priority Crimes Litigation Unit, stated that the NPA did not have any investigators dedicated to apartheid era offences and that it was likely that not more than half a dozen cases will be prosecuted.<sup>33</sup> Since the finalisation of the TRC's activities, the NPA has only prosecuted three cases of those recommended for investigation or prosecution. The likelihood that the NPA will investigate and prosecute, for example, all of the incidents that Eugene de Kock raised in his amnesty application is therefore minimal.<sup>34</sup> In 2005 the national director of public prosecutions released a prosecuting policy for offences emanating from conflicts prior to May 1994 that allows perpetrators to apply for amnesty under certain conditions.<sup>35</sup> The primary criterion is the full disclosure of all facts and circumstances related to the offence. The policy, however, does not require the disclosure to be made to the public.

Setting aside questions concerning the constitutionality of the policy,<sup>36</sup> the lack of transparency and the imposition of a second executive-based amnesty process, it is clear that the intended outcome of the policy is fewer investigations and prosecutions. The need

to ensure the provision of information from witnesses will be reduced and the incentive for perpetrators to come forward increased. The prejudice, therefore, of the disclosure of information provided to the TRC may be lessened. This also has implications for the application of the confidentiality exemption discussed earlier. Fourthly, and in any event, the exemption requires that the information should have 'bearing on an actual and specific prosecution which is "about to commence" or which is pending'.<sup>37</sup> Despite requests for further details, DOJ has rarely been able to confirm that a prosecution is pending or about to commence. Further, the department has not sufficiently demonstrated that the information actually relates to a specific investigation.

#### Box 6.2: The Department of Justice

DOJ has recently attempted to rework its use of the exemption relating to ongoing prosecutions and preventing the contravention of an offence. In its refusal of access to Eugene de Kock's amnesty application, it stated that:

The disclosure could reasonably be expected to facilitate a contravention of the law to the extent that the reputations and dignity of the individual names may be impaired thereby as contemplated in section 39(i)(b)(iii)(dd) of PAIA.

SAHA, in its internal appeal to the minister, rejected the ground of refusal, as it utilised an exemption aiming to protect current civil and criminal proceedings in order to prevent what it perceived would be a breach of privacy. An understanding of statutory interpretation informs us that, if we look to the heading the exemption in question, entitled 'Mandatory protection of police dockets in bail proceedings, and protection of law enforcement and legal proceedings', the provision is intended to be limited to current or proposed civil and criminal proceedings to which the records relate. It is not intended to prevent breach of the law through the act of its disclosure. There must be utilisation of the material contained within the record that will impact upon other proceedings. Furthermore, PAIA considered the possibility of breach of privacy in section 34, which the department had already relied upon, and does not intend to afford two opportunities for recipients of requests to raise the same issue.

#### *iv. South Africa's defence, security and international relations*

The Act provides a discretionary exemption preventing disclosure of information if it could reasonably be expected to cause prejudice to the defence, security or international relations of the country, or if the information has been supplied in confidence subject to an arrangement or international agreement or otherwise.<sup>38</sup> The exemption has been applied in two ways: to protect current activities of the state and to protect apartheid era collaborators. Pigou discusses the use of the exemption by the National Archives to protect

## Paper Wars

records documenting its dealings with the TRC archives and its recommendations, where the National Archives refused access to classified records on the basis that they were being transferred 'in an operation that [had] implications for State security, the security of staff and the security of assets'. The minister of arts and culture stated on appeal that:

[You were] informed that a security threat had been identified (by the National Intelligence Agency) directed at the records of the TRC. In order to prevent a breach of security while the TRC records were being relocated the interdepartmental committee, responsible for the arrangements regarding the TRC records, decided that all the TRC related records of the departments serving on the committee would be regarded as confidential until the exercise was completed .... The government is currently engaged in an exercise of policy-formulation regarding the recommendations of the TRC; it is also a matter of public record that legal challenges regarding the finalization of the report of the TRC are presently being considered by the courts. I therefore see no reason to query the opinions of the NIA and to overrule the decisions of the DG and the National Archives, which are based on the advice they received from the NIA and other departments of government.<sup>39</sup>

SAHA appealed to the High Court. The issue in question was whether the threat to the security of the country was sufficient to warrant refusal. With regard to the records relating to transfer of the TRC archives, the National Intelligence Agency, upon an identical request, granted access to its own correspondence, despite purportedly recommending that all documents be confidential until the transfer took place. In regard to the National Archives' efforts to follow up on TRC recommendations, it was not apparent how disclosing related records, which could cover discussions with other public bodies regarding the development of measures to make apartheid era records accessible, could prejudice national security. The application of this and a number of exemptions over the course of the dispute ultimately appeared to be a tactic to avoid disclosure during a period in which relations with the National Archives were particularly fraught.<sup>40</sup>

The exemption was also relied upon to refuse access to five and mask three of the military intelligence record listings that were withheld from the TRC. DOD argued that the records had only been downgraded to 'secret'.<sup>41</sup> When SAHA appealed, arguing that DOD had not specifically demonstrated how, if at all, the exemption relating to the defence of the Republic applied and that it was inconceivable that the department could not mask exempt information in the listings, DOD argued that the group 6 list contained information relating to 'military tactics or strategy or military exercises or operations undertaken in preparation of hostilities or in connection with the detection, prevention, suppression or curtailment of subversive or hostile activities'.<sup>42</sup> Following SAHA's appeal to the High Court in June 2002, DOD conceded that the list could be released with redactions.

Efforts during this period to access the files referred to in the listings also had mixed results. Access to 22 files relating to anti-conscription activities during the apartheid era was refused on the basis that disclosure would cause prejudice to the defence and security

of the Republic,<sup>43</sup> but when SAHA appealed, they were released (with excisions).<sup>44</sup> Again, in 2003 DOD refused access to files contained in group 5 on the basis that they would reveal the location and identities of sources that could endanger their physical safety,<sup>45</sup> military tactics that are still being used<sup>46</sup> and more generally intelligence-related information used for the defence of the Republic.<sup>47</sup> In this case, DOD also determined to transfer the entire set of group 4 records to Zimbabwe (discussed later). At the time of writing, the matter was on appeal in the High Court.<sup>48</sup>

In four of six DOD cases that have been appealed (excluding the matter currently before the High Court), SAHA was granted access, albeit in some instances with information redacted. This should lead us to question whether DOD has appropriately applied the exemption in all cases, as it appears to be a default application without consideration of severance. What these cases also reveal is that, like the reliance upon its agreement with Israel, DOD continues to rely on informants secured and relationships established and negotiated by the apartheid government. While these relationships may be legitimate and in the best interests of the Republic, failing the commission of a breach of the law (which may arguably be the case if the agreement or relationship contravenes international sanctions) or a threat to the safety of persons or to the environment, PAIA does not provide a mechanism to interrogate whether this is so.

#### *v. Commercial information and economic interests of the state*

These detailed exemptions aim to protect the economic interests and financial welfare of the Republic and the commercial activities of the state.<sup>49</sup> In the instance of information related to commercial activities, it may not be refused if it is already publicly available, the body that owns the information consents, or its disclosure would reveal a serious public safety or environmental risk. In March 2004 SAHA submitted two requests to Eskom for its Service Delivery Framework Agreement with the Department of Minerals and Energy, the Department of Public Enterprises and the South African National Civic Organisation, and a research document titled Soweto Socio-economic Research prepared by EON Consulting.<sup>50</sup> Both requests were refused on the broad basis that disclosure of the records would damage the economic interests of the state.<sup>51</sup>

SAHA was forced to appeal on each of the limbs of the provision. SAHA contended, among other things, that harm was unlikely and could not reasonably be expected, given that some of the subject matter was publicly available, and that, since Eskom has a monopoly on the supply of electricity, it has no competitors that could use the information to the organisation's disadvantage. Of greater importance, however, was the fact that the agreement had been cited many times as authority for actions regarding the provision of electricity, including those with respect to debt write-offs and the installation of pre-paid electricity meters. The documents therefore relate to decisions that are administrative decisions under the Promotion of Administrative Justice Act No. 3 of 2000, which requires

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affected parties to be afforded an opportunity to comment prior to decisions being taken; failure to disclose may be in breach of these requirements. As a consequence, SAHA alleged that the public interest override compels disclosure in that the agreement and research are likely to reveal limitations on constitutional rights such as health, housing and education where it deals with disconnections to schools, homes and medical centres; the installation of pre-paid meters; and the collection of debt. Eskom subsequently released both documents without masking.

In a later request for access to a report entitled Economic Project Evaluation July 2001: A Macroeconomic Impact Study on the Production of Pebble-bed Modular Reactor and Fuel Plant, the company Pebble Bed Modular Reactor (Pty) Ltd (PMBR Ltd) refused the request on the basis that it formed a material part of its business case and the report's release would cause harm to its commercial and financial interests and put it at a disadvantage in contractual and other negotiations, and may prejudice it in commercial competition.<sup>52</sup> Unlike Eskom, PBMR Ltd is competing in the international arena for the sale of nuclear technology and therefore had a legitimate interest in protecting its ability to compete. Nevertheless, the title of the report indicated that it dealt with matters other than internal financial implications.<sup>53</sup> It appeared to contain information regarding the impact of the establishment of the pebble bed modular reactor and fuel plant on the economy and the ability of the company to deliver electricity supply, and therefore must have considered financial impacts greater than the pricing or cost concerns of PBMR Ltd or the ability of the company to compete.<sup>54</sup> Given the limited information available about the report, it is not possible to say with any certainty that this exemption should not have applied. This is particularly so given that the term 'commercial and financial' has a broad scope.<sup>55</sup> SAHA also appealed to the reason of the decision maker in arguing that, in releasing the report, he/she would contribute to a more rational and informed public debate. PBMR Ltd, however, was not convinced and sought further justification. SAHA did not have the resources to litigate.

The utilisation of the exemption has, in these two cases, appeared to attempt to camouflage the decision making of parastatals regarding the provision of an essential utility. Earthlife Africa in its case against Eskom has faced similar opposition in relation to minutes of meetings of the Eskom board. In the judgment of the High Court, Acting Justice Fevrier held that the 'expert' testimony of the managing director of the Resources and Strategy Division of Eskom provided sufficient evidence that all the minutes contained trade secrets and information that was confidential, and that Earthlife, despite having no detailed knowledge of the information contained in the records, failed to provide sufficient expert knowledge to rebut.<sup>56</sup> The decision was fundamentally flawed in many respects, particularly in that the onus was placed on Earthlife to disprove the application of exemptions. Nevertheless, the protection afforded the commercial enterprises of publicly owned companies exercising public functions is concerning, particularly given recent

developments regarding the failure to meet demand for electricity and the health and environmental concerns regarding nuclear energy proposals.

Challenging cases such as these against profit-making enterprises with resources to litigate is particularly difficult for the people who are most affected. The *Fevrier* decision has now been overturned by agreement in the Supreme Court, and the parties must send the question of whether the documents contain trade secrets or other commercially sensitive information to two independent experts to report to the court. This is a promising development that has implications not only for considerations relating to trade and commercial secrets, but also for matters in which bodies apply exemptions in a blanket fashion to all records.

#### *vi. Research information of third parties*

Section 43 of PAIA protects information about research being or to be carried out by or on behalf of third parties where disclosure would be likely to expose the third party, a person working on behalf of a third party or the subject matter of the research to disadvantage. It also protects research carried out by the public body itself.

In 2004 SAHA submitted six requests to South African Breweries Ltd (SAB) for access to information regarding, among other things, the prevalence of HIV/AIDS among its workforce, access to health services and benefits by the workforce, and HIV/AIDS policies.<sup>57</sup> Although the requests were directed to a private body, the case nevertheless provides a useful example. SAB outsourced the provision of health and counselling services to a third party in order to maintain the confidentiality of workers and ensure that information regarding their HIV/AIDS status was not communicated to co-workers or supervisors. The company argued that to disclose the level of detail requested would prejudice its ability to maintain credibility with its employees in regard to confidentiality, and that disclosing research information or the results thereof would expose numerous parties to disadvantage and prejudice, including SAB, the third party, and employees and their families.

