

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

CASE NO: 05598/16

In the matter between:

THE SOUTH AFRICAN HISTORY ARCHIVE TRUST

Applicant

and

THE SOUTH AFRICAN RESERVE BANK

First Respondent

**THE GOVERNOR OF THE SOUTH AFRICAN
RESERVE BANK, L KGANYAGO**

Second Respondent

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1. Applicant's heads of argument

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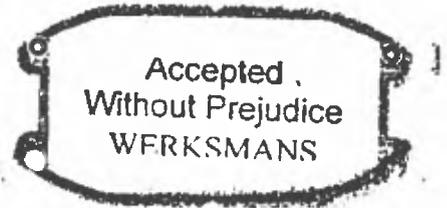
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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case No.: 16/05598

In the matter between:

THE SOUTH AFRICAN HISTORY ARCHIVE TRUST Applicant

and

THE SOUTH AFRICAN RESERVE BANK First Respondent

**THE GOVERNER OF THE SOUTH AFRICAN
RESERVE BANK, L KGANYAGO** Second Respondent

APPLICANT'S HEADS OF ARGUMENT

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INTRODUCTION

1. This is an application in terms of section 78(2) read with section 82 of the Promotion of Access to Information Act 2 of 2000 ("**PAIA**" or "**the Act**") by the South African History Archive ("**SAHA**") to obtain access to records held by the South African Reserve Bank ("**SARB**").¹
2. On 1 August 2014 SAHA requested copies of records obtained by SARB as part of investigations into eight named individuals, in respect of the period 1 January 1980 to 1 January 1995 ("**the requested records**").² The requested information addresses corruption under apartheid, and the utilisation of key institutions in the public and private sectors to facilitate the externalisation of South African funds during apartheid.
3. In terms of section 25(1) of the Act, SARB was required to decide whether to grant the request, and notify SAHA, within 30 days.
4. On 14 August 2014 SARB's attorneys wrote to SAHA's attorneys:³
 - 4.1. asserting that this request and related requests were "vexatious" and a "designed attempt to intimidate" SARB; and
 - 4.2. requesting the reasons why and the purposes for which SAHA sought the information requested.

¹ This application is brought in accordance with the Rules of Procedure for Application to Court in terms of the Act (GNR.965 of 9 October 2009: Government Gazette No. 32622).

² The content of SAHA's PAIA request is set out at Page 7, para 9, founding affidavit. The Form A: Request for Access is at Annexure FA2 of the Founding Affidavit, page 52. The eight individuals are: The late Mr Giovanni Ricci, the late Mr Fanie Botha, Brig Johann Blaauw, Mr Paul Ekon, Mr Hill, Mr Vito Palazzolo, Mr Craig Williamson and Dr Wouter Basson.

³ Founding Affidavit, Annexure FA6, page 78.

5. On 26 September 2014 SAHA's attorneys replied to that letter. They pointed out that in terms of the Act, because SARB is a public body, SAHA was not obliged to provide reasons for its request for access to information. However, in the spirit of collegiality, it stated the reasons why it sought the records.⁴
6. Ten months later, on 27 July 2015, SARB complained that the request was vague and ambiguous. SAHA replied to this on 19 August 2015, and addressed other matters raised by SARB.⁵
7. Finally, on 28 October 2015, SARB informed SAHA that it had refused the request of 1 August 2014:
 - 7.1. It stated that it did not have records in relation to five of the individuals named in the SAHA request.
 - 7.2. It asserted that notwithstanding the provisions of the Constitution and PAIA, section 33 of the South African Reserve Bank Act 90 of 1989 ("the SARB Act") precludes it from disclosing the records in respect of the other three individuals.
 - 7.3. It refused to provide access to any record, or any part of any record, at all.
 - 7.4. This is despite the fact that as subsequently emerged in this litigation, some of the records held by SARB were public documents.
8. We submit that the summary in the founding affidavit of SARB's position is a fair one: SARB relied on generic and blanket objections that could not

⁴ Founding Affidavit, Annexure FA7, page 80.

⁵ Founding Affidavit, pages 20-21, paras 45-48; Founding Affidavit, Annexure FA8, page 82.

conceivably apply to every part of every document requested. Its true objection is an objection in principle to disclosing any document that is under its control, or any part of any such document.⁶

9. The position in law under PAIA is clear. Everyone is entitled to access to records held by public bodies as of right, provided that the required procedures have been followed. The only basis upon which the public body can refuse to provide the records is by establishing one of the statutory grounds of refusal created by PAIA.
10. The question in this case is whether SARB has met the burden resting on it to establish a valid statutory ground of refusal in relation to each of the records requested, and each part of each of those records.
11. SARB has stated that it does not have any records in relation to five of the named individuals: Mr Ricci, Mr Botha, Mr Ekon, Mr Williamson and Dr Basson. It has provided a section 23 affidavit to this effect, and has provided further information in this regard in its answering affidavit. SAHA does not persist in seeking relief in relation to these five individuals.
12. SARB is in possession of records relating to the three remaining individuals, Brig Blaauw, Mr Palazzolo and Mr Hill, but refuses access to all of those records.⁷ SARB's refusal is based on six main grounds:

⁶ Founding Affidavit, page 34, para 101. SAHA's assertion as to the true attitude of SARB is denied only as part of a general denial: Answering Affidavit, page 185, para 153.4.

