

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

**ORIGINAL**

**CASE NO: 32512/13**

In the application of:

**THE RIGHT2KNOW CAMPAIGN**

First Applicant

**THE SOUTH AFRICAN HISTORY ARCHIVE TRUST**

Second Applicant

And

**THE MINISTER OF POLICE**

First Respondent

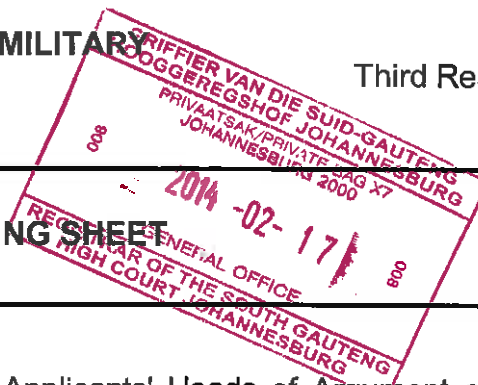
**THE NATIONAL DEPUTY INFORMATION  
OFFICER: SOUTH AFRICAN POLICE SERVICE**

Second Respondent

**THE MINISTER OF DEFENCE AND MILITARY  
VETERANS**

Third Respondent

**FILING SHEET**



Documents presented for filing: The Applicants' Heads of Argument and Practice Note.

**DATED** at **SANDTON** on this the **17<sup>th</sup>** day of **February** **2014**.

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**TO:**

**THE REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG LOCAL DIVISION, JOHANNESBURG**

**BY HAND**

**AND TO:**

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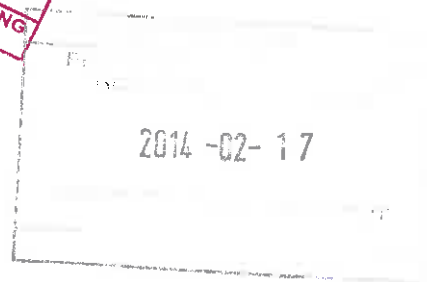
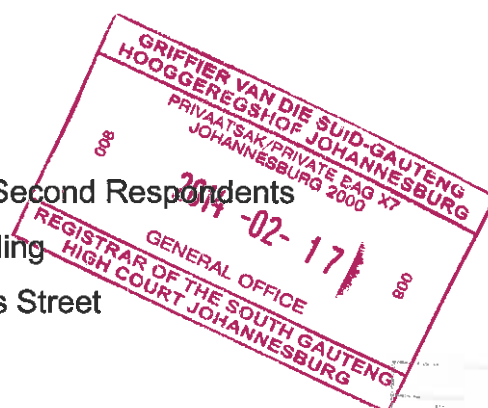
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**BY EMAIL & HAND**

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**APPLICANTS' HEADS OF ARGUMENT**

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**INTRODUCTION**

- 1 This is an application in terms of section 78 of the Promotion of Access to Information Act 2 of 2000 ("**PAIA**") to review and set aside the first and second respondents' refusal to grant access to information.

- 2 The application arises from a PAIA request for information made by the second applicant, the South African History Archive Trust ("**SAHA**"), on behalf of the first applicant, the Right2Know Campaign ("**R2K**"). SAHA is a non-governmental organisation and R2K is a voluntary association, which have as their objects *inter alia* promoting transparency and accessibility of information to the general public.<sup>1</sup> The request relates to:
- 2.1 records indicating what places or areas have been declared a "National Key Point" or "National Key Points Complex" under section 2 and 2A of the National Key Points Act 102 of 1980 ("**National Key Points Act**" or "**the Act**"); and
- 2.2 the bank statements from 2010 to 2012 of the Special Account for the Safeguarding of National Key Points provided for in section 3B of the National Key Points Act ("**the Special Account**").
- 3 The respondents have refused to provide any of the information on two grounds:
- 3.1 The mandatory protection of safety of individuals and protection of private property (section 38(a) and 38(b)(i)(aa) of PAIA); and
- 3.2 The request is unduly onerous in that the work involved in processing it would result in the substantial and unreasonable diversion of resources (section 45(b) of PAIA).

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<sup>1</sup> Paras 13 and 14 of the Founding Affidavit at pages 9-13 of the Record.

- 4 We address the scope and application of each of these grounds in turn below. We submit that neither of these grounds of refusal, nor indeed any other ground of refusal under Chapter 4 of PAIA, applies to justify the refusal. We emphasise that:
- 4.1 The respondents have relied on bald and entirely unsubstantiated allegations of harm in refusing the request for information.
- 4.2 The respondents have failed to apply their minds to whether part of the records can be severed from the rest and disclosed. Instead the respondents have simply resorted to a blanket refusal of the request, contrary to the duties imposed under section 28 of PAIA.<sup>2</sup>
- 4.3 The disclosure in Parliament in 2013 of the names and locations of a number of National Key Points, by the Ministers responsible for their administration, demonstrates the unreasonableness of the respondents' blanket refusal of the request.
- 5 We argue further that, even if any ground of refusal were applicable, the public interest override under section 46 of PAIA requires disclosure of the requested records.
- 6 Before addressing the grounds of refusal, we summarise the legal and factual background and discuss the right of access to information held by the State.

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<sup>2</sup> Section 28 of PAIA is quoted in relevant part at paragraph 44 of these submissions.

7 The structure of these submissions is accordingly as follows:

- 7.1 The legal framework: the National Key Points Act;
- 7.2 The factual background;
- 7.3 The right of access to information held by the State;
- 7.4 The grounds of refusal;
- 7.5 The public interest in disclosure of the records; and
- 7.6 Whether a “judicial peek” at the record under section 80 of PAIA is appropriate.

## THE LEGAL FRAMEWORK: THE NATIONAL KEY POINTS ACT

### The declaration of National Key Points

8 Section 2 of the National Key Points Act empowers the responsible Minister to declare “any place or area”<sup>3</sup> a National Key Point –

*“[i]f it appears to the Minister at any time that any place or area is so important that its loss, damage, disruption or immobilization may prejudice the Republic, or whenever he considers it necessary or expedient for the safety of the Republic or in the public interest.”*

9 The responsible Minister may also declare that a number of National Key Points constitute a ‘National Key Points Complex’ under section

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<sup>3</sup> Section 1 defines ‘area’ to mean “any soil or water surface, whether with a building, installation or structure thereon or not, and includes any place”. ‘Place’ is defined as “any premises, building, installation or industrial complex”.

2A.<sup>4</sup>

- 10 Pursuant to Proclamation No. 21 of 2004, published in *Government Gazette No. 26164* of 26 March 2004, the Minister of Safety and Security (now the Minister of Police, the first respondent) replaced the Minister of Defence as the Minister responsible for administering the National Key Points Act. The first respondent is accordingly the Minister responsible for declaring places or areas National Key Points.
- 11 There is no public notice requirement for the declaration of National Key Points under the National Key Points Act. Under section 2(2) of that Act, the Minister of Police is required only to send written notice to the owner of the place declared a National Key Point.
- 12 Notwithstanding that criminal offences attach to certain activities committed in respect of National Key Points under section 10 of the National Key Points Act, it has not been publically disclosed which places or areas have been declared National Key Points by the Minister of Police. Section 10 of the Act provides:

***“10 Offences and penalties***

*(1) Any person who at, on, in connection with or in respect of any National Key Point performs any act which, if such*

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<sup>4</sup> Section 2A(1) provides for the declaration of a “National Key Points Complex” in the following terms:

*“(1) When in the opinion of the Minister it will contribute to the safeguarding of two or more National Key Points if certain steps in respect of their security are taken jointly by their owners, he may declare those Key Points a National Key Points Complex irrespective of whether one of the Key Points adjoins any other irrespective of whether the steps contemplated will be taken at or on any of the Key Points.”*

*act would have constituted an offence in terms of the Official Secrets Act, 1956 (Act 16 of 1956), if performed or executed at, on, in connection with or in respect of any prohibited place, as defined in section 1 of that Act, shall be guilty of an offence and liable to the penalties prescribed for that act in that Act.*

(2) *Any person who-*

- (a) hinders, obstructs or thwarts any owner in taking any steps required or ordered in terms of this Act in relation to the efficient security of any National Key Point;*
- (b) hinders, obstructs or thwarts any person in doing anything required to be done in terms of this Act;*
- (c) furnishes in any manner whatsoever any information relating to the security measures, applicable at or in respect of any National Key Point or in respect of any incident that occurred there, without being legally obliged or entitled to do so, or without the disclosure or publication of the said information being empowered by or on the authority of the Minister, or except as may be strictly necessary for the performance of his functions in regard to his employment in connection with, or his ownership of, or as may be necessary to protect, the place concerned,*

*shall be guilty of an offence and on conviction liable to a fine not exceeding R10 000 or to imprisonment for a period not exceeding three years or to both such fine and such imprisonment."*

### **Public expenditure on National Key Points**

- 13 Sections 3 and 3A of the National Key Points Act govern public spending on National Key Points. These provisions impose financial obligations on the Minister and the private owners of places or areas that have been declared National Key Points or Complexes. Specifically, sections 3 and 3A require private owners of National Key Points to take certain security



measures (as may be required by the Minister) at their own cost, alternatively for the Minister to take the necessary steps and thereafter recover the costs from the owner.