There is certainly legitimacy in this argument: the issue is one that is particularly sensitive and should be treated with great care. However, refusal on the basis of the need to protect research information of the third party is questionable. SAHA was requesting information regarding the prevalence of HIV/AIDS in the company, the number of workers undertaking testing and counselling, the numbers of workers who have left the company or died while in its employ, and the levels of income of workers with HIV/AIDS. While this information is likely to be collected on an ongoing basis, it is not information about research being or to be carried out by or on behalf of a third party, but information collected in the ordinary course of the implementation of SAB policy regarding HIV/AIDS. Further, the information was unlikely to have any commercial value. Currie and Klaaren state that 'disclosure of research that is commercially valuable but which is not ultimately

intended for publication arguably does not result in any serious disadvantage to the types of interests protected by the ground'.<sup>58</sup>

Upon reading SAB's three-page response, a sense of concealment is not apparent: SAB was clearly attempting to demonstrate that it had a considered policy that was being implemented and was keen to ensure that worker confidentiality was not breached and thereby workers would not be reluctant to access health services offered. Nevertheless, a reluctance to probe and compare prevalence of HIV/AIDS within the company, the use of health and counselling services, and access to antiretrovirals was apparent, given that the information requested could have been released with masking.

The exemption was similarly used to refuse access to records of the Home Affairs Intervention Team, a body established within government to make proposals and establish mechanisms to rectify the numerous failures of the Department of Home Affairs (DHA) to fulfil its mandate.<sup>59</sup> Both these cases are an attempt to apply the term 'research' to a broad range of activities that the exemption should not contemplate. Upon a plain language interpretation, what the exemption aims to protect is research information that has an intellectual property or monetary value. The 'research' information of the Intervention Team in particular could not have such a value, given that its operations are intended to facilitate the restructuring of a department so that it fulfils its ordinary functions — information that is of no value in terms of its intellectual ingenuity or its sale. It is also interesting that DHA characterised the Intervention Team as a third party, particularly given that the other public bodies with representatives on the team had transferred identical requests to DHA, not to the head of the team itself. In any event, another public body, which the Intervention Team must be, does not fall within the definition of a third party for the purposes of the override.<sup>60</sup>

### *vii. Operations of public bodies*

Section 44 of PAIA aims to protect the operations of public bodies by providing them with the discretion to refuse a request if the records contain, for example, opinions, advice, discussions or deliberations, or a report or recommendation relating to the formulation of policy or the taking of a decision. It also prevents (upon a mandatory ground) disclosure that could be reasonably expected to prejudice the effectiveness of a testing, examining or auditing procedure or of evaluative material.

In 2007 DHA refused access to records regarding its Turnaround Task Team documenting discussion and recommendations for processing asylum seeker applications. The request was refused on the basis that the records would disclose the operations of public bodies (although no further detail was provided). The Turnaround Task Team was set up to deal with the backlog of asylum seeker applications (some asylum seekers, who had applied as far back as 1997, were still waiting for a decision). The Turnaround Task Team determined, among other things, to set up a refugee reception office at Crown Mines, and



purchased additional computers and employed staff for that purpose. The backlog project, as it became known, commenced in 2005.

Given these facts, decisions must have been finalised regarding efforts to 'turn around' the backlog. Pre-decision documents are protected to permit the frank and honest debate necessary to formulate government policy. However, where a decision has been determined, the decision itself must lose its protection, as 'it does not have a deliberative character'.<sup>61</sup> Currie and Klaaren state that 'a pre-decision document that is adopted or incorporated by a final decision or in a finalised policy should therefore lose any protection it may have had and no longer qualifies for this ground of refusal'.<sup>62</sup> Some of the documents contain finalised decisions or opinions, advice, discussions and deliberations that became finalised decisions and therefore cannot be refused. The failure of DHA to provide any detail regarding what records are captured by the request or how the exemption applies to these records made rebuttal lengthy and at times vague.<sup>63</sup>

### *Public interest override*

The definition of public interest tends toward a broad interpretation of matters that are of relevance to the public in that they impact upon their communal interests. The construction of public interest in PAIA, however, is narrow and restrictive: in order to override any exemption, it requires that disclosure 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* that the public interest in disclosure outweighs the harm contemplated. As noted earlier, the majority of requests made by SAHA relate to relatively controversial issues. In many cases, the records aim in the first instance to reveal evidence of contraventions of the law; arguments concerning the applicability of the public interest override are easy to construct. The public interest override is a key issue in the majority of requests, not because of difficulty in arguing its application, but because public bodies rarely apply it.

DOJ provides a key example. Almost all of SAHA's requests to the department seek records that make allegations about or reveal the commission of human rights violations. DOJ, in most of these cases, refuses access on the basis of section 34 of PAIA, the protection of privacy. In doing so it states: 'The requested documents contain personal information that implicates various third parties in alleged unlawful activities. Its disclosure could be defamatory to the individuals implicated and could also infringe their dignity which is protected under the Constitution'.<sup>64</sup>

DOJ, however, has never explicitly considered the application of the public interest override, which would apply in the case of the above paragraph in that the record contains information of public interest (i.e. it relates to human rights violations in the apartheid era) and may disclose a contravention of the law. In a meeting with the deputy information officer (DIO) in 2006, SAHA argued that her reasoning would compel disclosure

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rather than prevent it. When questioned whether she applied the override, she stated that it is the first step she takes. Despite subsequently acknowledging that this in fact should be the final step after giving consideration to the exemptions, the DIO then refused access to Eugene de Kock's application on the same basis without mention of the override.

The issue has also arisen in the military intelligence listings case.<sup>65</sup> When DOD released the group 22 listing, it had been heavily masked on the basis that it cited names of projects and countries, and that disclosure of these names would reveal countries visited by Armscor and thereby their involvement in arms deals when international sanctions were in place against South Africa. DOD stated that, prior to the start of these projects, the parties involved signed international agreements that are still in place. They therefore reasoned that section 37, which prevents disclosure of information subject to confidentiality agreements, prevented access. DOD also masked the names of private firms that dealt with South Africa during this time on the basis that their disclosure might be expected to put such firms at a disadvantage or negatively prejudice future contractual agreements. DOD failed to consider that the engagement by these states and firms was in contravention of international law while international sanctions were in place, and that therefore the first limb of the public interest override was satisfied. In effect, the department was avoiding jeopardising relations developed by the apartheid government. SAHA appealed and, in a rare reconsideration on the grounds of the public interest override, DOD granted access. SAHA requested confirmation that no firms' names had been redacted, as none were revealed in the 'unmasked document', but did not get a further response from the minister.<sup>66</sup>

The contention that the failure to implement the override is experienced across the board can be evidenced by the statistics released by the SAHRC in its yearly reports to Parliament.<sup>67</sup> Across the period 2002–06, 1,997 out of 64,208 reported requests were granted on the basis of the public interest override. The statistics are somewhat skewed, however, by the inclusion of requests reported by SAPS, which constitute 55,027 of the total: excluding SAPS, the figures show that the override was applied positively in 79 of 9,181 requests; in other words, in less than 1 per cent of cases.<sup>68</sup> While reporting to the SAHRC is fairly minimal, given that bodies that actually report to the SAHRC are more likely to collect accurate statistics, they can provide some measure to show that where the override is applied, it leads to access in only a few cases.

Aside from its limited explicit application, the override raises the following issues. Firstly, the limitation in the first limb excludes records that may reveal the implementation of a practice, for example, that is contrary to government policy and may significantly impact upon access to essential services by the community. Secondly, while the second limb includes the term 'public interest' as a requirement, it fails to actually define it or to provide any means to measure whether it outweighs the harm contemplated by the exemption. And thirdly, the provision imposes the burden of demonstrating that the

document would reveal evidence of a contravention of the law or a safety or environmental risk on the requester. It is not feasible to argue that records may provide evidence of a contravention of the law when, in some cases, it is not known which records relate to the request. SAHA has argued that, in accordance with constitutional interpretation,<sup>69</sup> the provision should be read broadly and understood to require requesters to demonstrate that the document may provide any evidence in supporting a contention of illegality or breach of a legal duty. Without judicial precedent, these arguments are simply ignored.

The limited application of the override is an issue that is only remedied through appeals; however, its limited scope could be resolved through amendment to return it to its original formulation in the Open Democracy Bill, where it was a simple public interest test that applied to a broader range of interests; that is, to matters of public interest that do not necessarily relate to contraventions of the law, but are of substantial interest to requesters who aim to ensure that the rights of citizens are being sufficiently represented and upheld.

#### Box 6.3: Severance

While public bodies have been reluctant to utilise severance, particularly during the first few years following the enactment of PAIA, the key issue, however, seems to be one of consistency. Pollecut notes that DOD mistakenly granted access to a file; SAHA returned the document and its subsequent appeal was refused.<sup>70</sup> Having had the benefit of viewing the file prior to returning it, it was apparent to SAHA that the names that it revealed could have been easily redacted; however, it did not have the resources at that time to litigate.

Some years later, in 2005, DOD released huge volumes of records rather than allowing inspection, because it determined a need to mask the files. The masking undertaken, however, was excessive; the department masked names such as the name of a minister of defence, and the name of an advocate in litigation had been masked, but not the name of the attorney. In a discussion with the Documentation Centre in 2005, DOD acknowledged the problem and laid the blame on the minister for failing to designate sufficient funds to employ and train permanent staff. The National Archives has also adopted an inconsistent approach. In 2003 it masked around 90 per cent of the security legislation directorate files of Michael and Shulamith Muller (making the document worthless in terms of revealing anything substantive about the persons or the monitoring of them),<sup>71</sup> but refused access to security police lists on the basis that the file numbers would disclose information that was subject to the privacy exemption (and what is presumed to be the identity of informers).<sup>72</sup>

There are, however, cases in which large-scale masking is essential. In 2002 SAHA assisted researchers for the Swiss National Science Foundation to obtain access to information regarding Swiss–South African military relations from a number of bod-

ies, including Armscor. After considerable difficulty in eliciting a response — it first ignored the request and then attempted to transfer it, during which time it determined to treat every written inquiry regarding its progress as requests pursuant to PAIA in themselves, then dismissed them as frivolous and vexatious — Armscor released the records, heavily masking the names of third parties. It was apparent to SAHA, however, that Armscor had considered the application of the third-party notification process and determined not to apply it, as it would require Armscor to contact all third parties involved since 1969. In this instance, masking, while subject to challenge on the basis of the public interest override, was accepted due to the practical and legal challenges involved in contacting a large number of third parties.

## Enforcement mechanisms

PAIA provides cumulative appeal mechanisms against refusals of access; the application of fees; the failure to respond (i.e. deemed refusal); decisions to extend time periods; and, in the case of affected third parties, the granting of access.<sup>73</sup> Upon any of these events, a requester is entitled to lodge a written internal appeal to the minister of the department or to the head of the public body (provided that the body is not a type (b) public body; that is, a private body exercising a public function). Requesters also have the option of complaining to the public protector or the SAHRC. If unsuccessful, the requester's only recourse is to lodge an application in the High Court for relief.<sup>74</sup>

In her chapter discussing the Nuclear Weapons History Project, Gould notes that when SAHA requested a report by Dr N. von Williegh from the International Atomic Energy Agency (IAEA), the Nuclear Energy Corporation of South Africa (NECSA) irritably responded that it was waiting for clearance from IAEA to release it, and that the Department of Minerals and Energy had instructed that the minister must approve all responses. Despite numerous requests to respond and complaints to the SAHRC and the public protector, no response was received. Due to the classification of NECSA as a type (b) public body, SAHA did not have the right to submit an internal appeal. Its only option was to apply to court to challenge the legitimacy of IAEA's intervention, the minister's need to approve release and the ultimate failure to respond. Given the numerous refusals that were received pursuant to the project and the cost burden of litigation, SAHA was not in a position to take the matter further. The barriers to and limitations of pursuing access through the prescribed appeal mechanisms highlighted by this case have had a significant impact on the right, largely for the following reasons:

- Independent regulators have failed to respond to complaints and have not taken the proactive steps necessary to assist requesters with legitimate disputes.
- The lack of independent regulatory intervention following the internal appeal process allows decision makers to refuse access or fail to respond with

the knowledge that only a select few requesters will proceed to litigation due to prohibitive costs, lack of resources and the failure of independent regulators.

- Where requests do proceed to court, bodies often settle prior to a precedent-setting decision.

