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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 Department¹

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,

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'.² 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.³

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

It is over eight years since the TRC handed its final report to then President Mandela,⁵ and four years since the Codicil was handed to his successor, President Mbeki.⁶ Between 1998 and 2003, over 3,000 cubic metres of TRC records were transferred from Cape Town to Pretoria.⁷ 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.⁸ 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,⁹ 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)¹⁰ 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.¹¹ 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.¹² Attached to the correspondence was a formal request for a copy of the transfer list.¹³

This request was subsequently refused on the basis that the transfer list could not be found within the department.¹⁴ 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.¹⁵

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.¹⁶ 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.¹⁷ In early November the National Archives informed SAHA that access to non-classified records relating to the request would be granted.¹⁸ 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.¹⁹ 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.²⁰ 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.²¹

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.²² The Department of Arts and Culture (DAC)²³ 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.²⁴

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.²⁵ 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'.²⁶ 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.²⁷ 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.²⁸ 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.²⁹ The report was accepted later that month, but, despite its undertakings, DAC did not provide the documents as agreed.³⁰ 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.³¹

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.³²

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.³³ 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.³⁴

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'.³⁵

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-

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

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.³⁶

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

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 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 Archive, 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 collated 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.³⁷ 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.³⁸

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'.³⁹ Meanwhile, DOJ spokesperson Paul Setsetse said that NIA held the documents.⁴⁰ 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.⁴¹ Resorting to a play on words, a senior NIA official would subsequently

explain that the documents were ‘technically in the possession of DOJ, but physically held by NIA’.⁴² 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.⁴³

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.⁴⁴ 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’.⁴⁵ 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’.⁴⁶ 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).⁴⁷ No detail was provided about their whereabouts or as to why the documents were being treated separately from the main TRC archive.⁴⁸ 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’.⁴⁹ A senior DOJ official explained that ‘the TRC stuff may be locked away in one of our buildings, but only NIA has the key’.⁵⁰ The whereabouts of the documents remained unknown.

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.⁵¹

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'.⁵² 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.⁵³ 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.⁵⁴

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.⁵⁵ 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.⁵⁶

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,

claiming that they could not be found.⁵⁷ 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 2002.⁵⁸ 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.⁵⁹ 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.⁶⁰

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.⁶¹

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.⁶²

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.⁶³ 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.⁶⁴

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.⁶⁵ 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.⁶⁶ In terms of the settlement with DAC, SAHA was given copies of National Archives records documenting the custody of the sensitive records.⁶⁷

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 2003.⁶⁸ On the eve of the first handover, SAHA warned that if

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.⁶⁹

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.⁷⁰ As the TRC process had failed to lift the lid on the informer issue (a concern that resounded in the post-TRC period),⁷¹ interest in this particular file was considerable. SAHA was not confident, however, that this listed document would be released;⁷² DOJ subsequently denied there was such a list.⁷³

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.⁷⁴ SAHA hit back, accusing the state of reneging on three access agreements and of consistently reneging on its legal obligations.⁷⁵

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.⁷⁶

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.⁷⁷ The department strongly defended the non-disclosure of the files and the related classification processes it had embarked on.⁷⁸ 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 2002.⁷⁹ 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.⁸⁰ 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'.⁸¹

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 512.⁸² 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.⁸³ 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.⁸⁴

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 2005.⁸⁵

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.⁸⁶

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.⁸⁷

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,⁸⁸ Pro Jack⁸⁹ and Alan Kidger⁹⁰), gun running, investigations by General Pierre Steyn,⁹¹ 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.⁹²

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.⁹³ 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.⁹⁴ Interestingly, in some of these matters, the director general argued that the information had been provided to the TRC on a confidential basis.⁹⁵ 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.⁹⁶ 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.⁹⁷ 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.⁹⁸ 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 4'⁹⁹ 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



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 Mhaulti'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.