- 14 For the sake of convenience, we reproduce the provisions of sections 3 and 3A of the Act in full:

***“3 Duties of owner in relation to Key Point or Key Points Complex***

- (1) On receipt of a notice mentioned in section 2 (2), the owner of the National Key Point concerned shall after consultation with the Minister at his own expense take steps to the satisfaction of the Minister in respect of the security of the said Key Point.*
- (2) If the said owner fails to take the said steps, the Minister may by written notice order him to take, within a period specified in the notice and at his own expense, such steps in respect of the security of the said Key Point as may be specified in the notice.*
- (3) (a) If the said owner without reasonable cause refuses or fails to take the steps specified in the said notice within the period specified therein he shall be guilty of an offence and liable on conviction to a fine not exceeding R20 000 or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.*  
*(b) If the said owner refuses or fails to take the steps specified in the said notice within the period specified therein, the Minister may take or cause to be taken the said steps irrespective of whether the refusal or failure took place with or without reasonable cause and irrespective of whether the owner was charged or convicted in connection with that refusal or failure, and the Minister may recover the cost thereof from that owner to such extent as the Minister may determine.*
- (4) (a) The Minister may after consultation with the owners of Key Points included in a Key Points Complex order them by written notice to take, within a period*

*specified in the notice and at their expense, such joint steps in respect of the security of that Key Points Complex as may be specified in the notice, and to determine within a period specified in the notice on the proportion in which each shall be responsible for the cost thereof.*

- (b) If the owners are unable to determine within the period specified the said proportion, the Minister may determine that proportion.*
- (5) If an owner referred to in subsection (4) without reasonable cause refuses or fails to take the steps for which he is responsible within the period specified in the notice, or delays, frustrates or renders them impossible, irrespective of whether any other owner with or without reasonable cause refuses or fails to take the steps for which he is responsible within the period concerned, or delays, frustrates or renders them impossible-*
  - (a) the first-mentioned owner shall be guilty of an offence and liable on conviction to a fine not exceeding R20 000 or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment;*
  - (b) the Minister may take or cause to be taken those steps, as well as the steps which any other owner was unable to take as a result of the first-mentioned owner's refusal or failure to take the said steps, irrespective of whether the owner has been charged or convicted in connection with that refusal or failure, and the Minister may recover the cost of those steps from all the owners on whose behalf they were taken in the proportion in which they were responsible for the cost or to such extent as he may determine.*
- (6) The Minister may at any time amend any period or steps in terms of a notice under this section, and the owner or owners concerned shall forthwith be notified thereof by written notice.*

### **3A Power of Minister to take over duties of owners**

- (1) The Minister may at any time, on behalf of and with the consent of the owner of a National Key Point or the owners of National Key Points included in a National Key Points Complex, take or cause to be taken any or all of the steps which in his opinion are or may become necessary in respect of the security of that Key Point or Key Points Complex, and the owner or owners shall be*

liable for the cost thereof to such extent as the Minister may determine.

- (2) *When the Minister takes or causes to be taken steps under subsection (1) of this section or section 3 (3) (b) or 3 (5) (b), he may take over the obligations of the owner or owners concerned arising from any contract or contracts with a third party or third parties, with the consent of that third party or those third parties, if in the opinion of the Minister the fulfilment of the contract or contracts will contribute to the security of the Key Point or Key Points Complex concerned.” (Our emphasis)*

15 The above provisions of the National Key Points Act must be read with the Public Finance Management Act 1 of 1999 (“the PFMA”), which is the framework legislation for all public expenditure.

15.1 Section 1 of the PFMA defines “irregular expenditure” to mean *“expenditure, other than unauthorised expenditure, incurred in contravention of or that is not in accordance with a requirement of any applicable legislation, including [the PFMA] . . .”*<sup>5</sup>

15.2 We submit that where public monies are paid for improvements to privately-owned properties declared to be National Key Points, and are not recovered from the private owner as required under sections 3 and 3A of the Act, such expenses are incurred in contravention of section 3A and amount to “irregular expenditure” under the PFMA.

15.3 Under section 38 of the PFMA, the accounting officer of the

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<sup>5</sup> This definition must be read with the definition of “unauthorized expenditure”, which means “(a) overspending of a vote or a main division within a vote, or (b) expenditure not in accordance with the purpose of a vote, or in the case of a main division, not in accordance with the purpose of the main division”.

national Department of Police (being the head of department)<sup>6</sup>  
bears the following responsibilities, which would be implicated by  
such irregular expenditure:

*“(1) The accounting officer for a department, trading entity  
or constitutional institution—*

- (a) . . .*
- (b) is responsible for the effective, efficient, economical and transparent use of the resources of the department, trading entity or constitutional institution;*
- (c) must take effective and appropriate steps to—*
  - (i) collect all money due to the department, trading entity or constitutional institution;*
  - (ii) prevent unauthorised, irregular and fruitless and wasteful expenditure and losses resulting from criminal conduct; and*
  - (iii) manage available working capital efficiently and economically;*
- (d) is responsible for the management, including the safe-guarding and the maintenance of the assets, and for the management of the liabilities, of the department, trading entity or constitutional institution;*
- (e) must comply with any tax, levy, duty, pension and audit commitments as may be required by legislation”.*

## **THE FACTUAL BACKGROUND**

- 16 The applicants’ request for information was made against a background of serious and widespread public concern relating to allegations of excessive and improper reliance on the National Key Points Act by public officials, *inter alia* –

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<sup>6</sup> Section 36 of the PFMA.

- 16.1 to restrict various activities including media reportage and political protest, and
- 16.2 for the misappropriation of public funds for improvements to private properties that are declared National Key Points.
- 17 The level of public concern is evidenced in the collection of news articles attached to the founding affidavit as Annexures “**CMK15**” and “**CMK16**”.<sup>7</sup>
- 17.1 The first two articles in Annexure “**CMK16**” allege instances of reliance by members of the SAPS on the National Key Points Act to arrest persons for gathering and protesting outside public buildings.
- 17.2 The third article in Annexure “**CMK16**” describes how the Chair of the Parliamentary Portfolio Committee on Correctional Services invoked the Act in January 2013 to justify the destruction of photographic evidence of prison-warders assaulting a prisoner at Groenpunt Prison.
- 17.3 The news reports attached as Annexure “**CMK15**”, address the status of President Zuma’s Nkandla Estate as a National Key Point; the investigations by the national Department of Public Works and the Public Protector into allegations of irregular public expenditure on improvements at the Nkandla Estate; and the restrictions that this designation has imposed on the media and

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<sup>7</sup> Record, pages 152-165.

political activity in respect of Nkandla Estate.

- 18 As the above-mentioned articles illustrate, the non-disclosure of National Key Points has generated widespread speculation of abuse of public power. This has harmed, and continues to harm, public confidence in the State and in members of Cabinet, including President Jacob Zuma and the first respondent.
- 19 Against this background, the applicants lodged their request for information in terms of section 18(1) of PAIA.