### *Failure of regulatory authorities*

The public protector and the SAHRC have legislative obligations in relation to the regulation of PAIA. The public protector is responsible for investigating and mediating complaints of maladministration against public bodies only.<sup>75</sup> The SAHRC is responsible for, among other things, monitoring and education, receipt of manuals and annual statistical reports from public and private bodies, and assisting requesters to exercise their right of access.<sup>76</sup> Section 8 of the Human Rights Commission Act No. 54 of 1994 gives the SAHRC the power to endeavour to resolve by mediation, conciliation or negotiation any dispute or to rectify any act or omission in relation to a fundamental right; any recommendation made as a result is not binding on the public or private body. The intervention by these bodies is intended to provide requesters with a more cost-effective means of resolving disputes.

In June 2003 SAHA was commissioned by the SAHRC to conduct research regarding the role of the commission as a champion of the right of access to information. The research found that persons interviewed for the purposes of the research opined that the activities undertaken to promote the objects of PAIA had not resulted in anything approaching a decisive and cultural shift in the public (or private) sector towards open and transparent governance. This lack of impact must be partly the result of a failure by the SAHRC to take a proactive role in complaints investigation and mediation. The SAHRC failed, until 2007, to follow up on any SAHA complaints in any meaningful way.<sup>77</sup> Despite failing to investigate or finalise complaints, the SAHRC did not include the complaints in its annual report and stated that it had no complaints still under investigation.

The public protector is mandated to have a greater enforcement role, in that he is responsible for investigating and mediating complaints of maladministration; however, his intervention has been similarly weak.<sup>78</sup> Despite provision in PAIA for the public protector to report to the SAHRC, SAHA found in its research regarding the role of the SAHRC in championing PAIA that there was no ongoing contact between the commission and the public protector regarding PAIA cases,<sup>79</sup> and neither reported referring any cases to each other nor receiving such referrals. In 2005 SAHA was advised by the SAHRC that, upon receipt of the complaint about NECSA, it would contact the public protector to determine what steps it would take: if the public protector was not intending to intervene, it would assist in the matter. SAHA was not informed about the precise arrangements; however, neither body took any steps to facilitate negotiation or mediation of the dispute, despite SAHA raising the lack of response two years on.<sup>80</sup>

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There are two justifications put forward by the SAHRC for its limited intervention. Firstly, it states that it is severely under-resourced. The PAIA unit established by the SAHRC in June 2002 was severely underfunded from its establishment. The extent of this under-resourcing is demonstrated by the SAHRC in its 2002/03 annual report, in which it states that implementing its obligations to produce a guide to PAIA in the various languages and forms would cost a total of ZAR 2 million, leaving ZAR 0.3 million to conduct education and training, monitor implementation, and provide assistance to requesters. The commission consequently recommended amending the regulations to provide for a 'limited but effective' distribution of the guide.<sup>81</sup> The situation did not improve in the 2003/04 reporting period, when the guide was granted only 1.5 per cent of the SAHRC's total budget, a mere ZAR 2.3 million.

Secondly, the commission argues that the weak enforcement power in PAIA has severely impeded its ability to act. The enforcement power contained in PAIA is weak in that it is a power to recommend to a public or private body that the body make such changes in the manner in which it administers the Act as the SAHRC considers advisable,<sup>82</sup> and it couches the commission's roles with caveats in terms of its available resources.<sup>83</sup> It also imposes little obligation upon public and private bodies to engage with the commission regarding complaints, in that it states, 'if appropriate, and if financial and other resources are available, an official of a public body must afford the Commission reasonable assistance for the effective performance of its functions in terms of this Act'.<sup>84</sup>

I make two points to rebut these justifications. Firstly, the PAIA unit is not entirely disconnected from the other units within the commission. The Legal Department, responsible for dealing with complaints and the conduct of mediation, negotiation and litigation, is tasked with intervening in cases and assisting complainants to resolve disputes. The failure of the SAHRC to take an active role in disputes and litigation regarding PAIA cannot therefore be solely one of under-resourcing of the PAIA unit, but must be ascribed to its limited priority in terms of its wide range of legislative obligations. Secondly, the SAHRC has failed to acknowledge its general powers under section 8 of the Human Rights Commission Act; in its 2006/07 report it stated that 'due to [its] lack of powers in [PAIA] to mediate, this is provided only if the two parties agree to such mediation'. The permissive wording in PAIA has allowed the commission to take a very soft approach to promotion and enforcement, with the result that it fails to be a catalyst for the resolution of disputes and access to records.<sup>85</sup>

The work of the SAHRC in promotion and education has increased in recent years (see Box 6.4), raising the potential to elevate the profile of PAIA and DIOs, and achieve greater consensus on not only what is required to implement PAIA, but on the interpretation of provisions. The limited role of the SAHRC in enforcement to date, however, has the effect of lessening this potential; without consequences, some public officers and bodies do not have the impetus to implement or appropriately apply PAIA.

**Box 6.4: Deputy Information Officers' Forum**

Over the last two years the SAHRC has attempted to raise the profile of the right of access to information held by government bodies by establishing the Deputy Information Officers' Forum. Through yearly meetings and an electronic discussion forum, the project aims to address issues in the implementation of PAIA and the lack of awareness of PAIA obligations by:

- sharing information;
- raising awareness;
- advising DIOs of developments and best practice; and
- building capacity within bodies.

It remains to be seen what impact the forum will have on the implementation of PAIA within bodies and on facilitating access to information.

In addition to the forum, the SAHRC co-hosts the Golden Key Awards, which aim to recognise the exemplary work of particular public and private bodies, DIOs, NGOs, individuals and journalists in using or complying with PAIA. SAHA was awarded the Golden Key Award for the best use of PAIA in 2006.

***Deterrent effect of appeal mechanisms***

The majority of requests submitted by SAHA are refused or ignored in the first instance. In the absence of facilitative relationships, such as that established with SAPS, where refusals may be negotiated or reconsidered, the only available remedial recourse is through an internal appeal, the intervention of the SAHRC or the public protector, and litigation.<sup>86</sup> The minister or head of a body often refuses the request again on appeal; he/she does so knowing that the majority of requesters are not in the position to litigate due to prohibitive court costs and that independent regulators are unlikely to take steps to intervene. Although SAHA may often rely on pro bono legal assistance, the risk of the imposition of a costs order, as occurred against Biowatch in seeking access to information regarding decision making in granting permits for the production of genetically modified crops,<sup>87</sup> makes litigation an option in only a limited number of cases. This allows bodies not committed to access to disregard their obligations unless court proceedings are instituted.

DOJ provides an example of how the available appeal mechanisms deter bodies from making sound decisions in the first instance. Given that SAHA ordinarily has more than one request with the department at any one time, it is impossible to litigate upon every refusal; the department can therefore wait for litigation before considering the merits of requests.<sup>88</sup> Such conduct is exacerbated when requesters are conducting projects requiring the submission of numerous requests to a number of bodies. When more than one body

ignores requests, options for appeal become limited. For example, in the nuclear energy project, SAHA submitted requests to the Department of Minerals and Energy (eight), the NECSA (27) and the National Nuclear Regulator (seven). These bodies simply ignored the requests on first instance and on internal appeal (where submitted), knowing that it would be impossible to litigate in all of these cases. Such cases become particularly difficult when they are deemed refused, as without a response it may be impossible to determine whether the records sought exist or whether legitimate grounds may be relied upon to refuse access. The requester is then left in the position of determining which requests and which bodies may provide the most useful information and the greatest chance of success.

### *Lack of precedents*

SAHA has resorted to litigation in around ten cases, resulting in seven sets of proceedings. In all finalised cases,<sup>89</sup> settlement occurred prior to hearing.<sup>90</sup> While the primary objective of litigation has been to secure access, a key goal has been to secure a judicial precedent that will provide guidance on the interpretation of PAIA. This is particularly so in the cases against DOJ, which repeatedly refuses access to TRC records unless SAHA litigates.<sup>91</sup> The utilisation of litigation, while based on sound strategy and while securing access, has been very costly<sup>92</sup> and has not led to long-term solutions in the form of guiding and binding precedents.<sup>93</sup> This is largely because litigation is being used as a method of negotiation and a means to force bodies to consider the merits of requests, rather than as a means of obtaining clarity on interpretive issues.

### *Proposals for reform*

The lack of an intermediary process between internal appeals and litigation has led to the pursuit of cases by requesters that public and private bodies do not intend to vigorously defend and the non-pursuit of information that should be in the public domain. An independent arbiter with the power to make binding orders following the refusal of access at first instance or on appeal would require bodies to consider the merits of requests prior to litigation or institute applications to appeal decisions, leading to greater engagement in the early stages of the request. Requesters would also benefit from a cheap, accessible and binding appeal mechanism.

The Open Democracy Bill, the precursor to PAIA, provided a comprehensive approach to the regulation of access to information, the protection of privacy, whistle-blowing and meetings of open government, and recommended three levels of monitoring and enforcement: an open democracy commission tasked with promotion, education, the provision of assistance and monitoring; information courts tasked with adjudicating disputes, staffed by High Court judges, but operating under rules designed to ensure that they were accessible, cheap, informal and expeditious; and the High Court, to which decisions of the



information courts could be appealed. These recommendations were rejected by cabinet.<sup>94</sup>

When it became apparent within the few years following PAIA's enactment that the appeal mechanisms were ineffective,<sup>95</sup> calls were made by a number of organisations, including SAHA, ODAC and the SAHRC, for DOJ to investigate the establishment of an independent arbiter of access to information disputes.<sup>96</sup> The department did not respond. Cabinet had, however, referred the issue of data protection and privacy to the South African Law Reform Commission (SALRC), which, following extensive consultation, drafted the Protection of Information Bill. The Bill, and the discussion paper accompanying it, proposed an information and privacy commission tasked with obligations relating to PAIA and the protection of privacy, including promotion, education, monitoring, investigation, mediation and the issuing of binding determinations. It also proposed that the commission litigate in its own name or on behalf of individuals or classes of individuals for breaches of the Acts.

In its submission to the SALRC regarding the discussion paper, SAHA welcomed its proposal (albeit with a number of concerns regarding the reporting requirements and the lack of power to award compensation and impose fines), but objected to the granting of the additional powers to the SAHRC. Nevertheless, cabinet had, during this time, established a commission headed by Kader Asmal to investigate Chapter 9 (of the Constitution) and other institutions, in particular whether such institutions required reform and whether they could be amalgamated or streamlined. It reported in September 2007, heavily criticising a number of institutions for failing to take a proactive approach to fulfilling their mandates and recommending that all institutions be collapsed into one human rights commission to be based at the current SAHRC. The commission did, however, make specific note of the SAHRC's failures in regard to PAIA and recommended that two dedicated information commissioners be appointed and ring-fenced funds be injected by Parliament.<sup>97</sup> While the recommendation aims to achieve greater accountability in the administration of PAIA, it is without doubt preferable that a dedicated and independent privacy and information commission, which reports directly to Parliament rather than DOJ, be established that will not be subject to any political manoeuvring or affected by any priority decisions. It remains to be seen how the two recommendations, that of the Asmal Commission and the SALRC, will be reconciled by Parliament.

## The multiple faces of information governance

PAIA does not act in isolation, but in conjunction with what may be hundreds of other enactments. A number of bodies, in particular bodies dealing with the security of the Republic and intelligence gathering, and statutory bodies, have obligations regarding the classification and dissemination of records pursuant to their own legislation. This legislation has an impact on both the procedures followed in responding to PAIA requests and the application of PAIA provisions and exemptions, creating confusion in some quarters

regarding inconsistencies among Acts.

PAIA applies to the exclusion of other legislation that prohibits or restricts disclosure if that other legislation is materially inconsistent with an object or specific provision of it; where other enactments provide a greater right of access, resort to PAIA is not necessary. Legislation that restricts the right of access can be, according to Harris and Merrett, broken down into four main categories:

- i. Acts that control official information,
- ii. Acts that restrict information from all sources on specific topics,
- iii. Acts that regulate administrative and legal functions, and
- iv. Other acts extending government power.<sup>98</sup>

I would add that these categories are not confined to legislation that necessarily restricts access, but can be extended to legislation that provides for a greater right of access. For example, the National Archives and Records Service Act No. 43 of 1996 provides a greater right of access under category (i) and the National Conventional Arms Control Act No. 41 of 2002 and the Inquests Act No. 58 of 1959 under category (iii).

The minister of justice was obligated by section 86 of PAIA to schedule regulations that would list enactments that provided a greater right of access, but the current minister has not done so. Given the lack of a comprehensive audit of intersecting legislation, and given that there are likely to be a large number of enactments that limit or extend the right of access, it is not within the scope of this chapter to list and discuss them all. What I aim to do, however, is to provide examples of cases where legislation has had an impact on the exercise of PAIA. These examples fall into two categories:

- i. Acts that control information across all public structures or in relation to specific public structures; and
- ii. Acts that relate to specific information held by specific sectors or structures.