⁷ Founding Affidavit, Annexure FA9, page 89, para 4. Answering Affidavit, page 143, para 65.

Copies of the public documents, being the Harms Report and newspaper articles were provided with the answering affidavit. See Answering Affidavit, page 151 - 152, paras 79 and 80.

- 12.1. First, by narrowly interpreting SAHA's PAIA request, SARB claims that the majority of the documents in the investigation files of Mr Palazzolo and Brig Blaauw do not fall within the scope of the request and therefore do not need to be disclosed.
 - 12.2. Second, SARB contends that the records are exempt from disclosure under section 42(1) of PAIA because their disclosure will cause harm to the integrity of SARB's record system and jeopardise the economic interests of the country.
 - 12.3. Third, SARB contends that the records are exempt from disclosure under section 34(1) because they contain personal information about Mr Palazzolo, his family Trust, companies and other third parties.
 - 12.4. Fourth, SARB contends that the records are exempt from disclosure under section 37(1)(b) and/or 42(1) because they consist of information supplied in confidence to SARB or under regulation 19 of the Exchange Control Regulations.
 - 12.5. Fifth, SARB contends that the records contain commercial information and are exempt from disclosure under section 36(1);
 - 12.6. Sixth, SARB contends that the records are exempt from disclosure under section 45 because the work involved in processing the request in respect of 43 archive boxes in relation to Mr Hill would substantially and unreasonably divert SARB's resources.
13. SAHA persists in its claim in respect of Mr Blaauw, Mr Palazzolo and Mr Hill.

OVERVIEW OF SAHA'S CASE

14. SAHA contends that SARB has failed to give effect to its constitutional and statutory obligation to provide access to information. The reasons relied upon by SARB in refusing access to the records are without merit:

14.1. First, SARB impermissibly relies on a restricted and narrow interpretation of SAHA's PAIA request. All of the records identified by SARB fall within the scope of the request;

14.2. Second, SARB's claims that the PAIA exemption provisions justify non-disclosure lack any evidence to support them. SARB makes blanket assertions in respect of unidentified records⁶ and fails to provide a sufficient factual basis for its reliance on the statutory exemption. This does not meet the obligations imposed on a public body under PAIA;

14.3. Third, even if there was a plausible basis to refuse disclosure, the statutory exemptions are subject to the public interest override in section 46 of PAIA. On the facts, section 46 trumps SARB's refusal, and disclosure of the records must follow.

15. The issue to be determined is whether SARB's refusal of access to the records is justified in terms of PAIA. This is an appeal, not a review: *"In proceedings under PAIA, a court is not limited to reviewing the decisions of the information officer or the officer who undertook the internal appeal. It decides the claim of exemption from disclosure afresh, engaging in a de novo reconsideration of the*

⁶ Replying Affidavit, page 352, para 7.

merits."⁹ And the court is not limited to the material which was before the information officer – additional evidence may be introduced.¹⁰ However, a Full Bench of this Court has held that in an appeal in terms of section 78, the recipient of the request is limited to the grounds of exemption on which it relied when it refused the request: it may not, in the litigation, attempt to raise and rely on new grounds of refusal to bolster its refusal.¹¹

16. In these submissions, we deal with the following issues in turn:

16.1. The proper approach to PAIA and the interpretation of the exemption provisions;

16.2. SARB's reasons for refusal in this application;

16.3. We demonstrate that on a proper approach to and interpretation of SAHA's PAIA request, the identified records fall within the scope of the request;

16.4. We consider SARB's reliance on the provisions of PAIA which justify an exemption of a record from disclosure, and submit that there is no factual basis for SARB's claims;

16.5. We address the question of severability of records;

16.6. We submit that even if SARB has managed to discharge the evidentiary burden in respect of any of the exemption provisions to justify refusal, the public interest override in section 46 of PAIA requires disclosure;

⁹ *President of the RSA and others v M and G Media Ltd* 2012 (2) SA 50 (CC) at para 14.

¹⁰ *Transnet Ltd and another v SA Metal Machinery Co (Pty) Ltd* 2006 (6) SA 285 (SCA) at para 24-25.

¹¹ *Afriforum v Emadleni Municipality* (A286/2015) [2016] ZAGPPHC 510 (27 May 2016) at para 26-28.