#### **The PAIA request and its refusal**

- 20 On 4 October 2012, SAHA submitted a request for access to information on behalf of R2K in terms of section 18(1) of PAIA.<sup>8</sup> The request sought the following information:

*“1. Records indicating any place or area declared as a National Key Point in accordance with section 2 of the National Key Points Act;*

*2. Records indicating any place or area declared as a National Key Points Complex in accordance with section 2A of the National Key Points Act;*

*3. Bank statements of the Special Account for the Safeguarding of National Key Points established in terms of section 3B of the National Key Points Act for the period 2010 to 2012.”*

- 21 The second respondent, the Information Officer, refused this request by

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<sup>8</sup> The request appears as Annexure “CMK8” at page 112 of the Record.

e-mail dated 16 November 2012.<sup>9</sup>

21.1 The e-mail was sent under the subject-line "*PROMOTION OF ACCESS TO INFORMATION ACT, 2000 (ACT NO 2 OF 2000): RE PROPERTY NKANDLA*".

21.2 The Information Officer stated that the request was refused in terms of sections 38(a) and 38(b)(i)(aa) of PAIA, which provide:

***"Mandatory protection of safety of individuals, and protection of property***

*38 The information officer of a public body –*

*(a) must refuse a request for access to a record of the body if its disclosure could reasonably be expected to endanger the life or physical safety of an individual; or*

*(b) may refuse a request for access to a record of the body if its disclosure would likely prejudice or impair –*

*(i) the security of –*

*(aa) a building structure or system, including, but not limited to, a computer or communication system".*

21.3 The Information Officer explained the basis for the SAPS's reliance on the above grounds of refusal as follows:

*"To provide access to the requested records will impact negatively on and jeopardize the operational strategy and tactics used to ensure security at the relevant property or safety of an individual (eg if a person plans, intends [sic] or tries to harm the relevant individual or to prejudice or impair the security of the building, access to this information may prejudice the effectiveness of those methods, techniques or procedures used to ensure the safety of such individuals and/or the building – a person who intends to harm the relevant individual may with ease harm the individual if he or*

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<sup>9</sup> Annexure CMK9 at page 117 of the Record.

*she has access to such information, or he or she may with ease determine the strategies and tactics used for such protection and then use the information to do such harm."*

21.4 Access to all the requested records was refused – a blanket refusal – without reference to any attempt to excise any requested information that would not fall foul of sections 38(a) and (b)(i)(aa) of PAIA.

### **The internal appeal**

22 Following the Information Officer's refusal, the applicants exhausted the internal appeal process provided for in section 74 of PAIA. They submitted the notice of internal appeal on 18 December 2012.<sup>10</sup> The appeal was brought on the following grounds:

22.1 The refusal of the record was premised on the incorrect assumption that the request for information concerned Nkandla, which it did not. This error was evident in the subject-line of the e-mail containing the refusal, which read "*PROMOTION OF ACCESS TO INFORMATION ACT, 2000 (ACT NO 2 OF 2000): RE PROPERTY NKANDLA*". The Information Officer therefore misdirected herself and made her decision in relation to records not requested (paragraphs 3 to 8).

22.2 The Information Officer did not apply her mind to the actual request for records (paragraph 9).

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<sup>10</sup> Annexure "CMK10" at page 119 of the Record.



- 22.3 The requested information did not fall within the category of information exempted from disclosure in terms of section 38(a) and (b)(i)(aa), in particular in that SAHA did not request information concerning the security in relation to National Key Points or Complexes, but only a list of places or areas declared as National Key Points and certain bank statements of the Special Account (paragraph 10).
- 22.4 The Information Officer failed to exercise the discretion granted to the Information Officer under section 38(b)(i)(aa) of PAIA (paragraph 11).
- 22.5 The Information Officer did not provide adequate reasons for refusing access to the requested information, as required under section 25(3)(a) of PAIA (paragraph 12).
- 22.6 The Information Officer failed to apply her mind to whether any or part of the records sought could be disclosed upon severance from those parts of the record that could not be disclosed, as required under section 28 of PAIA (paragraphs 13 and 14).
- 23 On 17 January 2013, the Information Officer requested an extension of 30 days to finalise the internal appeal process.<sup>11</sup> In this correspondence, the Information Officer advised the applicants that the reference to "PROPERTY NKANDLA" was merely a "typing error", and that she had copied and pasted the subject line from a previous e-mail.

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<sup>11</sup> See the email attached as Annexure "CMK11" at page 124 of the Record.

24 On 28 February 2013, the first respondent (the Minister) confirmed the refusal to disclose the requested records on appeal on the following grounds:<sup>12</sup>

24.1 The Information Officer did apply her mind to the request, and the reference to "PROPERTY NKANDLA" was a mere typing error (paragraph 1);

24.2 The request for information relating to the list of all the places or areas which had been declared National Key Points or Complexes was properly refused in terms of sections 38(a) and (b)(i)(aa) of PAIA (paragraph 2);

24.3 The refusal to disclose the identity of the National Key Points and Complexes was also justified under section 45(b) of PAIA. I note that the Minister repeatedly refers to section 45(1)(b) in the letter of dismissal, but the relevant section on which the Minister relies is in fact section 45(b).

24.4 The request for the bank statements of the Special Account for the Safeguarding of the National Key Points was refused as the SAPS does not have such an account (paragraph 3).

25 The Minister provided the following explanation for his decision:<sup>13</sup>

25.1 The Minister repeated the reasons given by the Information

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<sup>12</sup> A copy of the letter of refusal (dated 28 February 2013) appears as Annexure "CMK12" at page 127 of the Record. The applicants received the decision by e-mail on 7 March 2013, which appears as Annexure "CMK13" at page 133 of the Record.

<sup>13</sup> Annexure "CMK12" at pages 127-132 of the Record.

Officer in her refusal of the request to justify the reliance on section 38(a) and 38(b)(i)(aa), and added the following in this regard:

*"The National Key Points include different places or areas which are extremely important and its loss, damage, disruption or immobilization may prejudice the Republic or its safety and it is in the public's interest that they be secured and that such declaration as a National Key Point not be publically advertised. Such 'critical' places or areas are very likely to become 'soft spots or targets' for the enemy or a person that intends to harm the Republic or endanger the life or physical safety of an individual at or from such place or area. Knowledge of exactly which places or areas are declared as such points [is] highly likely to prejudice or impair the security of such places or areas when such knowledge is used by persons who intend to do such harm to such building, structure or system". (Paragraph 5 of Annexure "CMK12" at pages 128-129 of the Record, emphasis added.)*

- 25.2 The Minister described the categories of places or areas which constitute National Key Points as including: banks; munitions industries; petrochemical industries; water supply; electricity; communications; air transport; government institutions; data processing; research; or technology information systems.
- 25.3 The Minister stated further that many of the 200 (two hundred) National Key Points are privately owned and that, as a result, revealing the addresses of such National Key Points would entail disclosing the "personal information" of a third party, which is defined in section 1 of PAIA to include "the address of the individual".<sup>14</sup> The Minister reasoned that to protect the privacy of

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<sup>14</sup> At paragraph 32.1 of the answering affidavit, page 183 of the Record, the respondents admit that "the majority of the 200 places or areas that have been declared as national key points are privately and not government owned". (Emphasis added.)

third parties in accordance with section 34(1) of PAIA, the SAPS Information Officer would have to comply with the notification process provided for in section 47 of PAIA in order to process the applicants' request for information. This would substantially and unreasonably divert the resources of the SAPS, and the request could therefore be refused in terms of section 45(b) of PAIA (paragraphs 6 to 9).

25.4 The SAPS does not have a special account as contemplated in terms of section 3B of the National Key Points Act. The Minister explained that, in general, employees of the SAPS are not used to secure the National Key Points, although the SAPS' VIP Protection Unit does safeguard VIPs who "*are mostly at some of these National Key Points*". In providing these services, the VIP Protection Unit does not use a separate budget or account (paragraph 11).