## Acts controlling access across all public spheres

### *National Archives and Records Service Act No. 43 of 1996*

The National Archives and Records Service Act (NARSA) requires public bodies to transfer records older than 20 years to the National Archives for public access (with exceptions). This means that any records held by National Archives that are older than 20 years should not be subject to PAIA and should be freely accessible, including cabinet records. Records less than 20 years old should be requested pursuant to PAIA, unless they are cabinet records, in which instance access may only be given by special permission

of the national archivist. Prior to the enactment of NARSA and the constitutional right to freedom of information, access to records in the National Archives was only allowed where they were 30 years old, unless the minister of education withdrew the right of access on public policy grounds. The lack of definition of 'public policy' allowed arbitrary restrictions to be enforced, such as the restriction on access to records less than 50 years old of the governor general, the state president, the Public Service Commission, the commissioner of police, Inland Revenue and DHA, and on post-1910 records of the Executive Council, the prime minister, the Department of Foreign Affairs and the Department of Information.<sup>99</sup>

Harris and Merrett note that, even though 2,372 requests out of 2,381 were granted in the period 1980–90, the room for secrecy illustrates that 'the grounds on which public policy restrictions can be applied [should] be established in law'.<sup>100</sup> The enactment of NARSA shortened the access time period; however, it still allows the national archivist to exempt any government body from the a provision of the Act (upon authorisation of the National Archives Advisory Board, which comprises six persons appointed by the minister of arts and culture and which may be dissolved by the minister on 'any reasonable grounds'), or defer access.<sup>101</sup> While this is a great deal better than the pre-NARSA enactment, the room for secrecy remains; this is concerning, given that the national archivist has been less than active in ensuring that apartheid records are transferred to the National Archives or in facilitating access to such records.

Pigou notes that in 2001 SAHA submitted a request to the National Archives for access to correspondence documenting its dealings with the TRC and other parties in relation to the archive of the TRC.<sup>102</sup> After a number of internal appeals relating to access to 'classified' records, the national archivist, Dr Graham Dominy, stated:

Your most recent requests for access are being referred for legal advice as there is a lack of clarity between two pieces of legislation, namely the National Archives Act and the Public Access to Information Act (PAIA) [sic] .... Please note that a submission has been made requesting that the National Archives be considered a public body in terms of PAIA. However, the Minister of Justice has not yet approved it. There may therefore continue to be delays in dealing with PAIA requests until this matter has been finalised.<sup>103</sup>

Upon a later request for the Defence and Aid file of the former Directorate of Security Legislation,<sup>104</sup> in which SAHA challenged the national archivist's request for an affidavit of authorisation from a defunct organisation on the basis that it had 'been given access to a number of [the] files in the past without having to make a request in terms of the PAIA', and that 'PAIA is there to be used as a last resort when the file is not open to the public and if access cannot be secured using another piece of legislation',<sup>105</sup> the national archivist stated:

I regret any inconvenience you may have been put to. The relationship between the publication of the National Archives Act and the application of the Promotion of Access to Information Act does have grey areas and we are investigating how to resolve the issues on an on-going basis. Generally, but not in every instance, the Archives Act applies to records that are older than twenty years, and which are in the National Archives, and PAIA applies to more recent records and obviously to accessing records in offices of origin. I have instructed that your complaint be investigated and I will let you know the outcome as soon as possible.<sup>106</sup>

Whether or not the reliance on inconsistency at that time was legitimate is questionable: I would chance that it is a misconstrued attempt to avoid disclosure under PAIA. The National Archives is established pursuant to statute, indicating it may be a 'type (b)' public body;<sup>107</sup> however, it sits within and reports to the Department of Arts and Culture, and is in fact considered part of that department and therefore a branch of a public body in the ordinary sense (and in terms of part (a) of the PAIA definition). In any event, the distinction only affects the appeal process and has, to all other intents and purposes, no practical effect. The body is required to consider access in terms of the prescribed exemptions and exclusions and no other external grounds, and is required to respond within the prescribed time periods.

Contributing to the response of the National Archives may have been the neglect on the part of DOJ to schedule Acts that provide for a greater right of access. Nevertheless, section 86 of PAIA states that, until the amendment of the Act, where any other legislation not referred to in the schedule provides for access to a record of a public or private body in a manner that is not materially more onerous than the manner in which access may be obtained in terms of the Act, access may be given in terms of that legislation. Accordingly, given that the National Archives Act provides for a less onerous right of access, its operation should not be precluded by PAIA. The national archivist noted this in his letter; however, he did not go on to specify where he believed the 'grey areas' lay.<sup>108</sup>

#### Box 6.5: Cabinet records

An issue of particular concern is that of cabinet records, which are governed by the National Archives Act, but cannot be accessed pursuant to PAIA. In 2007 SAPS refused access to documents on the basis that they were cabinet records to which PAIA does not apply. It took some months, and consultation with the National Archives by SAPS, before SAPS agreed that, given that the records were more than 20 years old, they should in fact be in the custody of the National Archives, and if they were, SAHA would be granted access.<sup>109</sup>

In October 2002 SAHA requested access to cabinet records that were less than 20 years old, in particular those relating to the 1990–94 negotiation period. SAHA reasoned with the national archivist that these records were 'public records of great historical value which should be firmly in the public domain'. Although ordinarily

archival legislation allowed for the release of such documents after 20 years, legislation empowered the national archivist to release these documents (as well as State Security Council documents from the 1980s) on a discretionary basis before that time.<sup>110</sup> The request was denied, having been 'duly considered and the relevant bodies ... consulted'. It was explained that 'the National Archives is considering a structured approach to the question and it is not in a position to respond to ad hoc requests at this stage'.<sup>111</sup> Over four years later, these records remain closed, and no details of a 'structured approach' to addressing this matter have been publicly divulged.

### *Protection of Information Act No. 84 of 1982*

The Protection of Information Act is an apartheid government enactment that aimed to restrict access to information on public affairs and control the extent to which government employees could disseminate information. The Act was the result of the government's obsession with secrecy:

Every bureaucrat was graded in terms of a rigorous security clearance procedure, the grading level determining an individual's right of access to information. The procedures meshed with a pervasive system of information grading — commonly referred to as 'classification' — defined by perceived security risks. The Protection of Information Act, and various legislative forerunners, promised severe punitive action against individuals defying the system.<sup>112</sup>

Despite its apartheid origins, the legislation is still in force; that is, the threat of punishment for unauthorised disclosures remains. This means that it is being utilised to both classify and declassify records, and prevent government employees from accessing information for which they do not have the appropriate security clearances and from blowing the whistle on matters of public interest.<sup>113</sup> This has a number of implications for PAIA.

Firstly, Pollecut notes that the declassification of files in the archives is driven by requests. In the absence of an information audit, there has been little, if any, proactive declassification of records. As a result, requests for military and other intelligence records subject to classification under the Protection of Information Act are substantially delayed until declassification is undertaken. Secondly, the Protection of Information Act has been used to prevent access on the basis of classification. Classification was cited as a reason for refusal by the National Archives, in conjunction with the National Intelligence Agency (NIA), following requests for access to TRC records documenting their chain of custody and records related to TRC recommendations discussed by Pigou.<sup>114</sup> These were refused on the basis that they had purportedly been classified as 'confidential' by NIA. It was not clear whether the classification was ad hoc, specifically subject to the classification provisions of the Protection of Information Act, or occurred following submission of the request. Subsequently, the national archivist clarified that he was refusing access in terms of sections 37 and 38 of PAIA.<sup>115</sup> The correct and constitutionally consistent interpreta-

tion of the intersection of PAIA with the Protection of Information Act is that PAIA is paramount, and that information should only remain classified where it can be exempted from disclosure pursuant to PAIA.<sup>116</sup>

Thirdly, the extension of classification to records that do not relate to national security but to 'sensitive' matters of public interest and therefore to records of the entire public sector may be unconstitutional. According to Klaaren, this is largely because the 'military information security policy has been crudely and inappropriately adapted to cover the entire public sector'.<sup>117</sup> This is shown in the case of the National Archives, which used classification to withhold access to its own records, records that are not traditionally defined as relating to national security.

In February 2003 the then minister for intelligence, Lindiwe Sisulu, established the Classification and Declassification Review Committee (CDRC), which was tasked with developing criteria for the protection of information, which included a review of relevant legislation such as the Protection of Information Act and its implementing policy, the Minimum Information Security Standards. Submissions to the committee by SAHA and other organisations and individuals made a number of recommendations regarding the need for an archival audit and proactive declassification, full access to cabinet records, the release of apartheid operatives from secrecy undertakings, and the replacement of the Protection of Information Act with information protection legislation that is consistent with PAIA and presumes disclosure.<sup>118</sup> Several submissions also argued that apartheid era records should be open; the National Security Archive<sup>119</sup> suggested that the German model, where the East German Socialist Unity Party files were opened, should be adopted and that particular regard should be given to records that relate to human rights abuses.

There were concerns early on about the extent to which the CDRC would bring about any substantial change. Harris, Hatang and Liberman state:

*There is cause for scepticism ... that this initiative will significantly liberalise secrecy policy. It is led by the NIA, which has consistently taken an obstructionist position. Besides its efforts to obstruct the TRC inquiry into project coast ... (i.e. it tried to prevent TRC access as it didn't have the required security clearances), the NIA also illegally took possession of thirty-four boxes of sensitive TRC records, concealed their whereabouts, and then blocked access to them.*<sup>120</sup>

Despite the fanfare with which the CDRC was launched, the submission of its report and recommendations received very little public attention, and the momentum of the process appeared to peter out. Indeed, the recommendations were effectively mothballed and only dusted off again during 2006, when the current minister of intelligence, Ronnie Kasrils, decided to revisit the issue by establishing the Intelligence Review Commission.<sup>121</sup> The Protection of Information Act therefore continues to play a role in restricting access to records.

## Acts regulating discrete collections

### *Promotion of National Unity and Reconciliation Act No. 34 of 1996*

The Promotion of National Unity and Reconciliation Act (the TRC Act) regulated the confidentiality of information collected by the TRC in the course of its investigations and the conduct of its hearings by the Human Rights Violations, Amnesty and Reparations Committees. In summary, the Act states that records collected during investigations and submitted to the TRC by perpetrators and victims of human rights violations were confidential; however, confidentiality lapsed when a hearing relating to such a violation commenced.<sup>122</sup> Any records of in camera hearings retain confidentiality until the TRC determined otherwise.

I have discussed the application of the PAIA exemption that restricts access to records that are subject to a confidentiality agreement or which were provided in confidence. In these cases, DOJ in effect aimed to rely on the provisions of the TRC Act, in particular section 19(8)(a), which states that applications are confidential. In the Cradock 4 case, while the department made no specific references to subsection (b) of that provision, which states that confidentiality lapsed when an amnesty hearing commenced unless the hearing itself was not public, it stated in its answering affidavit to the High Court that it could not say with any certainty that public hearings were in fact held (although reference to its own website or to the South African Broadcasting Corporation would have provided a simple and quick means of establishing that they in fact were).<sup>123</sup> It then relied upon the provision to apply the PAIA exemption relating to confidential information to refuse access. DOJ similarly relied on the confidential status of in camera hearings (and therefore associated potential breaches of privacy and threats to the life or safety of individuals).

It failed to consider, however, that section 5 of PAIA states that this Act applies to the exclusion of any provision of other legislation that prohibits or restricts the disclosure of a record of a public or private body and is materially inconsistent with an object or a specific provision of the Act. Blanket restriction on access to in camera and public hearings of the TRC constitutes a material inconsistency with the objects of PAIA, which are, among other things, to give effect to the right of access to information by starting from the position that a record should be accessible rather than withheld. As a consequence, each and every record requested must be considered in terms of the application of PAIA, including the exceptions to the confidentiality exemption and the question of whether the information is publicly available,<sup>124</sup> and the applicability of the public interest override.<sup>125</sup>

### *Inquests Act No. 58 of 1959*

The refusal of access to inquest records submitted as evidence in the Cradock 4 hearings also raised the issue of the application of the Inquests Act. DOJ refused access to the

inquest judgment and other materials on the bases that the 'information is personal and is protected ... and disclosure could be traumatic to the victims' families and offensive to the public'. The Inquests Act provides that the record of an inquest forms part of the records of the magistrate's court in the district in which it was held, and the Magistrate's Court Act No. 32 of 1994<sup>126</sup> provides that records of that court are available to the public. Accordingly, had the records not been subject to TRC hearings or requested pursuant to PAIA, they would be publicly available. The fact that they were now contained in a collection of materials categorised by their inclusion in another hearing should not have imposed a restriction or a greater burden on access.