16.7. We then deal with SARB's point in limine: we contend that there is no material non-joinder in this case; and

16.8. Finally we address the question of costs.

THE PROPER APPROACH TO PAIA

The constitutional right and its importance

17. Section 32 of the Constitution guarantees the right of access to information:

"Everyone has the right of access to ... any information held by the State."

18. The right of access to information is fundamental to a state whose founding values include the pursuit of *"accountability, responsiveness and openness"*.¹² Access to information held by the state is critical to achieving this value and other rights.

19. The right to information distinguishes democratic states from other regimes. The SCA and Constitutional Court have affirmed that *"...open and transparent government and a free flow of information concerning the affairs of the state is the lifeblood of democracy."*¹³

20. This value permeates the Constitution. For instance:

20.1. The preamble states that the Constitution lays the foundation for a *"democratic and open society"*.

¹² Section 1(d) of the Constitution.

¹³ *President of the Republic of South Africa v M&G Media Ltd* 2011 (2) SA 1 (SCA) at para 1 and *Oriani-Ambrosini v Sisulu, Speaker of the National Assembly* 2012 (6) SA 588 (CC) at para 46.

- 20.2. Section 41(1)(c) requires all spheres of government and all organs of state to provide “transparent” and “accountable” government.
- 20.3. 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.
- 20.4. Section 195 lays down the basic values and principles that govern public administration in every sphere of government.¹⁴ Public administration “*must be accountable*”¹⁵ and “[t]ransparency must be fostered by providing the public with timely, accessible and accurate information”.¹⁶

The approach which a public body is required to take to a PAIA request

21. Section 32 of the Constitution reflects the need for a decisive break with the apartheid state’s obsession with secrecy. Public authorities are no longer permitted to “*play possum*” with members of the public in relation to information where their rights 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.*”¹⁷
22. This approach – that a public body is not to “play possum” with the public - is reflected in the Act and in the jurisprudence. Thus:

¹⁴ Section 195(2)(a) of the Constitution.

¹⁵ Section 195(1)(f) of the Constitution.

¹⁶ Section 195(1)(g) of the Constitution.

¹⁷ Cameron J in *Van Niekerk v Pretoria City Council* 1997 (3) SA 839 (T) at 850C. This passage has repeatedly been quoted with approval, including in *MEC for Roads and Public Works, Eastern Cape, and Another v Intertrade Two (Pty) Ltd* 2006 (5) SA 1 (SCA) at para 21.

- 22.1. The “provisions of PAIA which provide for the refusal of access to information must be strictly and narrowly construed so that the broadest effect may properly be given to ss 32 and 195 of the Constitution”.¹⁸
- 22.2. If a requester has made a request for access that does not comply with the requirements of section 18 – which includes providing sufficient particulars to enable the public body to identify the record requested - the information officer may not simply refuse the request on the basis of that non-compliance. He/she must notify the requester of the non-compliance; inform the requester that he/she or another identified official will assist the requester to make the request in a form that will remove the grounds for refusal; give the requester a reasonable opportunity to seek such assistance; and as far as reasonably possible, furnish the requester with information that will assist the requester to make the request in the required form.¹⁹
- 22.3. The object and purpose of the Act is to provide a simple and inexpensive mechanism of obtaining information held by public bodies. A request is not to be interpreted in a technical manner, as if it were a pleading. That is inconsistent with the objects of PAIA.²⁰

¹⁸ *Avusa Publishing Eastern Cape (Pty) Ltd v Qoboshiyane no and others* 2012 (1) SA 158 (ECP) at para 17.

¹⁹ Section 19.

²⁰ *Afriforum v Emadleni Municipality* (A286/2015) [2016] ZAGPPHC 510 (27 May 2016) at para 37-38.

23. The Constitution and the Act require this co-operative and non-obstructive approach because of the nature and importance of the right. The Constitutional Court has emphasised:²¹

23.1. *“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.”*²²

23.2. *“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’.”*²³

23.3. *“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.”*²⁴

24. Different levels of transparency apply to private and public bodies. The right of access to information held by private bodies is limited to instances where that information is necessary for the exercise of a right.²⁵

²¹ *President of the RSA v M&G Media Ltd* 2012 (2) SA 50 (CC).

²² *M&G Media* at para 10.

²³ *M&G Media* at para 8, quoting the Court’s judgment in *Brummer v Minister for Social Development and Others* 2009 (6) SA 323 (CC) at 346A-B.

²⁴ *M&G Media* at para 10.

25. Public bodies are subject to a higher level of accountability and scrutiny. The right of access to information held by public bodies is regulated by section 11:

"(1) A requester must be given access to a record of a public body if –

(a) that requester complies with all the procedural requirements in this Act relating to a request for access to that record; and

(b) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part.

...

(3) A requester's right of access contemplated in subsection (1) is 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."