26 The applicants launched this application on 2 September 2013 – that is within the 180-day time period prescribed in *Brümmer v Minister for Social Development & Others* 2009 (6) SA 323 (CC).<sup>15</sup>

### **The recent disclosure of certain National Key Points in Parliament**

27 Since the applicants instituted this application, the names and locations of a number of National Key Points have been publically disclosed by

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<sup>15</sup> See para 46.

government, without any apparent concern for the security risks alleged by the respondents. In response to Parliamentary questions in June and August 2013, several national Ministers publically disclosed that certain places and institutions under their administration are National Key Points. These disclosures are detailed in the replying affidavit,<sup>16</sup> and include:

- 27.1 the Government Printing Works;
- 27.2 the Nuclear Energy Corporation of South Africa;
- 27.3 the Strategic Fuel Fund Association's Saldanha and Milnerton Tank Farms;
- 27.4 the Strategic Fuel Fund Associations's Saldanha Oil Jetty;
- 27.5 PetroSA's GTL (Gas-to-Liquid) refinery at Mossel Bay;
- 27.6 PetroSA's Voor Bay (or Voor Baai) petroleum storage facility;
- 27.7 PetroSA's Single Point Mooring;
- 27.8 PetroSA's Klipheuwel Pump Station;
- 27.9 PetroSA's FA Platform (an offshore gas platform off the coast of Mossel Bay in the Western Cape);
- 27.10 PetroSA's Orca (a floating oil production facility);
- 27.11 the South African National Space Agency's Farm No 502 JQ, Hartebeesthoek;

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<sup>16</sup> Para 15 of the replying affidavit at pages 201-204 of the Record. See also Annexures "RA1" to "RA6" at pages 218 to 299 of the Record.

- 27.12 the National Research Foundation's Square Kilometer Array site;
- 27.13 the Medium Speed Wind Tunnel on the Pretoria Campus of the Council for Scientific Council and Industrial Research;
- 27.14 Onderstepoort Biological Products SOC Ltd;
- 27.15 the Office of Interception Centre and Communication Centre;
- 27.16 the Civitas Building;
- 27.17 the Forensic Chemistry Laboratories in Pretoria, Johannesburg, Cape Town and Durban;
- 27.18 the Medical Bureau for Occupational Health & Compensation Building Commissioner;
- 27.19 the Radiation Control premises in Cape Town; and
- 27.20 the BSL4 Laboratory at the National Institute for Communicable Diseases.

28 We note that, in explaining the criteria used for the declaration of the Government Printing Works as a National Key Point, the Minister of Home Affairs lists "Effect on Morale".<sup>17</sup> Even if this could be a proper basis for designation of a National Key Point under the National Key Points Act, which is denied, the criterion indicates the breadth of the grounds upon which places have been declared National Key Points.

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<sup>17</sup> See Annexure "RA1" at page 218 of the Record.

## ACCESS TO INFORMATION HELD BY THE STATE

### The constitutional right and its importance

29 Section 32(1)(a) of the Constitution provides that everyone *“has the right of access to any information held by the state”*.

30 This right gives effect to the founding constitutional values of openness and accountability in public affairs. These values permeate the Constitution, for instance in the following provisions:

30.1 The preamble provides that the Constitution lays the foundation for a *“democratic and open society”*.

30.2 The founding values of the state in section 1 include the pursuit of *“accountability, responsiveness and openness”* in section 1(d).

30.3 Section 39(1)(a) provides that the courts must promote the values that underlie *“an open and democratic society”* when they interpret the Bill of Rights.

30.4 Section 41(1)(c) requires all spheres of government and all organs of state to provide *“transparent”* and *“accountable”* government.

30.5 Sections 57(1)(b), 59(1)(b), 70(1)(b), 72(1)(b), 116(1)(b), 118(1)(b) and 160(7) require parliament, the provincial legislatures and all municipal councils to conduct their business in an open, transparent and accountable manner.

30.6 Section 195 lays down the basic values and principles that govern public administration in every sphere of government.<sup>18</sup> They provide that public administration “*must be accountable*”<sup>19</sup> and that “*Transparency must be fostered by providing the public with timely, accessible and accurate information*”<sup>20</sup>

31 The SCA said in **M&G**,<sup>21</sup> and the Constitutional Court confirmed in **Oriani-Ambrosini**,<sup>22</sup> that “*open and transparent government and a free flow of information concerning the affairs of the state is the lifeblood of democracy*”.

32 The Constitutional Court also emphasised the importance of the right in **M&G**.<sup>23</sup>

32.1 “*The constitutional guarantee of the right of access to information held by the State gives effect to ‘accountability, responsiveness and openness’ as founding values of our constitutional democracy. It is impossible to hold accountable government that operates in secrecy.*”<sup>24</sup>

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<sup>18</sup> Section 195(2)(a).

<sup>19</sup> Section 195(1)(f).

<sup>20</sup> Section 195(1)(g).

<sup>21</sup> *President of the Republic of South Africa and Others v M&G Media Ltd* 2011 (2) SA 1 (SCA) at para 1.

<sup>22</sup> *Oriani-Ambrosini v Sisulu, Speaker of the National Assembly* 2012 (6) SA 588 (CC) at para 46.

<sup>23</sup> *President of the Republic of South Africa and Others v M&G Media Ltd* 2012 (2) SA 50 (CC).

<sup>24</sup> At para 10.



32.2 *"The importance of this right ... in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the State. Indeed one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency 'must be fostered by providing the public with timely, accessible and accurate information'".*<sup>25</sup>

32.3 *"The right of access to information is also crucial in the realisation of other rights in the Bill of Rights. The right to receive or impart information or ideas, for example, is dependent on it. In a democratic society such as our own, the effective exercise of the right to vote also depends on the right of access to information. For without access to information, the ability of citizens to make responsible political decisions and participate meaningfully in public life is undermined."*<sup>26</sup>

33 Currie and Klaaren note that the entrenchment of this right in the Constitution must be seen against the backdrop of the apartheid state's obsession with official secrecy. It is a characteristic feature of authoritarian states that they seek to control the flow of information in their societies. Section 32 of the Constitution marks a decisive break with the past, by entitling everyone to information held by the state. The

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<sup>25</sup> At para 8, quoting with approval the Court's judgment in *Brummer v Minister for Social Development and Others* 2009 (6) SA 323 (CC) at para 62.

<sup>26</sup> At para 10.

effect of the right of access to information is that public authorities are no longer permitted to "*play possum*" with members of the public where the rights of the latter are at stake. The purpose of the right of access to information "*is to subordinate the organs of State . . . to a new regimen of openness and fair dealing with the public.*"<sup>27</sup>

### **PAIA gives effect to the right**

- 34 PAIA gives effect to the constitutional right of access to information. It says in its preamble that,

*"the system of government in South Africa before 27 April 1994, amongst others, resulted in a secretive and unresponsive culture in public and private bodies which often led to abuse of power and human rights violations",*

and that it seeks to –

*"foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information";*

and

*"actively promote a society in which the people of South Africa have effective access to information to enable them to more fully exercise and protect all their rights".*

- 35 Section 9 of PAIA deals comprehensively with the objects of the Act.

They are, amongst others, "*to give effect to the constitutional right of*

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<sup>27</sup> Currie & Klaaren *The Commentary on the Promotion of Access to Information Act* (2002) at p. 2; *Van Niekerk v Pretoria City Council* 1997 (3) SA 839 (T) at 850A-B – cited with approval in *MEC for Roads and Public Works, Eastern Cape, and Another v Intertrade Two (Pty) Ltd* 2006 (5) SA 1 (SCA) at para 21; *The President of RSA v M & G Media* (supra) at paras 9 to 11.

*access to ... any information held by the State” and “generally, to promote transparency, accountability and effective governance of all public and private bodies” (subsections 9(a) and (e)).*

- 36 In accordance with section 32 of the Constitution, PAIA deals with information held by organs of state and public bodies differently from information held by private bodies. For organs of state, the requester does not need to explain why it seeks the information, let alone why it requires it for the exercise of its rights.

- 36.1 Section 11(1) of PAIA makes clear that a requester is entitled to the information requested from a public body as long as it has complied with the procedural requirements in PAIA and as long as none of the grounds of refusal are applicable.

*“A requester must be given access to a record of a public body if the requester complies with the relevant procedural requirements and access to that record is not refused on any of the grounds set out in Chapter 4 of Part 2 of the Act.”*

- 36.2 Section 11(3) further stipulates that –

*“A requester’s right of access contemplated in subsection (1) is, subject to this Act, not affected by –*

*(a) any reasons the requester gives for requesting access; or*

*(b) the information officer’s belief as to what the requester’s reasons are for requesting access.”*

- 37 The importance of access to information held by the State (or a public body) as a means to secure accountability and transparency justifies the

approach adopted in section 32(1)(a) of the Bill of Rights and in PAIA: namely, that unless one of the specifically enumerated grounds of refusal applies, citizens are entitled to information held by the State as a matter of right. This is so regardless of the reasons for which access is sought and regardless of what the organ of State believes those reasons to be.