### *National Conventional Arms Control Act No. 41 of 2002*

In 2007 SAHA was verbally refused access to the 2003/04 and 2005 annual reports of the National Conventional Arms Control Committee<sup>127</sup> on the basis that the information was confidential. The National Conventional Arms Control Act (NCAC Act), however, states at section 23 that 'the Committee must ... present to Parliament and release to the public an annual report on all conventional arms exports concluded during the preceding calendar year'. Subsection 2 goes on to provide that, subject to the specific details that must be contained within the report, information concerning the technical specifications of conventional arms may be omitted from a report in order to protect military and commercial secrets. Furthermore, subsection 3 states that 'no person may disclose any classified document or the content thereof concerning the business of the Committee except with the authorisation of a competent authority or as required in terms of [PAIA]'.

SAHA consequently appealed on the bases that, firstly, the committee had a positive duty to release to the public an annual report that is only limited to the extent of the content included in the report; and, secondly, the provision made it clear that the annual report cannot be a classified document, as the positive duty to release cannot be overcome by the restriction on disclosing classified information. It is unclear whether the committee had thought so far as to rely upon the exemption contained in PAIA relating to confidential information; however, even if it had, PAIA should not have been used to restrict access, because the NCAC Act provides a greater right.

In light of this, and despite the reference to PAIA in subsection 3, it is questionable whether the document should have been requested pursuant to PAIA in the first place. However, the Ceasefire Campaign, which wished to obtain the report, had made a number of unsuccessful attempts to access it without resort to PAIA. The NCAC Act does not provide any means for individuals outside parliamentary structures to compel release, and therefore PAIA provides the only other viable option. Had the minister of justice amended PAIA to provide for legislation providing a greater right of access, SAHA may have faced the same difficulties with the committee; however, the argument for access would have been simpler had it been forced to litigate.<sup>128</sup>



## Other issues

I have discussed the limitations of both PAIA and related legislation that have had a substantial impact on the extent to which SAHA has been able to access information. I would now like to turn to external factors: the destruction of records, record-keeping practices and cultures of transparency or secrecy inherent in public bodies.

PRETORIA NEWS  
MONDAY, SEPTEMBER 3, 2007

# History archive trust set for war with defence ministry

## Organisation seeks court order to obtain military intelligence files

ZELDA VENTER  
HIGH COURT REPORTER

**T**he SA History Archives Trust (Saha) is set to battle it out in court with the minister of defence over access to certain information contained in apartheid-era SA Defence Force (SADF) military intelligence files relating to ties between South Africa and various foreign governments.

Saha accused the SANDF of masking the bulk of information and refusing to hand it over to them.

The minister said the files were back in Zimbabwe "where they belong" and that this was done "to prevent embarrassment to South Africa".

Saha, however, is determined to obtain a Pretoria high court order to force the government to hand over the documents.

If they had been sent to Zimbabwe, they should be returned. Saha also wants the court to order that the department declare the names and positions of the officials responsible for sending the documents to Zimbabwe so that it can take legal action against them.

Piers Pigou, Saha's director, said in papers filed before court that the archive was dedicated to recapturing the country's lost and neglected history and recording history in the making.

More than four years ago Dr John Sellen, a former professor of international studies who has since died, applied for access to certain documents from the department in terms of the provisions of the Promotion of Access to Information Act.

The defence department eventually informed Sellen that eight of the 21 files requested had been declassified and the rest had to be masked. Pigou said they were told that some of the records were protected and not available for release. The records protected were described as box 264, volumes 1-4, American Ambassadors 1968-1977.

Pigou said that two months later the department wrote to them stating that the archive was no longer the custodian of some of the documents pertaining to military information, as these had been "transferred to the country of origin" - Zimbabwe.

He said the department did not give any explanation for not providing the remainder of the documents requested.

Pigou said the grounds for refusing access to the protected records were that the disclosure "could reasonably be expected to endanger the life or physical safety of an individual".

It was also stated that the records contained information relating to military tactics in preparation for hostilities.

Saha expressed its concern that

the records were transferred despite the request to hand them over before the transfer. The trust also objected that no copies of the documents had been retained.

Pigou said access to information was central to meaningful participation in the democratic process. He also stated that he had reason to believe the documents were not transferred to Zimbabwe, as authorities there claimed they had not received any documents from South Africa.

But Stelwe Nkhosha, of the SANDF's legal services, stated that the documents were in Zimbabwe because they belonged in that country.

He said the files were official Rhodesian security force records from 1964 to 1978. They had been obtained unofficially by the SANDF's military intelligence division in 1980 and kept in the archives for safe-keeping.

"At the time the provenance of the Rhodesian files was not recalled ... The issue was discussed and all the relevant aspects, including security, were considered. It was decided to return them to Zimbabwe to prevent embarrassment to South Africa should their provenance become known," he said.

Nkhosha said no court can order the SANDF to have them returned from Zimbabwe.

It is believed that the application will be heard early next year.

Figure 2. Press clipping, Zelda Venter 'History Archive trust set for war with defence ministry' Pretoria News, 3 September 2007.

### Destruction of records: Missing, shredded or gathering dust?

The purge of public records by the apartheid state was one mechanism in a systematic endeavour to selectively write history and influence the memory of oppressed and oppressors alike. The routine destruction of sensitive records began well before the onset of the negotiation period from 1990. The destruction of records is routine practice in most governance structures and is accepted as legitimate, as states do not have the resources to retain all records. The TRC, in its final report, noted that 'the selection policies of some countries' national archives secure for archival preservation as little as 1 per cent of all state records', and that the State Archives Service<sup>129</sup> estimates that the policies implemented in South Africa between 1960 and 1994 secured the preservation of approximately 15 per cent of state records'.<sup>130</sup>

Despite the requirement to get authority from the Archives Commission from 1926 and subsequently the Director of Archives from 1979 to dispose of records, the security establishment<sup>131</sup> management culture was characterised by 'almost complete autonomy from the intervention of the State Archives Service'.<sup>132</sup> In 1978 all government departments received guidelines for the destruction of classified records outside the operation of the Archives Act, contrary to the State Archives Service standing order.<sup>133</sup> Harris notes that it was clear that state secrecy 'ensured that this programme was neither transparent nor accountable to the public'.<sup>134</sup> In 1990, with the likelihood of transition to democratic rule growing, the National Intelligence Service (NIS) adopted a more proactive approach to disposal by issuing guidelines that required the destruction of paper-based records unless there were very good reasons for retaining them, and mandated that security-relevant records were to be kept on microfilm or in electronic form where they were secure and could be easily erased. This process, sanctioned by cabinet and supported by legal opinions obtained by the State President's Office, NIS and the director general of education, was broadened into a systematic purging of all state records.<sup>135</sup>

The TRC investigation into the destruction of records found that blame could be apportioned to actors on all sides of the political transition: the State Archives Service, the director of archives, the African National Congress (ANC), NIA (and its predecessor, NIS), incumbent heads of the state, the cabinet, the South African Police and the State Security Council. The TRC also found that:

By May 1994, a massive deletion of state documentary memory within the security establishment had been achieved .... The motivation for this purging of official memory was clearly to prevent certain categories of record falling into the hands of the incoming government. The apartheid state was determined in this way to sanitise its image and protect its intelligence sources. It was also apparently intent on eliminating evidence of gross human rights violations.<sup>136</sup>

While the TRC investigation demonstrated that a substantial proportion of public records,

particularly those related to more sensitive issues, were destroyed, the limited resources of the TRC and its reliance on the cooperation of departmental officials meant that it was not able to provide a comprehensive account of what remained.<sup>137</sup>

The advent of PAIA provided an opportunity for the findings and recommendations of the TRC to be tested. When SAHA set about requesting records in 2001, it became evident that the well-documented destruction of records was to become an oft-quoted reason for refusal. The greatest evidence of concealment arose in the request for access to the military intelligence lists noted frequently throughout this chapter. This raised grave concerns about the extent of destruction and the secreting of information from the TRC that were likely to seriously skew the recording of events and the findings of the commission. Harris states:

It is not clear what impact this might have had on the Commission's work. Nor is it clear whether this was an isolated incident or part of a broader pattern of obstruction. Nevertheless, it raises serious questions about the degree to which the Commission was permitted access to the records it required in order to fulfil its mandate comprehensively.<sup>138</sup>

This exercise of skewing the recording of history continued well past the transition period. In 2004 DOD informed SAHA and the late Dr John Seiler, the requester whom it was representing, following a request, that it had transferred the entire group 4 collection to its 'country of origin ... in keeping with the archival principle that official governmental records remain the property of the originating country and its people'.<sup>139</sup> It was revealing that the department chose to disclose the transfer two days prior to Christmas, a time when the media and holiday goers would pay scant attention. In its answering affidavit to SAHA's application in the High Court seeking an explanation and the return of the documents, DOD alleged that it had discovered the origin of the collection in 2002 and, in a discussion among members of the Command and Management Information Systems Defence Intelligence, Military Legal Services, and Policy and Planning, the military legal representative expressed the opinion that the files should be returned to the Zimbabwean government to 'prevent embarrassment' to South Africa. DOD asserted that it 'consulted with the National Archivist',<sup>140</sup> but because the records were official Rhodesian documents obtained 'unofficially' by South Africa, it considered them to be outside the ambit of PAIA and the National Archives Act; an interesting, but entirely misconceived argument. If records collected through intelligence activities, whether overt or covert, escape the ambit of South African laws, then large collections of intelligence records both of the military and other intelligence-gathering bodies would escape the operation of any South African legislation.<sup>141</sup> The minister also argued that the transfer was in keeping with 'good archival practice', despite the fact that the office of the national archivist of Zimbabwe had not been informed of the transfer and was not aware of where the records were being kept.<sup>142</sup>

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The concealing and retention of security police files has also been of fundamental concern. During the TRC investigation into the destruction of documents, the joint investigative team discovered a collection of South African Police records that post-dated 1990 and included:

- 11 back-up tapes of the head office computerised database (the readability of seven of these tapes was confirmed); and
- Security Branch records that fell into three categories:
  - general files, all post-dating 1990;
  - computer data tapes containing data on anti-apartheid organisations, apparently captured in the 1980s; and
  - individual case records.<sup>143</sup>

While access was granted to the lists of provincial records, head office and regional records could not be located.<sup>144</sup> After some time, SAPS advised that the paper records had been found; however, due to a lack of 'intellectual control', it was impossible to retrieve them for public use. SAPS subsequently transferred them to the National Archives for processing.

It became apparent, nevertheless, that select records had disappeared since they had been viewed by the TRC: requests submitted based on the lists of provincial office files released to SAHA in 2002 were refused by the National Archives on the basis that the files in question could not be found.<sup>145</sup> SAHA consequently submitted a request for updated lists of security police files to ascertain what remained,<sup>146</sup> but was refused on the basis that the list contained personal information. During this time, SAHA raised the location of the data tapes again with SAPS, but the latter provided a number of affidavits stating that the records could not be found and staff did not recall having ever seen them. Disturbingly, an affidavit to this effect was provided by Commissioner Roos, who was consulted some three years previously regarding the files, but stated that he 'personally never inspected the files and [was] totally unaware of the existence of the data tapes'.<sup>147</sup> When SAHA requested a meeting with the national archivist regarding the refusal of access to security police lists and the location of the missing security police records and data tapes, he stated that:

I am informed that the discrepancies you have alluded to relate to the fact that the files we have in the National Archives were sent to us by the National Headquarters of Crime Intelligence. Apparently there are other fragmentary lists from other sources, but the SAPS has assured the National Archives that all files have been transferred.<sup>148</sup>

It is not clear, however, whether the records have actually been indexed since their transfer, nor whether the national archivist in fact knows what he holds, particularly given his

reference to being assured by SAPS that the records were transferred.

