

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

STATE YOUR REFERENCE NUMBER:

A. Particulars of public body

The Information Officer/Deputy Information Officer:

Mr. Memory Mathonsi
Financial Services Conduct Authority (FSCA)
Riverwalk Office Park, Block B
41 Matroosberg Road
Ashlea Gardens Extension 6 Menlo Park Pretoria
0081

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

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

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

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

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

Fax number: +27866491491

Telephone number: +27117182563

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

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

C. Particulars of requester

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

Full names and surname:

Identity number:

The decision against which the internal appeal is lodged

<i>Mark the decision against which the internal appeal is lodged with an X in the appropriate box:</i>	
X	Refusal of request for <i>access</i>
	<i>Decision</i> regarding fees prescribed in terms of section 22 of the Act
	<i>Decision</i> regarding the extension of the period within which the request must be dealt with in terms of section 26(1) of the Act
	<i>Decision</i> in terms of section 29(3) of the Act to refuse access in the form requested by the requester
	<i>Decision</i> to grant request for access

E. Grounds for appeal

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

State the grounds on which the internal appeal is based:

Factual Background of Appeal

1. On 20 October 2018, the South African History Archive (SAHA) submitted a request to the Financial Sector Conduct Authority (FSCA) (Requestee) for information under the Promotion of Access to Information Act, 2000 (PAIA), requesting records or parts of records including all policies, directives, guidelines, orders, meeting minutes or similar records related to the cancellations of pension funds (the ‘cancellations project’) from 1 January 2007 to date (PAIA request).
2. On 31 October 2018 the FSCA acknowledged receipt.
3. On 12 December 2018 a letter was received from the FSCA requesting extension of time which was granted in terms of section 26(1)(a) of PAIA.

4. On 01 January 2019 the Requestee released the requested information in part. The other part was denied based on mandatory protection of privacy of a third party (section 34(1)) and section 44 1(a)(1) which protects operation of public bodies.

Grounds for Appeal

Ad paragraph 4 (in reference to Paragraph 1 of the original PAIA request)

5. The FSCA falls short in its response to the request as it only refers to the guidance note it is still processing, and does not address the other sources of information we have requested in relation to the cancellation of funds. We also want to point out that the guidance note is something that is current and we are requesting any from 2007 related to the ‘Cancellations Project’.
6. The FSCA has published in their latest circular that there is an ‘Information circular PF No.2 of 2017’ that will be withdrawn and replaced by the current guidance note that it is currently working on. We confirm that we would like a copy of this circular even though it is withdrawn from current use.
7. In regard to the other documents requested, we are made aware both from the founding affidavit of Chantal Hugo from Liberty Holdings¹ and the First inspection report by Jonathan Mort that there were meetings held between the FSB and Liberty Cooperate². We therefore reiterate the request for the minutes of these meetings held at their respective intervals, quarterly and other.
8. In the matter *Holobye Trading 2 CC v Head: Department of Roads & Transport & others*³; the Presiding officer at para 14-15 relies on the words of Chaskalson P, stating that:

“It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given and calls for an objective enquiry...”

¹ see paragraph 24 of Chantal Hugo’s founding affidavit.

² In Jonathan Mort’s first inspection report at para 5.1.4 he mentions quarterly meetings between Liberty and the FSB regarding parts of the cancellations project.

³ ZAGPJHC 268 (2017).

9. As a result of the FSCA acting in the interests of the public and acting in the role of an organ of state, it is afforded the power to use its discretion not to share information by relying on one or more of the reasons set out under section 44 of PAIA. This power is not unfettered and must meet the test of rationality in its application as developed in our courts.
10. We submit that the FSCA does not even correctly set out which sub-section of section 44 it is relying upon for its assertions in para X and needs to substantiate that it has indeed applied its mind to the request at hand in compliance with the rationality test as will follow.
11. The two-pronged test for rationality requires that the decision **must**⁴:
 - a. be based on accurate findings of fact, and
 - b. a correct application of law.

Ad paragraph 11 (in reference to paragraph 3.3 and 3.4 of original PAIA request)

12. Section 34 of PAIA clearly states that the unreasonable disclosure of third party information is prohibited. The FSCA has furnished no evidence confirming that releasing the information would be unreasonable.
13. Regardless of whether section 44 and section 34 are correctly invoked, in terms of section 46 of PAIA “the information officer of a public body must grant a request for access to a record of the body contemplated in section 34 and 44 if the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question.”
14. In *Centre for Social Accountability v Secretary of Parliament*⁵ the courts established that the test for whether an issue is in the public interest is whether society has a legitimate expectation that certain information be made publicly available and whether such information protects a clear public right. The public must objectively expect information to be made accessible.
15. It is now estimated by the FSCA that there are over R40 billion in unclaimed/unpaid benefits owing to over 4 million South Africans. The way these assets are being treated is unarguable of great public importance.

⁴ *Chairman State Tender Board v Digital Voice Processing (Pty) Ltd* 2012 (2) SA 16 (SCA) at para [40].

⁵ 2011 (5) SA 279 (ECG)

16. The 'Third Inspection Report' is reported by the FSCA to discuss how unclaimed benefits were treated during the cancellations project, in which hundreds of funds (at least) were cancelled in error. There thus remain crucial public questions about accountability in this process and the way in which assets were treated after unlawful fund cancellations. A report that details how millions of rands of tax payers monies were handled must no doubt, objectively, be made available to the same public. It is evident that the interest of the public outweighs the provisions of 34 and 44 as invoked by the FSCA.

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

F. Notice of decision on appeal

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

State the manner:

Particulars of manner:

Signed at JOHANNESBURG this 10th of April 2019.

A handwritten signature in black ink, appearing to read 'Nobukhosi Zulu', written in a cursive style. The signature is positioned to the right of a circular stamp that is partially obscured and contains illegible text.

SIGNATURE OF APPELLANT

Ms Nobukhosi Zulu (FOIP Coordinator)

South African History Archive (SAHA)

FOR DEPARTMENTAL USE:

OFFICIAL RECORD OF INTERNAL APPEAL

Appeal received on

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

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

OUTCOME OF APPEAL:

DECISION OF INFORMATION OFFICER/DEPUTY INFORMATION OFFICER

CONFIRMED/NEW DECISION SUBSTITUTED

NEW DECISION:

DATE

RELEVANT AUTHORITY

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