38 It is therefore crucial to determine whether the request was made in conformity with the form requirements of section 18 of PAIA. Once this has been established the second inquiry is whether access was given as requested or whether any of the grounds of refusal contemplated in Chapter 4 of PAIA apply to this case. If they do not, that is the end of the matter and the information sought must be disclosed.

39 The Constitutional Court held in **M&G** that,

*"the formulation of section 11 casts the exercise of this right in peremptory terms --- the requester 'must' be given access to the report so long as the request complies with the procedures outlined in the Act and the record requested is not protected from disclosure by one of the exemptions set forth therein. Under our law, therefore, the disclosure of information is the rule and exemption from disclosure is the exception."*<sup>28</sup>

40 The SCA also held in **Transnet**<sup>29</sup> that this principle is peremptory. If the State or a public body fails to bring its information within one of the

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<sup>28</sup> *President of the Republic of South Africa and Others v M&G Media Ltd* 2012 (2) SA 50 (CC) at para 9.

<sup>29</sup> *Transnet Ltd and Another v SA Metal Machinery Co (Pty) Ltd* 2006 (6) SA 285 (SCA) at para 58.

recognised exemptions in terms of PAIA, the requester is entitled to it as of right and the court does not have any discretion to refuse access to it.

- 41 Further, the exemptions must be interpreted as narrowly as possible, as Currie and Klaaren explain:

*“The grounds of refusal are limitations of the right of access to information. They must accordingly be read as narrowly as possible, consistent with their purpose of protecting specific rights or compellingly important interests. Access to information is the norm and refusal to disclose information the exception.”<sup>30</sup>*

- 42 This is confirmed by section 2(1) of PAIA, which provides that when interpreting a provision of the Act a court must prefer any reasonable interpretation of the provision that is consistent with its objects over any alternative interpretation that is inconsistent with these objects.

- 43 This is, in any event, entrenched in section 39(2) of the Constitution which provides that when interpreting any legislation courts “must promote the spirit, purport and objects of the Bill of Rights.” This requires that:

43.1 Courts should seek to avoid interpretations which would render statutory provisions unconstitutional;<sup>31</sup> and

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<sup>30</sup> Currie & Klaaren *The Commentary on the Promotion of Access to Information Act* (2002) at p.105.

<sup>31</sup> *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) at paras 22-23.

43.2 When a provision is reasonably capable of two interpretations, both of which are constitutionally permissible, courts must adopt the interpretation which “*better*” promotes the spirit, purport and objects of the Bill of Rights.<sup>32</sup>

44 Finally, and crucially for the purposes of the present case, section 28 of PAIA requires an organ of state which takes the view that a PAIA request should be refused to consider whether access to any part of the record may be granted. If part of the record can be reasonably be severed from the rest and does not contain information to which access must be refused, the organ of state is obliged to disclose this portion of the record. Section 28 (1) provides:

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

*(a) does not contain; and*

*(b) can reasonably be severed from any part that contains, any such information must, despite any other provision of this Act, be disclosed.”*

45 The Constitutional Court has held that section 28 imposes a duty on the public body to sever the protected from the unprotected information and to disclose the latter:

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<sup>32</sup> *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009 (1) SA 337 (CC) at paras 46, 84 and 107; *Fraser v Absa Bank Ltd (National Director of Public Prosecutions as Amicus Curiae)* 2007 (3) SA 484 (CC) at para 47.

*"Section 28 of PAIA requires that any information in a record that is not protected and that can reasonably be severed from the protected parts of the record be severed and disclosed. There is no discretion to withhold information that is not protected. The unprotected material must be disclosed 'despite any other provision' of PAIA, unless it 'cannot reasonably be severed' from the protected portions."*<sup>33</sup>

- 46 It follows that the respondents were required to apply their minds to the whole of the records requested and to determine whether, if not all, part of it could be disclosed if reasonably severable from the rest. As we explain below, the respondents manifestly failed to apply their minds to the issue of severability, and their blanket refusal to furnish any of the requested record is accordingly unlawful and unreasonable.

### **The nature of these proceedings**

- 47 Court proceedings under PAIA are governed by sections 78 to 82. They establish the following principles:

47.1 In terms of section 78, a requester aggrieved by a refusal of a request for access to information may *"by way of an application"* apply to court for appropriate relief. The requester is obliged to proceed by application proceedings even when disputes of fact are foreseeable.

47.2 In such an application, the court is not limited to a review of the decision to refuse access to information. It decides the public

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<sup>33</sup> *President of the Republic of South Africa and Others v M&G Media Ltd* 2012 (2) SA 50 (CC) at para 65.

body's claim of exemption from disclosure afresh and engages in a *de novo* reconsideration of the merits.<sup>34</sup>

47.3 Section 81 provides that the proceedings are civil proceedings<sup>35</sup> subject to the rules of evidence applicable to proceedings of that kind.<sup>36</sup> It goes on to say that the burden of establishing that the refusal of a request for access complies with the provisions of PAIA, "*rests on the party claiming that it so complies*".<sup>37</sup>

48 The imposition of the burden on the state to show that a record is exempted from disclosure is understandable. As the Constitutional Court explained in *M&G*, it would be "*manifestly unfair and contrary to the spirit of PAIA read in the light of section 32 of the Constitution*" to impose the burden on the requester to show that a record is not exempt from disclosure.<sup>38</sup>

49 The Constitutional Court pronounced authoritatively on the onus which falls on organs of state in this regard, emphasising that "*neither the mere ipse dixit of the information officer nor his or her recitation of the words*

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<sup>34</sup> *Transnet Ltd and Another v SA Metal Machinery Co (Pty) Ltd* 2006 (6) SA 285 (SCA) at paras 24 to 26; *President of the Republic of South Africa and Others v M&G Media Ltd* 2012 (2) SA 50 (CC) at para 14.

<sup>35</sup> Section 81(1).

<sup>36</sup> Section 81(2).

<sup>37</sup> Section 81(3)(b).

<sup>38</sup> *President of the Republic of South Africa and Others v M&G Media Ltd* 2012 (2) SA 50 (CC) at para 15.



*of the statute is sufficient to discharge the burden borne by the State”<sup>39</sup>*

It held as follows:

*“[23] The proper approach to the question whether the State has discharged its burden under s 81(3) of PAIA is therefore to ask whether the State has put forward sufficient evidence for a court to conclude that, on the probabilities, the information withheld falls within the exemption claimed.*

*[24] The recitation of the statutory language of the exemptions claimed is not sufficient for the State to show that the record in question falls within the exemptions claimed. Nor are mere ipse dixit affidavits proffered by the State. The affidavits for the State must provide sufficient information to bring the record within the exemption claimed. This recognises that access to information held by the State is important to promoting transparent and accountable government, and people's enjoyment of their rights under the Bill of Rights depends on such transparent and accountable government.*

*[25] Ultimately, the question whether the information put forward is sufficient to place the record within the ambit of the exemption claimed will be determined by the nature of the exemption. The question is not whether the best evidence to justify refusal has been provided, but whether the information provided is sufficient for a court to conclude, on the probabilities, that the record falls within the exemption claimed. If it does, then the State has discharged its burden under s 81(3). If it does not, and the State has not given any indication that it is unable to discharge its burden because to do so would require it to reveal the very information for which protection from disclosure is sought, then the State has only itself to blame.”*

50 If the requester has complied with PAIA and the information does not fall within one of the grounds of exclusion there is no discretion on the part of the public body or the court to refuse access.<sup>40</sup>

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<sup>39</sup> *President of the Republic of South Africa and Others v M&G Media Ltd* 2012 (2) SA 50 (CC) at paras 23-25. Though the judgment cited is a majority judgment of Ngcobo CJ, the Constitutional Court was unanimous on this issue.

<sup>40</sup> *Transnet Ltd and Others v SA Metal Machinery Co (Pty) Ltd* 2006 (6) SA 285 (SCA) at para 58.

51 In order to determine whether the respondents have discharged the statutory burden imposed upon them by section 81(3) of PAIA (to establish that their refusal of the request complied with the provisions of PAIA), the court has the power to call for and examine the requested records, without disclosure to the Applicant. The courts exercise this discretion sparingly and when it is in the interests of justice to do so – particularly where the court is lacking the material necessary to responsibly determine whether the record falls within the exemptions claimed.<sup>41</sup>

52 For the reasons given below, we submit that it is not appropriate in this case for the Court to exercise its power under section 81.