#### Box 6.6: NIA and Project Bible

NIA is suspected of concealing records following a request for access to records described as Project Bible. These records were referred to in the ANC's Daily News Briefing of 25 November 2003, in which it was stated that former ANC intelligence commander Mo Shaik declared that he had handed over a secret database containing information about 888 suspected apartheid government spies that was compiled as part of the ANC's Project Bible and aimed at combating government infiltration of the then liberation movement.<sup>149</sup> When the request for these records was refused in the first instance and then on appeal, the minister of intelligence, Ronnie Kasrils, stated that he had 'been assured by the NIA that the information you requested is not in the possession of the NIA',<sup>150</sup> and failed to advise whether it was in fact in his possession or whether SAHA should transfer the request.<sup>151</sup>

The policy and practice of the apartheid state, however, leading up to, and in part following, transition to democratic governance in 1994 resulted in the massive disposal of records characterised as sensitive and of particular importance for and interest to the newly liberated citizenry. However, these case studies provide grounds for questioning the status quo; that is, that the majority of pre-1990 records were subject to furnaces or shredders and were lost to contemporary requesters. While the case studies do not necessarily provide answers, they raise the question: were and are records being concealed, or is a lack of resources responsible for administrative inefficiency and restrictions on access? Information officers are only required by PAIA to provide an affidavit stating what steps they took to locate requested records. They are therefore not required to provide an explanation of why records could not be found or whether they have disappeared, and thereby implicate the body in negligent or wilful destruction. This is a particularly problematic limitation on access, as requesters are often completely reliant upon those of whom requests are made to disclose the existence of records.

### Records management

It is commonly thought that dictatorships or oppressive governance structures such as the apartheid government are rigorous and fastidious record keepers, but that democracies tend to take a more lackadaisical approach. While we know that extensive collections of records regarding individuals were collated by the apartheid government, it cannot be said with any certainty that it was rigorous in all areas of governance. It is apparent, however, that since transition, records management has been poor. This is apparent even in bodies, such as SAPS, that fervently implement PAIA; in response to a request for access

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DEPARTEMENT VAN JUSTISIE/DEPARTMENT OF JUSTICE

THE SECRETARY  
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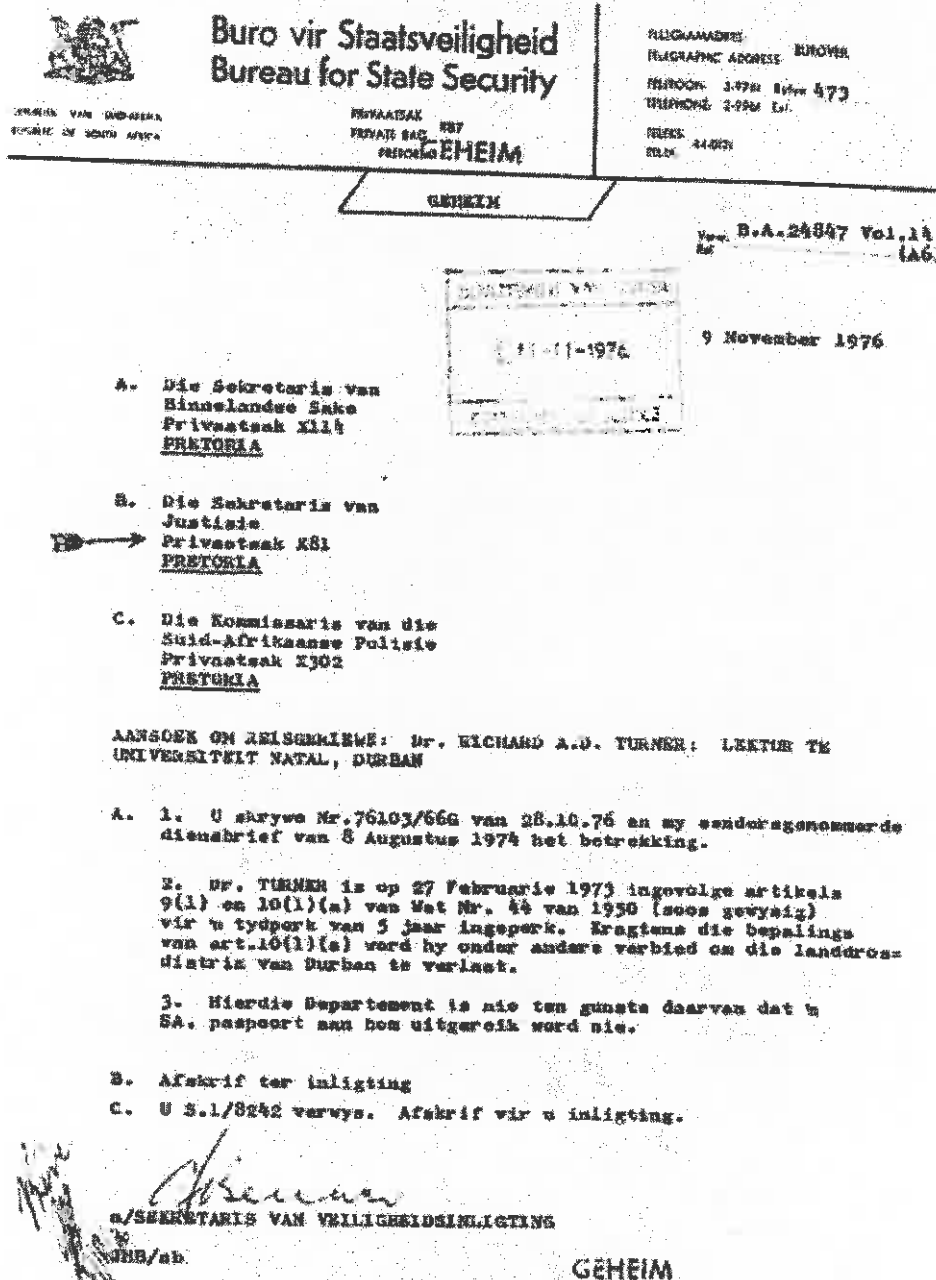
RESTRICTION : R A D TURNER

1. Turner is subject to group (c) restrictions in terms of which he is inter alia prohibited from participating or assisting in any manner in the preparation of any document in which any form of state or any principle or policy of the government of a state is propagated, defended, attacked, criticised, discussed or referred to. He is also debarred from giving educational instruction to any person other than his children. (A, par. 1(a) and 4(f)).

2.1 Prof. Stock, Principal of the University of Natal has now written to the Minister that his university is considering the appointment of Turner, who is still a member of the university's staff, as a supervisor of a research project and of the resultant thesis which will be prepared by Mr R de Kadt, a postgraduate student and lecturer in the department of History and Political Science at the university. Prof. Stock contends that it is desirable for both the University and Mr De Kadt that the latter should study at the said University, and that Turner is the "most suitable person and, indeed, the only person" within the University capable of supervising the said project and thesis. Prof. Stock continues as follows:

Figure 3. Opening page of 'Secret' document, dated July 1977, from the files of the Directorate of Security Legislation at the Department of Justice regarding request to allow Dr Rick Turner to supervise a student's research project. Turner, a Durban based academic whose political involvement had led to various restrictions and banning orders in the 1970s was assassinated at his home on 8 January 1978.

## Applying PAIA



**Figure 4.** Recommendation marked 'Secret' from the Bureau for State Security (aka BOSS) to the Secretaries of States for Foreign Affairs and Justice and the Commissioner of the South Africa Police recommending that Dr Turner's application for a passport be refused, which it duly was.

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to records relating to Operation Crackdown, a highly publicised operation targeting organised crime, SAHA was informed that numerous records at all levels of SAPS — that is, area, provincial and national levels — could not be found despite having been created in 2005.<sup>152</sup> Similarly, upon a request for access to records relating to the repatriation of the remains of Saartjie Baartman, the Department of Arts and Culture acknowledged that a number of key documents had been misplaced.<sup>153</sup>

There are two primary pieces of legislation that impose duties on public bodies relating to record keeping.<sup>154</sup> PAIA provides that each public body must produce and submit a manual to the SAHRC that sets out, among other things:

- a description of its functions and structure;
- sufficient detail to facilitate a request for access to a record of the body, including a description of the subjects to which records relate and the categories of records held on each subject; and
- the latest notice regarding the categories of records that are available without the need to invoke PAIA.<sup>155</sup>

Manuals can play a vital role in assisting requesters to understand the functions and structure of a body and the categories of records collected; however, the lack of implementation of this requirement has been problematic (see Box 6.7).

In addition to PAIA, NARSA imposes requirements on public bodies and imparts power to the National Archives as the overseer of records management. The Act allows the National Archives to receive and comment on filing plans submitted by public bodies;<sup>156</sup> these filing plans provide lists of categories of records held by the public bodies and are more detailed than PAIA manuals. The Act also requires most public bodies to transfer records older than 20 years to the National Archives for retention and public access.<sup>157</sup> By agreement between the national archivist and the minister of a public body, records may be withheld from public access or retained by the department despite being created more than 20 years ago.<sup>158</sup>

A more detailed breakdown of records is provided by lists and indexes specific to collections, which may describe individual documents or the subject matter of groups of records. These lists, therefore, go a step further than filing plans in providing guidance on records that are available and may be requested. The use of lists, which ordinarily describe more discrete collections of records, has also saved considerable resources of both requesters and recipients of requests. SAHA has used lists of, for example, security police files (discussed above),<sup>159</sup> Security Legislation Directorate files<sup>160</sup> and Correctional Services files<sup>161</sup> to submit in excess of 360 requests<sup>162</sup> for access to personal files<sup>163</sup> on behalf of individuals or in its own right.<sup>164</sup> Had these lists not been available, requesters would have submitted requests blindly, increasing the number of requests submitted and



the burden on recipients of requests to consider them, irrespective of whether or not a file existed. While ideal, it is inconceivable that every public body has the resources to produce and publish lists of records for each of its collections, or that it should be required to do so. As noted in Box 6.7, the inclusion of a full filing plan within the PAIA manuals would significantly facilitate access to records. I would even submit that PAIA's requirement to provide as much detail as required to facilitate requests for information compels such publication.

The extent to which bodies are able to manage record keeping is, in contemporary times, largely determined by the extent to which bodies manage the flow of electronic information. There nevertheless appears to be resistance to the implementation of electronic record-keeping and dissemination practices within government. SAHA reported in 2001 that 'only a sliver of the state's electronic records resources is under any form of archival control' and 'an effective programme for preserving the long-term electronic memory of the state remains out of reach'.<sup>165</sup> In 2005 SAHA reported that, following its commissioned research on access to digital records, a DIO stated that there is no requirement for government bodies to keep electronic records, nor should they be expected to do so.<sup>166</sup> While roughly half of the departments were in the process of implementing or piloting electronic records management systems, in one case this was driven by the information technology section of the department without input from information and records managers.<sup>167</sup> In 2001 the National Archives released guidelines relating to the management of electronic records, and was apparently working with the State Information Technology Agency to develop government-wide standards for electronic record keeping.<sup>168</sup> A regional conference of archivists held in Dar es Salaam in June 2007<sup>169</sup> repeatedly raised the need for the adoption of electronic records management policies; however, the South African National Archives was not represented and appears to have done little since the release of the guidelines in 2001.

What are the remedies to these limitations? The TRC in its final report recommended that 'a comprehensive analysis by independent researchers be undertaken into both the scope and content of the remaining archival holdings of the intelligence services of all divisions of the security forces'.<sup>170</sup> Once completed, the TRC recommended that these documents be subject to existing archival legislation and transferred to the National Archives. Similar specific recommendations were also made with respect to the archival holdings of the apartheid SADF.<sup>171</sup> While the TRC limited its recommendations to apartheid records, an information audit covering all historical and contemporary records is necessary, given the poor implementation of records management policies since transition.

This would serve three broad purposes. Firstly, it would assist public bodies to categorise records and publish detailed lists of information that may be voluntarily disclosed without resort to PAIA.<sup>172</sup> While bodies are required to publish such lists in their manuals, the limited detail published at present results in the submission of requests that should

require a phone call or email at most. Secondly, it would provide the means to create and provide greater access to finding aids for collections of records held, minimising the resources required to be expended by public bodies in locating records subject to requests. Thirdly, it would also assist public bodies to utilise their own records, in particular historical records, in the formulation of policy. The TRC's recommendation should therefore not be limited to the former security apparatus and the SADF, and should be extended further to apply to all records held by all national, provincial and local governments.