26. The use of "must" obliges an information officer to grant access to the record if the request meets two conditions, namely:

26.1. compliance with the procedures in PAIA; and

26.2. the record is not protected from disclosure under the grounds set out in Chapter 4.²⁶

²⁵ Section 32(1)(b) of the Constitution.

²⁶ *M&G Media* at para 9.

27. The right of access does not depend upon (i) the requester's reasons for requiring the record or (ii) the information officer's assessment of those reasons.²⁷
28. Unless a statutory ground of refusal applies, citizens are entitled, as of right, to information held by a public body. This principle is peremptory.²⁸ If the public body fails to demonstrate that the record falls within one of the exemptions under PAIA, the requester has a right to its disclosure. This is not a discretionary matter.
29. In **M&G Media Ltd**, Ngcobo CJ stressed that: "*Under our law ... the disclosure of information is the rule and exemption from disclosure is the exception.*"²⁹

The test and onus in PAIA applications

30. The Act provides that the burden of establishing that the refusal of access to information complies with a provision of PAIA rests on the party refusing access.³⁰ The test for discharging this burden was articulated as follows by Ngcobo CJ:

"In order to discharge its burden under PAIA, the State must provide evidence that the record in question falls within

²⁷ Section 11(3) of PAIA.

²⁸ *Transnet v SA Metal Machinery Co (Pty) Ltd* 2006 (6) SA 285 (SCA) at para 58.

²⁹ *M&G Media* at para 9.

³⁰ Section 81(3) provides:

"The burden of establishing that—

(a) the refusal of a request for access; or

(b) any decision taken in terms of section 22, 26(1), 29(3), 54, 57(1) or 60,

complies with the provisions of this Act rests on the party claiming that it so complies."

See also *President of the RSA and others v M & G Media Ltd* 2012 (2) SA 50 (CC) at para 13.

*the description of the statutory exemption it seeks to claim.*³¹

31. Ngcobo CJ went on to say:

“[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.”*³²

32. Once it has been established that the request was made in conformity with the form requirements of section 18 of PAIA, the second enquiry is whether any of the grounds of refusal contemplated in Chapter 4 of PAIA apply to this case. If they do not, the information sought must be disclosed.³³

³¹ *M & G Media* at para 23.

³² *M & G Media* at para 24-25

³³ *Transnet* at para 58.

33. Once it is found that SARB has a record, part or all of which falls within the request, to meet its burden SARB must allege and prove that –

33.1. the requested record, and every part of it, is governed by either a mandatory ground or a discretionary ground for refusal; and

33.2. mandatory disclosure is not required in the public interest as set out in section 46 of PAIA.

SARB'S REASONS FOR REFUSAL

34. Mr Ellis of SARB was given the responsibility of considering SAHA's PAIA request in his capacity as the Head of the PAIA Practice Group.³⁴

35. Below is a table summarising the categories of documents identified by SARB in its possession in relation to Mr Palazzolo, Brig Blaauw and Mr Hill, along with SARB's reasons for refusing to grant access to each category of records.

36. SARB does not identify each record in its possession. Rather, it refers to categories of documents. Where SARB alleges that grounds exist for refusal of access to requested records, it does so in relation to a whole category. It does not identify each of the records to which that ground applies, and does not say why that ground applies to that record, and to the whole of that record. Rather, blanket assertions are made in respect of unidentified records.

37. Records relating to Mr Palazzolo:

³⁴ Answering Affidavit, page 141, para 59. Mr Ellis requested further particulars to contextualize the request on 14 August 2014. The LHR responded on 26 September 2014.

Records	Para of Answering Affidavit	Reason for Refusal	Para of Answering Affidavit
Trust documents		Do not fall within SAHA's PAIA request	81
Exchange control index cards		Do not fall within SAHA's PAIA request	82.1
		Exemption: Section 42(1): disclosure will cause harm to integrity of SARB's record system and jeopardise the economic interests of the country	82.2
		Exemption: Section 34(1). The cards record personal information about Mr Palazzolo.	82.3
Proof of transactions by Trust	77.5	Do not fall within SAHA's PAIA request	83.1
		Exemption: Section 34(1). The cards record personal information about the Trust.	83.2
Copies of Mr Palazzolo's bank statements	77.6	Do not fall within SAHA's PAIA request	84.1
		Exemption: Section 34(1). The statements record personal information about Mr Palazzolo.	84.2
Investigator notes and calculations	77.7	Do not fall within SAHA's PAIA request	85
Documents submitted to SARB by authorised dealers	77.8	Do not fall within SAHA's PAIA request	86.1
		Exemption: Section 34(1): The statements record personal information about Mr Palazzolo.	86.2
		Exemption: Section 37(1)(b) and/or 42(1). Information supplied in confidence or under regulation 19.	86.3
Correspondence	77.9	Do not fall within SAHA's PAIA request	87
Screen printouts from Exchange Control electronic database	77.10	Do not fall within SAHA's PAIA request	88