## **THE RESPONDENTS' REFUSAL TO GRANT ACCESS TO THE REQUESTED INFORMATION IS NOT JUSTIFIED UNDER PAIA**

53 The respondents rely on sections 38(a), 38(b)(i)(aa) and 45(b) of PAIA to justify their refusal of the applicants' request. We deal with each of these sections below.

### **Mandatory protection of safety of individuals and property**

54 In terms of section 38 of PAIA, "the information officer of a public body –

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<sup>41</sup> This approach was adopted by the North Gauteng High Court, Pretoria in *M & G Media v President of the Republic of South Africa and Others* 2013 (3) SA 591 (GNP), after the Constitutional Court remitted the matter to the High Court with an instruction that it examine the record in terms of section 80 of PAIA: see *President of the Republic of South Africa and Others v M&G Media Ltd* 2012 (2) SA 50 (CC).

54.1 must refuse a request for access to a record if its disclosure could reasonably be expected to endanger the life or physical safety of an individual (section 38(a)); or

54.2 may refuse a request for access to a record of the body if its disclosure would likely prejudice or impair, *inter alia*, the security of a building structure or system, including, but not limited to, a computer or communication system" (section 38(b)(i)(aa)).  
(Emphasis added.)

55 As with the above provisions, each ground of refusal in PAIA is tied to one of two standards – “*likely to*” or “*could reasonably be expected to*”. As Currie and Klaaren explain, ‘*likely to*’ is the more stringent of the tests applicable to the causative element of the grounds of refusal. A body invoking a ‘*likely to*’ ground of refusal must therefore show ‘*based on real and substantial grounds, that there is a strong probability that a harmful consequence will occur.*’<sup>42</sup>

56 This approach has been confirmed by the SCA in ***Transnet***, where it held that the ‘*likely to*’ standard is higher, although both standards require a result that is probable, objectively considered, in order to apply. The SCA described the standards (albeit in the context of section 36(1)(b) and (c) of PAIA) as follows:

*“It follows that the difference between (b) and (c) of s 36(1) is to be measured not by degrees of probability. Both involve a result*

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<sup>42</sup> Currie & Klaaren *The Commentary on the Promotion of Access to Information Act* (2002) at pp 102-3.

*that is probable, objectively considered. The difference, in my view, is to be measured rather by degrees of expectation. In (b), that which is likely is something which is indeed expected. This necessarily includes, at least that which would reasonably be expected. By contrast, (c) speaks of that which 'could reasonably be expected'. The results specified in (c) are therefore consequences (i) that could be expected as probable (ii) if reasonable grounds exist for that expectation."*<sup>43</sup>

57 Thus, for the respondents to succeed in establishing the ground under section 38(a) or 38(b)(i)(aa), they must demonstrate that it is probable (not possible) that the disclosure would (not could) cause the harm contemplated. For section 38(a), the respondents must show that it can reasonably be expected that disclosure of the requested records would endanger the life or physical safety of an individual. For section 38(b)(i)(aa), the standard is higher: the respondents must show that it is likely that disclosure of the records would prejudice or impair, *inter alia*, the security of a building structure or system. It must be recalled in this regard that in terms of section 82(3) of PAIA, the onus rests on the respondents in this regard.

58 The respondents have provided no evidence at all to show that the harm contemplated under section 38(a) could reasonably be expected to eventuate on disclosure of the National Key Points, or that the harm contemplated in section 38(b)(i)(aa) would be likely to eventuate. The respondents have simply made vague and bald allegations that the harm under section 38 would result from disclosure, and relied solely on their

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<sup>43</sup> *Transnet Ltd and Another v SA Metal Machinery Co (Pty) Ltd* 2006 (6) SA 285 (SCA) at para 42.

assertions in this regard.<sup>44</sup> This does not meet the standard of “adequate reasons” as required under section 25(3) of PAIA.

59 The respondents have also made no effort whatsoever to discern whether the asserted conclusions apply equally to all 200 National Key Points, and if not, whether certain of the National Key Points ought in fact to be disclosed.

59.1 Even if it is accepted that the 200 places declared as National Key Points have been lawfully declared as such – i.e. on the basis of a reasonable belief that the place or area is “*so important that its loss, damage, disruption or immobilization may prejudice the Republic*” or that its designation as is “*necessary or expedient for the safety of the Republic or in the public interest*” (which is not admitted by the applicants) – the applicants dispute the respondents’ contention that the disclosure of the mere fact that a place or area has been designated a National Key Point would endanger the life or physical safety of an individual, or prejudice or impair the security of a building, structure or system.

59.2 This is particularly the case where the National Key Point is a public place, whose existence and strategic importance for the Republic is widely known. It cannot reasonably be contended, for instance, that the mere disclosure of the fact that O.R. Tambo International Airport is a National Key Point itself poses any threat

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<sup>44</sup> These allegations are enumerated in para 9 and 11 of the Replying Affidavit at pages 198-200 of the Record.

to security.<sup>45</sup> However this is precisely what the respondents contend: They suggest that knowledge of its designation would “attract attention to it” and (by implication) that such “attention” would threaten the life of persons or the safety of the building.<sup>46</sup> This needs only to be stated to be rejected as absurd.

59.3 In respect of other places, whose existence and strategic importance may not be known, the applicants contend that the mere disclosure of the name of the place and its designation as a National Key Point, without more, could not reasonably be expected to endanger the life or physical safety of an individual, nor likely prejudice or impair the security of a building, structure or system. What is fundamental to the security of the place, and thus the public interest, is that the location of such National Key Points remains undisclosed. The applicants did not request this information.<sup>47</sup>

59.4 Plainly, the identity of the places declared National Key Points can be disclosed without disclosure of their addresses or precise location. For instance, the disclosure in Parliament of the designation of the Office of Interception and Communication Centre as a National Key Point (as discussed at paragraph 27 above) disclosed the existence of this institution (which previously was not well-known by the public) without any disclosure of its

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<sup>45</sup> Paras 41-42 of the Founding Affidavit, Record pages 24-25.

<sup>46</sup> At para 30.3 of the Answering Affidavit at page 182. See the applicants' reply at para 14 of the replying affidavit at page 200-201 of the Record.

<sup>47</sup> Para 43 of the Founding Affidavit, page 25 of the Record.

location.

59.5 The only answer given by the respondents to this contention is that *“in the digital and information age in which we live it is easy to find out the location of a place and the details of an individual or corporation”*.<sup>48</sup> If this is so, and the information is in fact already in the public domain, then this is further reason for why the State’s non-disclosure is unreasonable and unlawful.

60 The unreasonableness of the respondents’ blanket refusal is amply demonstrated by the disclosure of the names and locations of a number of National Key Points in 2013, by the Ministers responsible for their administration.<sup>49</sup> These disclosures evidence that the mere identification of (at least certain) places as National Key Points does not reasonably pose any risk of the harm contemplated in sections 38(a) and 38(b)(i)(aa) of PAIA.

61 Moreover, security may indeed be favoured by transparency and disclosure as opposed to state secrecy.<sup>50</sup>

61.1 If the safeguarding of certain infrastructure is truly critical, then a degree of public awareness of the importance of the place and its security can be useful. Citizens may play a “watchdog” role in respect of those places, and draw the relevant authorities’

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<sup>48</sup> Para 30.3 of the Answering Affidavit, page 182 of the Record.

<sup>49</sup> Para 15 of the Replying Affidavit at pages 201-204 of the Record. See also Annexures “RA1” to “RA6” at pages 218 - 299 of the Record.

<sup>50</sup> Paras 34.2 - 34.3 of the Replying Affidavit at pages 210-211 of the Record.

attention to visible security weaknesses or suspicious activity at or around the place.

61.2 Disclosure of the National Key Points also enables the public to demand that adequate security measures be taken in respect of these places, by private owners or the state as the case may be.

61.3 Publically disclosing that a certain place is a National Key Point may prevent attacks at that place precisely because it would be presumed to have special security measures and be the subject of public attention.

61.4 From the point of view of citizens, transparency and disclosure is plainly safer than secrecy. Given the criminal offences that attach to various activities at National Key Points, citizens are only able to effectively protect themselves by knowing that a place is a National Key Point.