#### Box 6.7: PAIA manuals

The management of records in the early stage of their life cycle is inextricably linked with and has serious implications for the retention and destruction of records, and therefore goes hand in hand with management of and compliance with an access to information regime. In recognising this, PAIA requires each public body to develop, publish and submit to the SAHRC a manual outlining its operations and categories of records.<sup>173</sup> These manuals can play a vital role in assisting requesters to understand the functions and structure of a body and the categories of records collected. They do have their limitations, however.

PAIA and its regulations fail to provide any direction for compiling the manuals, particularly in relation to the requirement to provide detail on the records held. Despite naming the relevant section 'Index of records', PAIA does not require the body to provide an index of records, but a description of 'subjects' and 'categories'. While it requires a description sufficient to facilitate the submission of a request, the words are imprecise, have been construed broadly and have not always assisted requesters to identify more specifically the types of records sought, their possible location within the body or the activity to which they might relate. The lack of implementation has also been problematic. The publication of manuals has been limited,<sup>174</sup> few are electronically available<sup>175</sup> and they are not regularly updated, despite changes in the allocation of responsibility for PAIA. The manuals have therefore had limited effectiveness in assisting requesters to locate records.

Both Gould and Pollecut note in their chapters in this volume that the use of lists rather than manuals in identifying records played a key role in finding relevant information. Pollecut states that, while in her particular case gaining access to indexes of specific bodies of files transferred the burden of finding pertinent information to the researcher, it also assisted in formulating more specific requests and provided an opportunity to peruse and closely examine records and uncover valuable documentation that may otherwise have been overlooked. Gould queries whether the use of lists by Sasha Suransky (see chapter 4, Box 4.1) compared with SAHA's subject-based approach led to the release of records where SAHA was refused on the basis that nothing could be found.

The importance of the availability of more detailed description is demonstrated by requests submitted to SAPS and DHA pursuant to a project examining the history of migration policy and practice in South Africa.<sup>176</sup> Just prior to the commencement of the project, SAHA submitted a request for access to the filing plans of all national government departments to enable requesters to identify potential records relevant to the subject forming the request.<sup>177</sup> The filing plans, compiled by each department and submitted to the National Archives for comment,<sup>178</sup> provide a more detailed breakdown of the categories of records held by the bodies than PAIA manuals.

In 2006 SAHA obtained access to the SAPS file plan, which it used to draft a request for the inspection of a number of categories of files.<sup>179</sup> A project researcher was therefore able to examine the files and identify records relevant to the research. Consequently, around 5,500 pages were released. While SAPS expended substantial resources and time in preparing the records, it may have expended considerably more had the requests been drafted by subject and not by file location, while SAHA was also likely to obtain a smaller and less relevant collection of records.

By contrast, DHA did not provide access to a file plan, and a large number of requests were submitted that identified the records by subject.<sup>180</sup> It is apparent from the long delays in dealing with the requests and the numerous phone calls seeking clarification regarding progress that the department has struggled to understand what records are sought and move beyond identifying who is responsible for each of the requests.<sup>181</sup> As a result, some 11 months after the submission of the first batch of requests and following the submission of an internal appeal, DHA was only beginning to deal with the substantive issues related to them.<sup>182</sup> Given the obligation to produce a filing plan and submit it for comment to the national archivist, the inclusion of a full filing plan within the PAIA manual would facilitate access.

## Culture and transparency

I have said that dictatorships spawn rigid record-keeping practices, and democracies a lackadaisical approach. But to what end? Rigid practices mean greater control; greater control means an increased ability to determine who knows what and when. The secrecy of the apartheid state was no secret. Clandestine operations and informers permeated both sides of the system — the oppressed and the oppressors. It was for this reason that access to information during this period was reserved solely for those who, through covert conduct, sought intelligence necessary to either suppress or resist. This culture of opaqueness and secrecy, after decades, must have become an inherent feature of the way in which government structures and liberation movements operated. What became of this culture, then, when transition to democratic governance was achieved through legislated equality and voting rights? Did the shift in the form of governance lead to a shift in mindset and a commitment to transparency?

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I have stated that it was apparent soon after the enactment of PAIA that implementation was severely hampered. In its 2002/03 report, the SAHRC stated that the failure to implement the Act 'can only be attributed to the lack of commitment to the advancement of this important constitutional right'. In its submission to the Human Rights Commission, SAHA and the Public Service Accountability Monitor wrote:

Effective and meaningful implementation is hampered by the fact that South Africans have been shaped by generations of an absence of the right to information .... Freedom of Information, as an idea and as a culture, has not yet taken root in the country. South Africans have neither the expectations nor the skills to ensure that PAIA is utilised optimally .... By and large existing officials have simply been given additional responsibilities under the Act. Few have experience and expertise in record keeping.<sup>183</sup>

There are four principal features evidencing this lack of shift. Firstly, bodies have failed to establish infrastructure required to implement PAIA obligations. DHA, for example, does not have a PAIA unit or budget, and in every instance relies on Legal Services to provide opinions on access; the deputy directors or their delegates to locate the records (in conjunction with information management, where necessary) and make a decision on access; and the director general to approve that decision. Following the submission of a number of requests over the period 2004–07, DHA lost requests more than once; was unable to provide details of the delegated official responsible for processing the requests; and was, until late into 2007, unable to provide any substantive responses. Needless to say, SAHA has only had six substantive responses to the 92 requests submitted since 2004.<sup>184</sup>

DOD also suffers from a lack of resources and infrastructure, despite the channelling of requests through its Documentation Centre: with over five million records and few permanent staff, it suffers from an overload of requests and an inability to devote considerable resources to conduct more efficient searches. When SAHA, in response to what it perceived to be an inappropriate response to a request, queried why staff do not phone SAHA to discuss problems with requests, the director claimed that, because DOD was not allocated a budget specifically for PAIA requests, staff were required to deal with them outside their normal work hours, and unless SAHA wanted a phone call at six o'clock in the morning, they would not call. The current waiting period for responses to requests is around two years.

### Box 6.8: The NIA and South African Secret Service exemption

In 2003 the minister of justice granted an exemption to NIA and the South African Secret Service from compiling a PAIA manual that would set out their functions and categories of records, in terms of section 14 of the Act.<sup>185</sup> The ramifications were concerning: the exemption allowed these bodies to maintain a level of secrecy that PAIA aimed to surmount and would make it difficult for requesters to understand

the categories of information that may be available. The exemption has contributed to the difficulties in challenging NIA refusals on the ground that records could not be found or do not exist. When SAHA challenged the refusal of access on the basis that records do not exist, NIA officials stated that the records of NIA's predecessors, the Bureau of State Security (BOSS) and NIS were routinely destroyed through the period 1960-90, and proactive destruction from 1990 until the establishment of NIA left it with little more than boxes of microfilm that have no indexes. In a letter to SAHA dated 17 May 2006, NIA stated:

BOSS/NIS records were subjected to a routine destruction process which began in 1982 in terms of the National Archives Act. That led to the State Archives Service investigating such destruction not only in the former BOSS/NIS but also in the following bodies: SAPS, SADF (particularly military intelligence), Department of Prison Services, and the Security Legislation Directorate of the Department of Justice. As stated in the TRC Report, Vol. 1 Chapter 9, par. 60+61, implementation of the policy gained a momentum in 1992, but reached its most intense levels in 1993. At the same time the mass destruction of records took place, embracing all media and all structures. The result of the destruction was a massive purging of the NIS's corporate memory.

It is difficult to accept that all former intelligence records were destroyed. While it is clear that large amounts of records were destroyed, the magnitude of the boxes of microfilm is not clear, and the fact that these records are not indexed makes it difficult for both requesters and NIA staff to establish what remains. NIA refuses to provide an affidavit setting out the steps it took to locate records, on the basis that it is exempted from producing a PAIA manual setting out its structure and the categories of its records, and that to reveal the steps taken to search for the records would jeopardise the security of its intelligence. It argues that the requests are too broad and vague, and that SAHA should provide it with more specific information to assist it to locate files.

In a meeting in June 2006, NIA argued that the requests are too broad and vague, and requested that SAHA provide it with more specific information to assist it to locate files. However it failed to acknowledge that information in manuals, filing plans and affidavits assists requesters to understand what records it does and does not have and to draft more appropriately future requests. Given its position concerning the provision of affidavits setting out the steps taken to locate records, it is not apparent to what extent the microfilm records are searched upon submission of a request. SAHA submitted a request for access to intelligence files concerning H       Passtoors, an anti-apartheid activist who was detained in South Africa and released pursuant to negotiation between the South African and Belgian governments. SAHA had already obtained large volumes of Security Legislation Directorate and Correc-

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tional Services records from the National Archives, but NIA stated that no records could be found.

Secondly, many bodies have not appointed DIOs who are competent to ensure compliance with PAIA. These officials can in effect pose a brick wall, particularly where their superiors continue to refer complaints and appeals to them. For example, DOJ, which has dedicated infrastructure and staff, demonstrates considerable difficulties in compliance, largely due to the incompetence of the official to whom the director general has delegated his responsibility. Pigou outlines numerous disputes, noting that in all cases taken to the High Court and following the intervention of counsel, DOJ settled and granted access with costs. This is largely because the DIO fails to demonstrate the capacity for reasoned thought upon receipt of requests, and uses a template letter to respond in which the subject header is changed and reasons for refusal are removed if not used in a particular letter. As a result, records that are of a substantially similar character to those released through litigation, such as the amnesty applications of Eugene de Kock, continue to be refused. The director general has ignored requests to meet and the minister's office fails to evidence involvement or intervention at any stage of the request process. SAHA submitted a complaint to the SAHRC regarding these issues, and the minister of justice responded defensively and refused to attend a mediation.

### Box 6.9: The Department of Labour

In 2005 SAHA requested access to the filing plans of all national departments to assist it to more appropriately frame requests and build on the use of PAIA manuals. The request, once transferred to all departments by the National Archives, had a mixed reception. Some departments provided access to their filing plan, some unsurprisingly advised that their plans were so outdated as to make them unusable and others simply ignored the request. The response of the Department of Labour, however, stood out.

Upon receipt of the request, the department phoned me to query it and asked why I wanted the information. I responded that I was not obliged to provide a reason for the request, but nevertheless was happy to confirm by email that I aimed to use the plan to assist with future requests. A few days later, I received another phone call from the department querying why I wanted the information. I pointed out that I had already discussed this with someone else within the department and I was not obligated to provide the information. The official of the Department of Labour stated that in fact I was. When I stated that the PAIA form, which is prescribed by regulation, does not contain a section that requires me to state the reason for the request, unlike the form for submission to private bodies, and the Act is silent as to this apparent requirement,

he responded that 'the form is wrong'. When I asked to whom I was speaking, he stated 'the head of Legal Services'.

Thirdly, a number of bodies demonstrate an unwillingness to engage in any facilitative communication or relationship with frequent requesters such as SAHA. SAHA's relationships with public bodies have evolved over time, leading to an understanding of their respective *modi operandi*. The evolution of these relationships has, in some cases, led to a greater exchange of information concerning the availability of records and the pressures from various quarters within bodies regarding access. SAHA enjoys a good relationship with SAPS, which has led to increased communication regarding requests, greater access to records and, as a result, greater trust than that enjoyed with other bodies. Indeed, as a result, SAHA has not litigated against SAPS. While SAHA has made considerable effort to establish a similar relationship with the National Archives, suspicion of and disregard for SAHA's motives by the national archivist has led to a fluctuating relationship; SAHA consequently questioned the ability of the national archivist to exercise his powers and to execute his PAIA obligations (see Box 6.10).

#### Box 6.10: National Archives

The relationship between SAHA and the national archivist from 2001 to 2004 provides an interesting case study of souring relations between a small, vocal and relatively well resourced NGO and a senior official who did not take well to being challenged, and apparently believed that SAHA was pursuing a sinister agenda. The events occurring over this period might have been avoided if the relevant state departments and individuals concerned had adopted an open and constructive policy of engagement and a commitment to communicate and seek resolutions to problems. Instead, from SAHA's perspective, the intended spirit of the law was abandoned in favour of resistance and conflict. While I will resist going into too much detail, a few key events are worth noting.