38. Records relating to Brig Blaauw:

Records	Para of Answering Affidavit	Reason for Refusal	Para of Answering Affidavit
Letter by Exchange Control Department	97.1	Do not fall within SAHA's PAIA request	98
		Exemption: Section 36(1): Information is commercial information.	99

		Exemption: Section 37(1)(b) / 42(1): Supplied in confidence.	101
Annual Financial Statements and company documents regarding company of which Braauw was director	97.2	Do not fall within SAHA's PAIA request	98
		Exemption: Section 36(1): Information is commercial information.	99
		Exemption: Section 37(1)(b) / 42(1): Supplied in confidence.	101
Miscellaneous newspaper clippings, property deeds, income returns and assessments.	97.3	Do not fall within SAHA's PAIA request	98
		Exemption: Section 36(1): Information is commercial information.	99
		Exemption: Section 37(1)(b) / 42(1): Supplied in confidence.	101

39. Records relating to Mr Hill:

Records	Para of Answering Affidavit	Reason for Refusal	Para of Answering Affidavit
43 Archive boxes	112 – 113		
Files of forensic auditors, and National Prosecuting Agency.		Exemption: Section 45. Work would substantially and unreasonably divert SARB's resources.	116
Eskom share certificates, company documents, minute books, asset registers, financial records, employee records, papers in the extradition proceedings, litigation against SARB arising from attachment and forfeiture orders.		Exemption: Section 49(2): Personal information of third parties	118 - 120
		Exemption: Section 37(1)(b) / 42(1): Supplied in confidence.	121

40. As is apparent from these tables, SARB adopts two main positions in relation to the categories of records it identifies:

40.1. Either SARB contends that the record does not fall within the ambit of SAHA's request, and there is therefore no obligation on it to provide access to the record; or

40.2. SARB contends that it is justified in refusing the information on the basis of one of the PAIA exemptions.

41. We now address each of these contentions.

ALL OF THE IDENTIFIED RECORDS FALL WITHIN SAHA'S REQUEST

42. SARB asserts that every document identified in relation to Mr Palazzolo and Brig Blaauw does not fall within SAHA's request and therefore need not be disclosed.

43. SARB seeks to give a narrow interpretation to SAHA's request – but even on that basis, its refusal is not justified.

44. The request for access described the records sought as:

"Copies of any and all records, or part of records, of any evidence obtained by the bank at any time as part of investigations into any substantial contravention or, or failure to comply with, the law in terms of significant fraud (including fraud through manipulation of the financial rand dual currency, foreign exchange or forging Eskom bonds), gold smuggling or smuggling or other precious metals from 1 January 1980 to 1 January 1995 in relation to the following persons: ..."³⁵

³⁵ Founding Affidavit, Annexure FA2, page 53.

45. In its letter of 15 October 2015 refusing the application, SARB advised SAHA that it had imposed its own interpretation on the request.³⁶ SARB continues to place its own restrictive interpretation on the request.³⁷ It limits the request to:
- 45.1. Investigations by the Exchange Control Department in respect of the various offences;
 - 45.2. Records that “reveal evidence” of such contraventions.
46. SARB 's narrow and technical interpretation of SAHA's request is contrary to the values of PAIA and the Constitution, and contrary to the approach explained by this Court in *Afriforum*, to which we have referred above. We submit that:
- 46.1. SARB has a duty to approach the interpretation of the scope of PAIA requests with an attitude of transparency and openness.
 - 46.2. If there is any doubt as to whether the document may fall within the ambit of the request, SARB is required to adopt the default of disclosure and not of secrecy.
 - 46.3. SARB must take into account the full context of the location of the documents that it has identified when determining whether a document falls within the scope of a PAIA request.
47. SARB is familiar with SAHA and the scope and thrust of its work. In correspondence exchanged after the request was filed, SAHA explained its interest in the requested records. SARB has the necessary knowledge about

³⁶ Founding Affidavit, Annexure FA9, page 88, para 3.3.

³⁷ Answering Affidavit, page 126, para 33. Answering Affidavit, page 127, para 35.

the purpose of the request for access to information to enable it to adopt a purposive approach to the interpretation of the request.

48. SARB acknowledges that (through the FinSurv Department), it investigated a possible substantial contravention of the law by Mr Palazzolo.³⁸ It has identified the “*documents collected during the course of the investigation*”.³⁹ All of the documents relevant to that investigation plainly fall within the scope of SAHA’s PAIA request. They must have had actual or potential relevance to the investigation, as they would not otherwise have been collected and retained on the investigation file. They were “obtained by the SARB” between 1980 and 1995 “as part of investigations” into contravention of or failure to comply with the law. They are records of evidence collected by the SARB as part of its investigations. That is what SAHA seeks, and there can be no doubt about that. The fact that a particular record may or may not prove the guilt of the subject is not the question. The records are the evidence which SARB collected and retained in the investigation file. This includes the following documents that SARB states are in the investigation file⁴⁰:

48.1. Trust documents;

48.2. Exchange Control Index Cards;

48.3. Trust documents relating to the Family trust;

48.4. Bank Statements;

³⁸ Answering Affidavit, page 147, para 76.