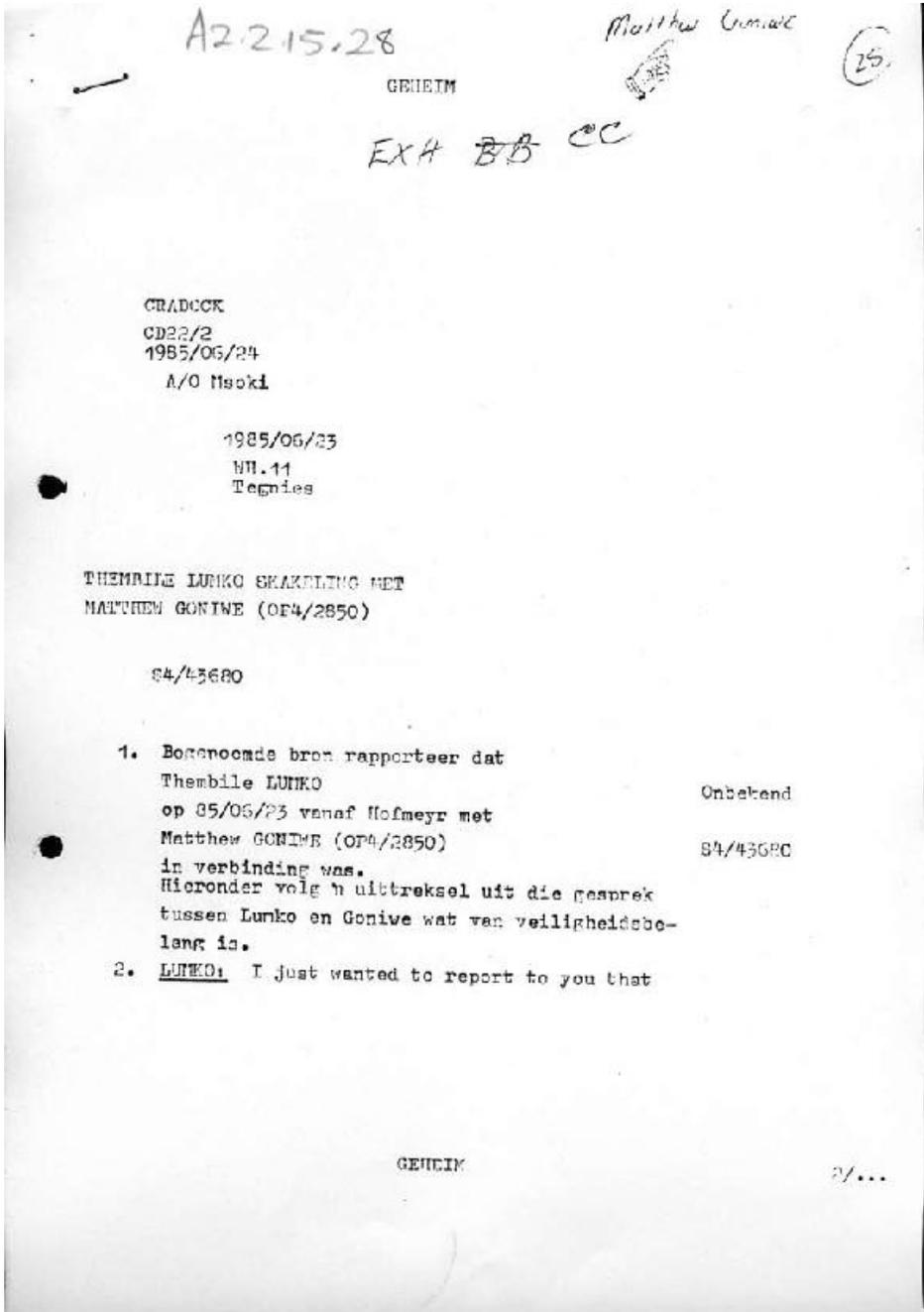


Figure 6. Secret security police report including transcript of telephone conversation by Matthew Goniwe compiled by Major Eric Winter, commander of Cradock Security Police, the week before the abductions and murder of the Cradock 4 (Archived as SAHA Collection AL2878 – A2.2.15.28).

GEHEIM

29

- 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.

GONINE: Where is the revolver now?

Lumko: It is here with me.

GONINE: 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. UITSKENNING

3.1 PERSONE

Matthew GONINE (OP4/2850)

S4/4360

Themba LUMKO - s/man van Hofmeyr.

Onbekend

Die Afdelingsbevelvoerder
Veiligheidstak
AFDELING OORSTREEK PROVINSIE

1. Vir u inligting.
2. Die Takbevelvoerder, Veiligheidstak, Middelburg(Kaap) was op 1985/05/23 telefonies ingelig van bogenoemde inligting.

MAJOR
TAKBEVELVOERDER : VEILIGHEIDSTAK
CRADOCK : E.F.H. 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.¹⁰⁰ 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.¹⁰¹

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.¹⁰²

In June 2003 SAHA submitted five requests to DOJ for copies of transcripts of section 29 hearings.¹⁰³ 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 askari¹⁰⁴ 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.¹⁰⁵ 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'.¹⁰⁶ 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.¹⁰⁷ 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.¹⁰⁸ 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'.¹⁰⁹ 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.¹¹⁰ 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.¹¹¹ No such review was undertaken, but a decision on access to the transcripts was taken at the TRC's final meeting in March 2003.¹¹² Unfortunately, the minutes of this meeting were captured on a laptop that was subsequently stolen.¹¹³

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,

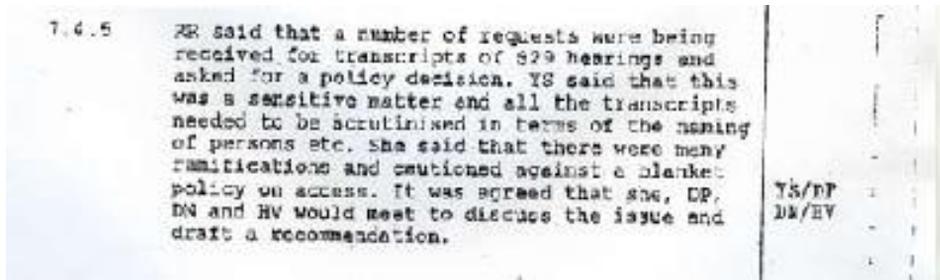


Figure 7. Extract from TRC Commissioners' minutes, 12 December 2006, stipulating recommendation for the development of a policy of access to Section 29 in-camera transcripts be developed. What the Commission ultimately recommended remains contested as the minutes of the final Commissioners' meeting in 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'.¹¹⁴ 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.¹¹⁵

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.¹¹⁶

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'.¹¹⁷ 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.¹¹⁸ 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'.¹¹⁹ 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.¹²⁰ 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 7¹²¹ 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 23.¹²² In both matters, the requests were made on behalf of interested organisations and not the victims' families.