62 The respondents have accordingly failed to justify their reliance on section 38 of the PAIA. Even if they had shown that this ground was applicable – which they have not – the respondents have not shown that they considered:

62.1 whether there is an overriding public interest in disclosure of the records, as they are obliged to have done under section 46 of PAIA; nor

62.2 whether certain of the requested records can be disclosed and



severed from those the records whose non-disclosure is justified under PAIA.

63 For these reasons, we submit that the respondents have failed properly to apply their minds to the request; and that even at this stage, the respondents have put up no evidence that would justify a finding that the information sought falls within any of the exemptions that they have invoked. The refusal on the basis of section 38 of PAIA thus falls to be set aside.

#### **Unduly onerous request**

64 Section 45(b) of PAIA provides that:

*“45. The information officer of a public body may refuse a request for access to a record of the body if –*

*... .*

*(b) the work involved in processing the request would substantially and unreasonably divert the resources of the public body.”*

65 In deciding the internal appeal, the first respondent (the Minister) reasoned that disclosure of the places or areas declared as National Key Points would impose unreasonable demands on the SAPS in that –

*“[T]he majority of these places or areas is not government owned and therefore there are [sic] personal information (i.e. the name of the place or area qualifies as ‘the address of the individual’ or that he or she is the owner of such place or area) of numerous third parties involved in the request. The fact that a place or area is the property of a certain person qualifies as personal information of such person.*

*... In order for the Service to adhere to the provisions of section 47 of the Act (ie the work involved in processing and notifying third parties of the request of access to a record contemplated in section 34(1) of the Act, and afford them 21 days to grant or refuse such access with reasons), will substantially and unreasonably divert the resources of the Service.”<sup>51</sup>*

66 While the Minister indicated that “the majority” of the National Key Points are privately-owned properties, the respondents have not indicated (despite being invited to do so in this application)<sup>52</sup> precisely how many fall into this category however. If records were being managed properly, the exact number of privately-owned National Key Points should be easily retrievable.

67 In any event, we deny that the Minister’s reliance on section 45(b) is valid for at least three reasons:

67.1 First, there is no reason to believe that merely affording notice to the third party owners of the private properties declared National Key Points would “substantially and unreasonably divert the resources of the Services”. The SAPS has a designated Information Officer to attend to the requisite PAIA notices. There would thus be no need to “divert” the resources of the Service. In any event, even if such notification were required for all 200 National Key Points, this would not be so onerous as to require a diversion of resources – let alone substantial resources – from the SAPS.

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<sup>51</sup> Para 6 of Annexure “CMK12”, page 129 of the Record.

<sup>52</sup> Para 60 of the Founding Affidavit, page 31 of the Record.

67.2 Second, the applicants' request for records "*indicating any place or area declared as a National Key Point or Complex*" does not require the disclosure of personal information of the owner, nor "the address of the individual". The applicants do not seek the disclosure of the location or addresses of the National Key Points; they require only information that identifies those places or areas. The respondents' contention that disclosure of the requested records requires the disclosure of addresses demonstrates that the respondents have misunderstood the nature of the applicants' PAIA request, and have not applied their minds to the disclosure of the records actually sought.

67.3 Third, even if the addresses of the National Key Points situated on private property were disclosed, we submit that the disclosure of the addresses alone – and without any indication of who the third party owner is – would not constitute disclosure of "personal information" as contemplated under section 1 of PAIA. It is only when an address is associated with the individual concerned, that it could reasonably be described as "personal information". This is made clear in the definition of "personal information" under section 1 of PAIA, which states that:

*"Personal information means information about an identifiable individual, including but not limited to –*

*. . .*

*(d) the address . . . of the individual". (Emphasis added.)*

The applicants did not request disclosure of any facts pertaining

to ownership of the places or areas declared as National Key Points. They only sought disclosure of which places or areas have been declared National Key Points or Complexes.

- 68 For all these reasons, the Minister's reliance on section 45(b) of PAIA to refuse disclosure of the requested records is unfounded and unlawful.

## THE PUBLIC INTEREST IN DISCLOSURE OF THE RECORDS

- 69 Section 46 of PAIA provides for the mandatory disclosure of records by a public body in the public interest. It stipulates that:

*"Despite any other provision of this Chapter, the information officer of a public body must grant a request for access to a record of the body contemplated in section 34(1), . . . 38(a) or (b) . . . or 45, if –*

- (a) the disclosure of the record would reveal evidence of –*
  - (i) a substantial contravention of, or failure to comply with, the law; or*
  - (ii) an imminent and serious public safety or environmental risk; and*
- (b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question."*

- 70 We emphasise that there is no evidence that the respondents weighed the alleged harm contemplated under sections 38 and 45 of PAIA against the public interest in disclosure, as they were obliged to do under section 46 of PAIA. On this ground alone, their refusal to disclose the requested records falls to be set aside.

71 On the evidence, it is clear that the disclosure of the requested records is indeed required in the public interest under section 46(a)(i), which interest outweighs the harm contemplated in sections 38(a), 38(b)(i)(aa) and 45(b). The disclosure of the record is necessary to reveal evidence of a substantial contravention of, or failure to comply with, the law – specifically:

71.1 Abuse by the Minister of Police of his discretion in declaring places or areas National Key Points or Complexes under sections 2 and 2A of the National Key Points Act;

71.2 Non-compliance with the financial obligations that the National Key Points Act imposes on the Minister of Police and the private owners of places or areas declared National Key Points or Complexes; and

71.3 Unlawful and/or false allegations by members of the SAPS and government officials that certain places are National Key Points in order to conceal or justify unlawful conduct on their part.

72 The contents of the records sought are of profound public interest and importance, as they concern:

72.1 The exercise of Ministerial discretion that has the effect of restricting various activities – including media reportage and political protest – and imposing obligations upon private persons at the threat of criminal sanction; and

- 72.2 The propriety and priority of public spending in a country with limited funds to meet the considerable demands of a developing economy.
- 73 The public interest in the contents of the records is heightened by the fact that the non-disclosure of National Key Points has generated, and continues to generate widespread speculation that:
- 73.1 The Minister of Defence has abused her powers to declare certain places and areas National Key Points or Complexes; and
- 73.2 There has been public spending on places declared to be National Key Points that is in contravention of sections 3 and 3A of the National Key Points Act.<sup>53</sup>
- 74 This has harmed, and continues to harm, public confidence in the state and in the members of Cabinet.<sup>54</sup>
- 75 The admitted failure of the respondents to maintain a special account, as required by sections 3 and 3A of the National Key Points Act, is a further reason for disclosure of the requested records.
- 75.1 At paragraph 32.1 of the answering affidavit, the respondents affirm that *"the majority of the 200 places or areas that have been declared as national key points are privately and not government*

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<sup>53</sup> See the articles attached to the founding affidavit as annexures "CMK15" and "CMK16" at pages 152-165 of the Record.

<sup>54</sup> Para 69 of the Founding Affidavit at page 35 of the Record.

*owned*".<sup>55</sup>

75.2 The respondents also state categorically at paragraph 33.1 that, "No special bank account was opened in terms of section 3B of the Act. Neither were monies paid into that account".<sup>56</sup>

75.3 These two admissions demonstrate the necessity for disclosure of the National Key Points under section 46(1)(a) of PAIA – specifically, in that disclosure would reveal evidence of a substantial contravention of, or failure to comply with the law, and the public interest in this disclosure would outweigh the harm contemplated in sections 38(a), 38(b)(i)(aa) and 45(b) of PAIA.

76 The purpose of the special account, as required under section 3B is *inter alia* to hold monies recovered from private owners of National Key Points for security measures that may be taken by the State in respect of those properties. Under section 3(1) of the National Key Points Act, private owners of National Key Points are required to take security measures at their own expense. Where they fail to take security measures as required by the Minister (in consultation or on written notice), the Minister may take or cause to be taken the necessary security measures and thereafter recover the expenses from the private owner to such extent as the Minister may determine.

77 The fact that the State has not opened or maintained a special account

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<sup>55</sup> Record, p. 183.

<sup>56</sup> Record, p. 185.

as required under section 3B suggests that the State has borne all the expenses of securing National Key Points on private property, in contravention of the requirement under section 3(1) that these steps be taken at the expense of the private owner.