³⁹ Answering Affidavit, page 147, para 76.

⁴⁰ Answering Affidavit, page 148, para 77.

- 48.5. Investigator Notes;
- 48.6. Documents from authorised dealers;
- 48.7. Correspondence;
- 48.8. Screen printout.
49. As to Brig Blaauw: It is clear that SARB investigated alleged contravention of exchange control regulations. SARB considered the matter serious enough to send an affidavit in that regard to the SAPS.⁴¹ All of the documents collected in relation to that investigation plainly fall within the scope of SAHA's PAIA request.
50. It follows that even on a technical reading of the request, all of the records contained in the investigation files of Mr Palazzolo and Brig Blaauw fall within SAHA's request. They are records of evidence collected by SARB as part of its investigations into the offences in question. It is only if one takes the most obstructive approach, seeking technical reasons to avoid disclosure, that one could attempt to contend that these records do not fall within the request. Regrettably, and consistently with its conduct throughout this matter, that is the approach which SARB takes. It is an approach which is unworthy of an institution such as SARB, and it is inconsistent with the requirements of the Constitution and PAIA. It is an approach that calls for adverse comment.
51. When SAHA's request is, as the law requires, interpreted in accordance with the values of openness, transparency, and with the default of disclosure in mind, then the matter cannot even be disputed.

⁴¹ Answering Affidavit, page162, para 97.1.

52. SARB must either grant access to those records or provide a factual basis for the exemption from disclosure in terms of PAIA.
53. We now deal in turn with each of the exemption provisions invoked by SARB to justify its refusal to disclose the records.

SARB'S RELIANCE ON THE PAIA EXEMPTIONS

Section 34: Unreasonable disclosure of personal information

54. Section 34(1) directs an information officer to refuse a request for access to a record if its disclosure would involve the unreasonable disclosure of personal information about a third party, including a deceased individual.
55. SARB relies on the section 34 exemption in respect of the records relating to Mr Palazzolo, in particular, the following: Exchange Control Index Cards, Proof of transactions of the trust, copies of Mr Palazzolo's bank statements, documents submitted to SARB by authorised dealers.
56. SARB did not give Mr Palazzolo notice in terms of section 47 and he was therefore not given an opportunity to consent to the disclosure in terms of section 48, or to object. He has since been given notice of this application, and of the order which SAHA seeks. He has not opposed it.
57. To the extent that the records do contain personal information, disclosure is prohibited only if it would be "unreasonable disclosure". SARB provides no evidence as to why the disclosure would be unreasonable. It does little more than, in the words of Ngcobo CJ, recite the statutory language, followed by an ipse dixit. The SARB has failed to discharge the onus.

Section 36: Information is commercial and disclosure likely to cause harm

58. In terms of section 36(1)(b) the information officer is obliged to refuse a request for access to a record if it contains "financial, commercial, scientific or technical

information, other than trade secrets, of a third party, the disclosure of which *would be likely to cause harm* to the commercial or financial interest of that party” (own emphasis).⁴²

59. SARB relies on the section 36 exemption in respect of the following records relating to Brig Blaauw: Letters by Exchange Control Department, Annual Financial Statements and company documents regarding a company of which Brig Blaauw was director, and miscellaneous documents – trust deeds, annual financial statements and company documents.
60. Again, the question is whether SARB has produced facts which show that disclosure of these documents “*would be likely to cause harm*” to the financial and commercial interests of those entities.
61. In **BHP Billiton PLC Inc v De Lange**, the SCA said the following about this section:

⁴² Section 36 provides in full:

- (1) *Subject to subsection (2), the information officer of a public body must refuse a request for access to a record of the body if the record contains—*
 - (a) *trade secrets of a third party;*
 - (b) *financial, commercial, scientific or technical information, other than trade secrets, of a third party, the disclosure of which would be likely to cause harm to the commercial or financial interests of that third party; or*
 - (c) *information supplied in confidence by a third party the disclosure of which could reasonably be expected—*
 - (i) *to put that third party at a disadvantage in contractual or other negotiations;*
or
 - (ii) *to prejudice that third party in commercial competition.*
- (2) *A record may not be refused in terms of subsection (1) insofar as it consists of information—*
 - (a) *already publicly available;*
 - (b) *about a third party who has consented in terms of section 48 or otherwise in writing to its disclosure to the requester concerned; or*
 - (c) *about the results of any product or environmental testing or other investigation supplied by a third party or the result of any such testing or investigation carried out by or on behalf of a third party and its disclosure would reveal a serious public safety or environmental risk.”*