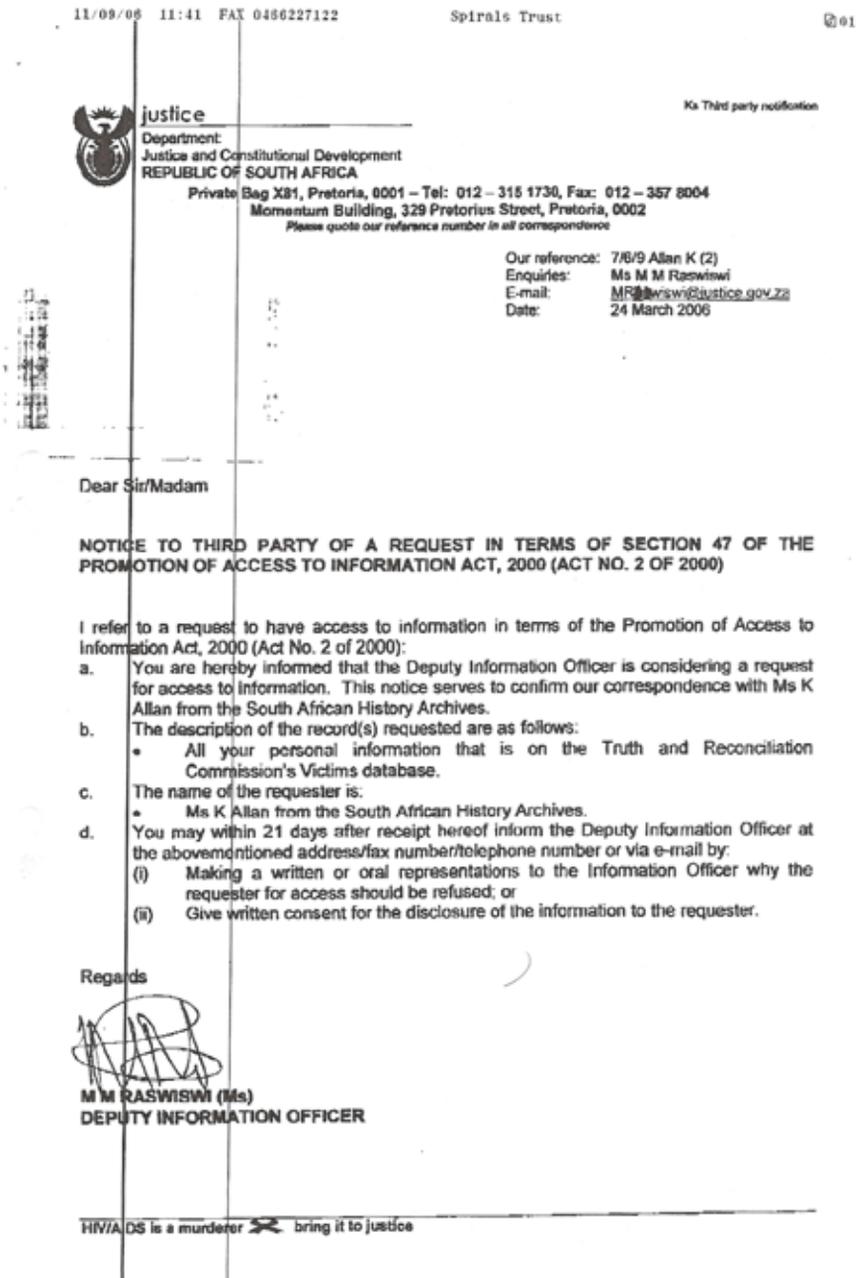


Figure 8. Correspondence sent by the Department of Justice to 22,000 South Africans who submitted statements to the TRC, claiming that SAHA wanted access to their personal data in the TRC database - something SAHA had explicitly stated it did not want.

A request for access to the TRC investigation file on Dulcie September on behalf of the September family was rejected¹²³ 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.¹²⁴ 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.¹²⁵ 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,¹²⁶ 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'.¹²⁷ 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.¹²⁸

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.¹²⁹ The Ministry responded in early September 2002, saying the minister had referred the matter to DAC,¹³⁰ which in the following week informed SAHA that the matter had been referred to the Office of the State Attorney.¹³¹

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'.¹³² 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.¹³³

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 meetings¹³⁴ 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,¹³⁵ as well as submissions that were made to the TRC during the public hearing processes.¹³⁶ This includes a full set of submissions made to the business hearings.¹³⁷

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.¹³⁸ 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:

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 opinion:

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

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*