The relationship with the national archivist soured quite early on, when in October 2001 SAHA publicly castigated the National Archives for failing to take decisions on any of the requests submitted by SAHA in May that year.<sup>186</sup> The relationship deteriorated further during 2002 in a public spat and litigation around the missing 34 boxes. The following year, in January 2003, SAHA released a report detailing experience of using PAIA that contained criticism of the National Archives' failure to comply with the Act in terms of timelines and the application of exemptions.<sup>187</sup> As a result, the national archivist submitted a formal complaint to SAHA's board of trustees about its director, alleging that the latter had repeatedly made misleading and negative public statements about the National Archives, and questioning the director's conduct and motives.<sup>188</sup> When the board of trustees concluded that it was satisfied that the director

was 'fulfilling his duties and responsibilities to the highest professional standards',<sup>189</sup> the national archivist accused the director of disrespecting due legal process<sup>190</sup> and of being unprofessional and unethical.<sup>191</sup> Once again, the board of trustees defended its director, and now raised its own concerns about the tenor of the accusations made and the fact that allegations were being raised in other government circles. The board challenged the national archivist to 'state [his] views in public so that we can defend the organization against accusations that are damaging to its reputation'.<sup>192</sup>

After a period of silence, the national archivist published an open piece in *This Day* newspaper in which he accused SAHA of an exaggerated response to the 34 boxes case and stated that the tempo of the internal debate has so far done little to encourage balanced and professional discussion of these issues.<sup>193</sup> SAHA's response in the following edition accused the national archivist of obfuscation and maintained that the organisation was simply exercising its rights in terms of PAIA. While the national archivist had accused SAHA of demanding 'instant access', SAHA pointed out that while the legislation required a response within 30 days, it had been waiting for almost a thousand days. SAHA reiterated its fundamental concern that time-consuming and costly litigation could have been avoided if government departments, including the National Archives, had simply done their job.<sup>194</sup>

During this dispute, the national archivist noted in a recommendation to the minister of arts and culture regarding three PAIA requests made by SAHA<sup>195</sup> that

many of the delays in responding to [SAHA's] applications have been occasioned by extensive legal research into whether a 'restraint of trade' can be applied in [the director's] case as most of his requests are motivated by an intimate and privileged knowledge of documents in the Archives acquired while in the public service.<sup>196</sup>

The minister of arts and culture at that time was apparently displeased with the national archivist's approach to dealing with these requests. In approving access to records on internal appeal, she noted by hand on the recommendation coming from the director general,

I really do not appreciate the reason why the CD/NA [i.e. the national archivist] did not get ... advice from the very beginning. The PAIA is a serious piece of legislation which requires a legal person to implement .... The CD/NA must not put me in such a position.<sup>197</sup>

The national archivist subsequently determined to espouse a policy of non-engagement with SAHA.

In July 2003 the National Security Archive in the United States, an independent archive housed at the George Washington University, visited South Africa with the intention of meeting with a number of agencies to discuss mutual issues, and sub-



sequently released a report that commented on the difficulties SAHA was facing in accessing information from the National Archives. The national archivist, who did not make himself available to the National Security Archive staff during their visit, was apparently angered that they had reported such comments without his rebuttal: he wrote to the National Security Archive stating that 'I have adopted the policy of no longer responding to the strident and repetitive criticisms of the National Archives by SAHA'.<sup>198</sup>

Although the residue of these disputes remains, efforts to forge a more constructive and collegial approach have been undertaken. This has not, however, resulted in an improved access to TRC records or apartheid era security and intelligence records, or an improved relationship. The national archivist in many cases fails to respond to correspondence. In the case of requests that cannot be delegated to his more than helpful staff, the delay in making decisions is still lengthy. We noted above the response of the national archivist to a request for a meeting in July 2007 regarding access to the security police lists and the missing security police files and data tapes that SAPS alleged were transferred to National Archives in 2003, in which he ignored the request for a meeting and stated that he had been assured by SAPS that he had all the files.

Without political will, or a proactive effort by the national archivist to champion many of the issues around record keeping, the retention of apartheid era records and the transfer to National Archives of records more than 20 years old, in particular cabinet records, a significant shift in the internal cultures of other national bodies cannot be achieved. The national archivist has claimed on numerous occasions that he has no power and that his positioning within the Department of Arts and Culture rather than the Presidency limits perceptions of his authority.<sup>199</sup> While there is some merit in his argument, these oft-repeated excuses are becoming tiresome in the face of numerous complaints, requests to intervene and notifications of concerns about the destruction of significant collections of records. One wonders what in fact he is empowered to do if this is not his domain.

The fourth, and perhaps strongest, indicator of a lack of any shift in culture in public bodies is the utilisation of a long-employed method of deflection by government: silence. The Presidency and the Departments of Minerals and Energy and Trade and Industry have mastered this approach; without making repeated phone calls, it is rare to get any kind of response at all.<sup>200</sup> NECSA and the National Nuclear Regulator (NNR) have also adopted this approach, despite limited attempts to engage through meeting. NECSA was unperturbed by complaints to the public protector and the SAHRC (although this is not surprising, given their lack of action): in its responses it failed to acknowledge its agreement to provide the requested records by the end of 2005, and even went so far as to argue that 'NECSA went beyond the requirements of the Promotion of Access to Information

Act'.<sup>201</sup> What it was in fact doing at that time was, some four years after the enactment of PAIA, organising its records in a manner that allowed it to comply with its legislative obligations. When SAHA submitted an additional batch of requests in 2007, it failed to get any acknowledgement at all. NNR adopted a similar approach in failing to respond until Earthlife Africa blew the whistle on a number of issues. In 2006 SAHA was granted access to a limited amount of information pertaining to four requests; however, later requests were ignored, and at the time of writing 22 are outstanding.

#### Box 6.11: The South African Police Service

SAPS has established a PAIA unit with committed staff and has gone to great lengths to assist requesters. The national DIO is tasked solely with managing the implementation of and compliance with PAIA, and has a dedicated team of staff to assist her. Both she, and Commissioner Geldenhuys, to whom she reports, express the importance of ensuring that members of the public have access to information. SAHA has therefore been able to establish a communicative and facilitative relationship that has meant that SAHA has not submitted any internal appeals and has not been required to appeal to the courts.<sup>202</sup> This is largely due to the ability to request the reconsideration of refusals and to negotiate access with officials who are tasked solely with managing requests and who take their obligations seriously in the early stage of the process. While the exemplary performance of SAPS has been limited by its failure to ensure the retention of apartheid era records, in particular data tapes and security police records and the records relating to Operation Crackdown, a strong, dedicated team for facilitating the implementation of PAIA has gone a considerable way toward ensuring that valuable materials are accessed.

These four features — infrastructure, competence of officials, relationships and failures to respond — demonstrate that there has not been a substantial shift in the mindset of those with public power from secretiveness to transparency. Understanding the lack of shift from a long history and culture of secrecy therefore assists us to understand why, in some cases, it seems that implementation PAIA remains in the starting blocks. This lack of shift must derive from the top, from the ministers and other heads of bodies, from a failure to prioritise compliance, allocate a dedicated budget and appoint qualified staff. It is a sorry (but true) state of affairs when the president of the country himself makes public statements about the need to prevent activist civil society organisations from accessing information and exercising their right to free speech. Without political champions, the importance of access to information in fighting for transparency and democratic governance will not be demonstrated across all layers of the executive.

## Conclusion

In concluding, I will start from the end by saying that the culture of secrecy pervading public bodies is the primary limitation on the right of access to information. It informs resource allocations; the enactment of facilitative regulations; the priority accorded to the implementation of procedures to create, manage and retain records and facilitate access; the desire of bodies to be seen to be transparent rather than defensive; the appointment and training of competent staff; and the adoption of narrow interpretations of restrictive provisions rather than broad and blanket applications. It has, therefore, a trickle-down effect that, without intervention not only from the top down but the bottom up, is and will continue to be the wall between the government and those whom it governs.

The effects of an ingrained culture of secrecy can be seen across two primary areas. While PAIA is lauded as a comprehensive and progressive enactment, it is clear from the case studies considering the application of the definitions, the exemptions and the public interest override that the Act is being used as a method to broaden restrictions on access rather than narrow the extent to which the constitutional right can be limited. This plays out in a number of ways.

It first results in complete silence: a complete failure to actually acknowledge, process or respond to requests. Secondly, it results in a broadening of the interpretation of categories of information to which exemptions apply, and a reduction in the extent to which harm must be demonstrated. This also leads to the limited exercise of discretion in favour of access. Thirdly, it results in the provision of limited information about which records relate to requests and how exemptions apply to them. This blanket application makes the situation particularly difficult for requesters, who are often entirely reliant upon bodies to disclose the existence of records and to determine whether records relevant to their request actually exist and are worth pursuing, whether the exemption/s cited by the body actually apply and whether there are grounds for challenging them. Fourthly, it results in a failure to consider the merits of requests prior to the threat of appeal or litigation.

Another area in which we can see the effects of this ingrained culture is in the application of intersecting legislation, where apartheid enactments influence and restrict access, and enactments providing for greater access rights are ignored. A causal factor influencing the capacity for intersecting enactments to impact upon PAIA in this way is the failure of the minister of justice to issue regulations listing enactments that supersede, and are superseded by, PAIA.

The legislation itself, however, has some fundamental limitations. It fails in some instances to limit the extent to which exemptions may apply, for example, in the instance of the exemptions regarding confidentiality; to permit inquiry into the legitimacy of the intent behind the agreements; or to limit the duration of the agreement or confidentiality. This may have the effect of permitting parties who wish to avoid disclosure of information that may embarrass bodies or expose them to criticism to withhold such information,

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even though requesters would otherwise have a right of access to it. It also, as we have seen in the case of the agreement between South Africa and Israel that was entered into in 1975, permits ongoing reliance on agreements without providing requesters with the power to question the extent of these agreements' application or their present applicability. It also limits, to an unnecessary degree, the circumstances in which the public interest override will apply. But, more importantly, it fails to provide adequate enforcement mechanisms that are accessible, efficient and cost effective; that will provide (where necessary) a means for urgent determinations; and that will provide greater leverage through which to compel bodies to apply PAIA appropriately.

The broader implication, the ability to limit the exercise of a range of other civil and political, social, economic and cultural rights, and merely rely upon oft-repeated rhetoric about resource limitations and quotations of statistics, is not yet realised by the broader public, or even a broader collection of civil society organisations working outside of traditional accountability and transparency rights. This is the challenge for access to information: to bring it to a wider audience and activism, and to push for reform on a larger scale, rather than limit it to the activities of the three organisations in South Africa at present who are the primary users of PAIA. The other, equally important implication, the ability to skew the recording of history and its events — and by history here I mean what happened yesterday and further back in time — is what I perceive as the key question for archival discourse. The use of access to information mechanisms has a key role to play in combating the selectivity of archival processes and the hand of the influential in tailoring and tampering with the picture that may be formed by record collections.

So what do we need to fix this right? Legislative amendment. Political champions. The systematic declassification of records. An archival audit. An independent and proactive information commission. The promotion of the act across all levels of governance. There is no one answer. As civil society organisations, litigators, activists and requesters, we can only continue to pursue requests, lobby government and promote the importance of the right of access to information.

**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG**

**CASE NO:**

In the application of:

**THE SOUTH AFRICAN HISTORY ARCHIVE TRUST**

Applicant

And

**THE MINISTER OF JUSTICE AND  
CORRECTIONAL SERVICES**

First Respondent

**THE DEPUTY INFORMATION OFFICER:  
DEPARTMENT OF JUSTICE AND  
CORRECTIONAL SERVICES**

Second Respondent

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**CONFIRMATORY AFFIDAVIT**

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I, the undersigned,

**TRICIA ERASMUS**

do hereby make oath and state the following:

- 1 I am an adult female attorney in the employ of Cliffe Dekker Hofmeyr Inc.
- 2 The facts hereinafter contained are within my personal knowledge and are, to the best of my belief, true and correct.
- 3 I have read the founding affidavit deposed to by Catherine Moira Kennedy and I confirm the correctness thereof in so far as it relates to me.

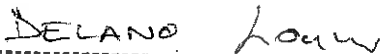
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T.E. D


  
 TRICIA ERASMUS

I HEREBY CERTIFY that the deponent has acknowledged that she knows and understands the contents of this affidavit, which was signed and sworn before me at **SANDTON** on the 1<sup>st</sup> day of **SEPTEMBER 2014**, the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.



KOMMISSARIS VAN EDE  
COMMISSIONER OF OATHS EX OFFICIO

AMP/RANK   
CONSTITUTIONAL COURT / KONSTITUSIONELE HOF S.A.  
1 HOSPITAL STREET  
CONSTITUTIONAL HILL  
BRAAMFONTEIN 2017

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Commissioner of Oaths  
Ex-Officio / Practising Attorney R.S.A.


  
 Certified True Copy