“A party who relies on these provisions to refuse access to information has a burden of establishing that he or she or it will suffer harm as contemplated in sections 36(1)(b) and (c). The party upon whom the burden lies, in this case, Billiton, must adduce evidence that harm “will and might” happen if Eskom parts with or provides access to information in its possession relating to the contracts. The burden lies with the holder of the information and not with the requester.”⁴³

62. SARB has provided no factual basis at all for its contention that disclosure of the information would cause financial or commercial harm to these entities.
63. To the contrary:
- 63.1. SARB does not disclose the identity of the entities;
- 63.2. SARB has made no attempt to make contact with the entities: for example, it did not send a notice to the company with which Brig Blaauw was associated because it claims “it would have been unreasonable for the SARB to trace the company”.⁴⁴ The address of the company can of course very simply be obtained from CIPRO.
- 63.3. There is no evidence that these entities even still exist, more than twenty year later;
- 63.4. In the nature of things, it is highly unlikely that financial information from 20 or more years ago would cause any material financial or commercial harm.
64. In the circumstances, SARB has shown no basis for the application of section 36 as a basis for refusing the information.

⁴³ *BHP Billiton PLC Incorporated and another v De Lange and others* [2013] 2 All SA 523 (SCA) at para 25.

⁴⁴ Answering Affidavit, page 163, para 100.

Section 37(1)(b): Breach of duty of confidence to third party

65. SARB relies on section 37(1)(b) to withhold disclosure. It provides that the information officer *"may refuse a request for access to a record of the body if the record consists of information that was supplied in confidence by a third party -*

- (i) the disclosure of which could reasonably be expected to prejudice the future supply of similar information, or information from the same source; and*
- (ii) if it is in the public interest that similar information, or information from the same source, should continue to be supplied."*

66. SARB relies on the section 37(1)(b) exemption in respect of the following:

66.1. Records relating to Mr Palazzolo: Documents submitted to SARB by authorised dealers;

66.2. Records relating to Brig Blaauw: Letters by Exchange Control Department, and Miscellaneous documents – trust deeds, annual financial statements and company documents;

66.3. Records relating to Mr Hill: All of the unidentified documents in the 43 archive boxes.

67. But SARB is unable in any instance to produce any evidence which

67.1. identifies the third party which supplied the information;

67.2. shows that it was provided in confidence;

- 67.3. shows that disclosure can reasonably be expected to prejudice the future supply of similar information, or information, from the same source.
68. All SARB does is repeat, in respect of each of the items, the mantra that “it is likely that these documents were supplied in confidence to SARB or under the provisions of regulation 19 of the Exchange Control Regulations”.⁴⁵
69. Exchange control regulation 19(1) provides
- “The Treasury, or any person authorised by the Treasury, may order any person to furnish any information at such person's disposal which the Treasury or such authorised person deems necessary for the purposes of these regulations and any person generally or specifically appointed by the Treasury for the purpose may enter the residential or business premises of a person so ordered and may inspect any books or documents belonging to, or under the control of such person.”*
70. In other words, SARB has powers of compulsion in respect of such documents - and on SARB's own version, this may be the method through which it obtained the documents. In that event, section 47(2)(b) would have no application.
71. The statement that it is possible that another method may have been used, and without any evidence as to the identity of the source, or evidence that it was supplied in confidence, or evidence as to the consequences of disclosure, is utterly speculative. It is not evidence of anything, let alone evidence of the kind required by Ngcobo CJ.
72. In **Billiton** the SCA gave short shrift to the vague and unsubstantiated arguments of a duty of confidentiality raised by Eskom when it sought to justify

⁴⁵ See for example Answering Affidavit, page 163, para 101.

its refusal to disclose information under section 37 of PAIA. Eskom had conceded that there was no express provision in either of the contracts that imposed a duty of confidentiality in relation to the provisions of the contracts. Instead, it relied on its "general" practice of not disclosing such information, and referred to a confidentiality agreement in relation to another site. The SCA stated at para 31:

"I agree with Counsel for Media 24 that this is insufficient to constitute an action for breach of a duty of confidence" as contemplated in section 37(1)(a) in the event of a disclosure of the records sought by Media 24. There is no reference in any of the agreements to a term to substantiate the "general practice referred to above". In my view, section 37(1)(a) is inapplicable and does not avail Billiton in its attempt to avoid disclosure of the information sought by Media 24 in terms of the provisions of PAIA."

73. SARB provides no factual basis for its allegations of confidentiality. It simply speculates that certain information may have been provided to it in confidence. It alleges no factual basis for either the speculation or the conclusion.

74. SARB makes two further claims with regard to confidentiality:

74.1. It alleges that the information received by the FinSurv Department is "of a confidential nature" and is in principle protected from disclosure in terms of section 33 of the SARB Act.⁴⁶ But section 33 states that disclosure is authorised if made for the purpose of the performance of an official's powers in terms of any law.⁴⁷ SARB accepts that "a decision by the information officer, to disclose information in terms of the provisions

⁴⁶ Answering Affidavit, page 129, para 38.