78 On the respondents' version, over 100 National Key Points are privately owned. Should the State indeed be financing all of the steps taken in respect of securing these National Key Points, this would likely amount to a significant public expense. (The R206 million spent on security upgrades, operational improvements and consultants at President Zuma's Nkandla Estate is indicative of the expenses potentially involved.)

79 Importantly, such financing by the State would also constitute a substantial contravention of the law, in that such public expenditure is proscribed by the National Key Points Act, and would further amount to irregular expenditure under the PFMA.

80 We submit that, in the light of the respondents' admissions regarding the special account, the public interest in disclosure of the National Key Points is required to reveal the abuse of state funds in the securing of National Key Points on private property, which is a matter of considerable public interest.

## **WHETHER A "JUDICIAL PEEK" IS APPROPRIATE**

81 In *President of the Republic of South Africa and Others v M&G*



**Media Ltd 2012 (2) SA 50 (CC)**, the Constitutional Court addressed the question of when it is appropriate for a court to resort to a “judicial peek” at a record under section 80 of PAIA. It established the following principles in this regard:

81.1 *“Section 80(1) was drafted as an override provision that may be applied despite the other provisions of PAIA and any other law. As such, section 80 should be used sparingly.”*<sup>57</sup>

81.2 The court’s power to examine the record *in camera* is “a discretionary power that must be exercised judiciously, with due regard to the constitutional right of access to information and the difficulties the parties face in presenting and refuting evidence”.<sup>58</sup>

81.3 *“The standard for assessing whether a court should properly invoke section 80 in a given case is whether it would be in the interests of justice for it to do so.”*<sup>59</sup>

81.4 *“A court should not use its powers under section 80 as a substitute for the public body laying a proper basis for its refusal”*.<sup>60</sup>

82 Given the manifest failure of the respondents to give adequate reasons for their refusal to disclose the requested records, and their failure to demonstrate that they have applied their minds to the issues of

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<sup>57</sup> Para 39, emphasis added.

<sup>58</sup> Para 40.

<sup>59</sup> Para 45.

<sup>60</sup> Para 49.

severance and the public interest in disclosure, we submit that the interests of justice do not call for judicial scrutiny of the records.

83 Moreover, the respondents have not pleaded that they are constrained in presenting evidence in relation to the dispute; they have simply failed properly to consider the request. The State has thus failed to lay any plausible foundation for claiming the exemptions. It has also not shown that its hands are tied in presenting evidence to justify a secret judicial examination of the record.

84 In these circumstances, any court examination of the records would amount to supplementing the respondents' case. This would have the effect of sanctioning the respondents' failure to apply their mind to the request and subsequent dispute, and would not be in the interests of justice.

85 We respectfully submit that this Honourable Court has sufficient evidence to responsibly decide that, on the probabilities, the records requested by the applicants are not protected under sections 38(a), 38(b)(i)(aa) or 45(b).

86 Finally, we emphasise that the "judicial peek" procedure is not an alternative suitable remedy for the requestor. It does not in any way guarantee the requestor's access to the information it seeks.

## **CONCLUSION**

- 87 The respondents have failed to discharge the onus under section 81(3) of PAIA, which requires them to show that, on a balance of probabilities, the requested information falls within one of the exemptions under Chapter 4 of PAIA. The applicants are accordingly entitled to the requested information.
- 88 The conduct of the respondents in this matter has been lamentable. The blanket refusal of the applicants' request for information, and the careless attitude with which the Information Officer dealt with the request (indicated by the erroneous subject-line in the Information Officer's email advising of the refusal) demonstrates that the respondents' failed to give due consideration to the merits of the request and to the constitutional right of access to information.
- 89 Accordingly, the applicants pray for an order in terms of the notice of motion and costs, including the cost of two counsel.

**S BUDLENDER**

**J BLEAZARD**

Applicants' Counsel

Sandton, Chambers

17 February 2014

## **LIST OF AUTHORITIES**

### **CASES**

Brummer v Minister for Social Development and Others 2009 (6) SA 323 (CC)

Fraser v Absa Bank Ltd (National Director of Public Prosecutions as *Amicus Curiae*) 2007 (3) SA 484 (CC)

Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO and Others 2001 (1) SA 545 (CC)

M & G Media Ltd v President of the Republic of South Africa and Others 2013 (3) SA 591 (GNP)

MEC for Roads and Public Works, Eastern Cape, and Another v Intertrade Two (Pty) Ltd 2006 (5) SA 1 (SCA)

Oriani-Ambrosini v Sisulu, Speaker of the National Assembly 2012 (6) SA 588 (CC)

President of the Republic of South Africa and Others v M&G Media 2011 (2) SA 1 (SCA)

President of the Republic of South Africa and Others v M&G Media 2012 (2) SA 50 (CC)

Transnet Ltd and Another v SA Metal Machinery Co 2006 (6) SA 285 (SCA)

Van Niekerk v Pretoria City Council 1997 (3) SA 839 (T)

Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another 2009 (1) SA 337 (CC)

### **STATUTES**

Constitution of the Republic of South Africa, 1996

National Key Points Act 102 of 1980

Promotion of Access to Information Act 2 of 2000

Public Finance Management Act 1 of 1999

### **OTHER**

Currie & Klaaren *The Commentary on the Promotion of Access to Information Act* (2002)

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

**CASE NO: 32512/13**

In the application of:

**THE RIGHT2KNOW CAMPAIGN**

First Applicant

**THE SOUTH AFRICAN HISTORY ARCHIVE TRUST**

Second Applicant

And

**THE MINISTER OF POLICE**

First Respondent

**THE NATIONAL DEPUTY INFORMATION  
OFFICER: SOUTH AFRICAN POLICE SERVICE**

Second Respondent

**THE MINISTER OF DEFENCE AND MILITARY  
VETERANS**

Third Respondent

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**APPLICANTS' PRACTICE NOTE**

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**NAME OF CASE:**

The name of the case appears above.

**DATE OF HEARING:**

Still to be allocated

**COUNSEL:**

For the Applicants:

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For the Respondents:

Unknown

**NATURE OF THE APPLICATION:**

This is an application in terms of section 78 of the Promotion of Access to Information Act ("**PAIA**") to review and set aside the first and second respondents' refusal to grant access to information.

**ISSUES TO BE DETERMINED:**

1. Whether the respondents' have discharged the onus under section 81(3) of PAIA, which requires them to show that, on a balance of probabilities, the requested information falls within one of the exemptions under Chapter 4 of PAIA.
2. Specifically, whether the respondents' reliance on the following two exemptions is justified:

- 2.1 The mandatory protection of safety of individuals and protection of private property (section 38(a) and 38(b)(i)(aa) of PAIA); and
- 2.2 The request is unduly onerous in that the work involved in processing it would result in the substantial and unreasonable diversion of resources (section 45(b) of PAIA).
3. Whether the respondents complied with the duty under section 28 of PAIA to determine whether part of the requested records can reasonably be severed from the rest and disclosed.
4. Whether the respondents' blanket refusal to disclose the requested records is justified, or whether part of the requested records can reasonably be severed from the rest under section 28 of PAIA and does not contain information to which access must be refused.
5. Whether the public interest override under section 46 of PAIA requires disclosure of the requested records.
6. Whether it is in the interests of justice for the Court to resort to a "judicial peek" at the record under section 80 of PAIA to determine whether the whole or part of the record should be disclosed.

#### **RELIEF SOUGHT BY THE APPLICANTS:**

An order:

1. Declaring the decision of the first and second respondents to refuse the applicants' request for information in terms of the Promotion of Access to Information Act 2 of 2000 ("PAIA") as unlawful and unconstitutional.
2. Reviewing and setting aside the refusal by the first and second respondents

of the applicants' request in terms of section 11, 78 and 81 of PAIA.

3. Directing the first and second respondents to supply the applicants with a copy of the requested information within 15 (fifteen) days of the granting of this order.
4. Directing the first and second respondents to pay the costs of this application.

**DURATION:**

4 hours

**URGENCY:**

This matter is not urgent/ there are no grounds for urgency in this matter.

**NECESSARY TO READ THE PAPERS:**

Yes

**STEVE BULENDER**

**JANICE BLEAZARD**

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81 Maude Street  
Sandton  
17 February 2014