⁴⁷ Answering Affidavit, page 134, para 49.

of PAIA would constitute a lawful disclosure for purposes of section 33 of the SARB Act.”⁴⁸ Section 33 of the SARB Act cannot create a statutory exemption where PAIA does not do so.

74.2. It alleges that the information is submitted in confidence because “the documents are kept by the respective banks or authorised dealers in confidence for their clients.”⁴⁹ The duty of confidence between a bank and its clients does not create an independent duty of confidence between SARB and the bank in respect of records and information it provided to SARB in respect of potentially illegal activities.

75. The examples of secrecy provisions in other jurisdictions do not assist SARB.⁵⁰ In each instance, one would need to know whether those countries have a constitutional right of access to information; whether they have legislation such as PAIA; and how any such legislation interacts with the banking secrecy provisions. In the absence of that information, the comparison is empty.

Section 42(1): Materially jeopardise the economic interests of the country.

76. Section 42(1) provides that the information officer may refuse access to a record if the disclosure of the record “would be likely to materially jeopardise the economic interests or financial welfare of the Republic or the ability of the government to manage the economy of the Republic effectively in the best interests of the Republic.”⁵¹

⁴⁸ Answering Affidavit, page 135, para 51.

⁴⁹ Answering Affidavit, page 131, para 42.

⁵⁰ Answering Affidavit, page 134, para 50.

⁵¹ Section 42(1) of PAIA provides:

77. SARB relies on the section 42(1) exemption in respect of the following:
- 77.1. Records relating to Mr Palazzolo: The exchange control index cards
 - 77.2. Records relating to Brig Blaauw: Letters by Exchange Control Department, and Miscellaneous documents – trust deeds, annual financial statements and company documents.
 - 77.3. Records relating to Mr Hill: All of the unidentified documents on the 43 archive boxes.
78. There is no evidence whatsoever to justify SARB's far-reaching assertion that disclosure of these records (or any part of any one of them) would materially jeopardise the economic interests or financial welfare of the Republic. SARB fails to show that the disclosure could "reasonably be expected" to prejudice the future supply of information from the same source.
79. Again, recitation of the provisions of PAIA, followed by an ipse dixit and a blanket assertion by the SARB, provides no justification for refusal of disclosure.

Section 45: Work involved in processing request

80. Section 45(1)(b) provides that an information officer may refuse a request for access if the work involved in processing the request would substantially and unreasonably divert the resources of the public body.

"The information officer of a public body may refuse a request for access to a record of the body if its disclosure would be likely to materially jeopardise the economic interests or financial welfare of the Republic or the ability of the government to manage the economy of the Republic effectively in the best interests of the Republic."

81. SARB relies on section 45 in relation to all of the records relating to Mr Hill.⁵² It claims that the exercise of considering all the documents would take approximately 141 days and that such a task would have to be performed by a person familiar with the investigations process in an exchange control investigation.⁵³
82. We note at the outset that on the basis of SARB's own claim, the estimate of 141 days is unfounded. An average of two to three days each for 43 archive boxes (SARB's claim) produces between 86 and 129 days.
83. SARB has failed to comply with its obligations under the National Archives and Records Services of South Africa Act 43 of 1996 with regard to the management and care of these public records in its custody.⁵⁴ SARB's increased work involved in considering the records is a self-created burden. It cannot be used to justify non-disclosure in terms of section 45.
84. Further, the fact that there are many relevant documents which relate to one of the individuals (Mr Hill) does not justify a refusal to disclose any documents at all. For example:
- 84.1. SARB could identify the files that appear to have the most relevance and deal with the documents in those files;⁵⁵ or

⁵² Section 45(1) of PAIA provides:

"The information officer of a public body may refuse a request for access to a record of the body if—

(a) the request is manifestly frivolous or vexatious; or

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

⁵³ Answering Affidavit, page 169, para 117.

⁵⁴ Replying Affidavit, page 377, para 144.

⁵⁵ Replying Affidavit, page 378, para 151.

84.2. SARB could produce an index of what is in the boxes, and invite SAHA to identify those categories of documents which are of the greatest interest to it, and limit the exercise to those documents.

85. In **CCII Systems**, this Court pointed to the benefit of a pragmatic *via media* for dealing with a dispute as to which documents had to be produced.⁵⁶ The Court has the power under section 82 to make *“any order that is just and equitable”*.

86. Instead, SARB relies again on a blanket refusal in respect of all the documents.

SEVERABILITY

87. Section 28(1) of the Act deals with severability:

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

(a) does not contain; and

(b) can reasonably be severed from any part that contains,

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

88. In other words, it is necessary to consider every part of every record. Where part can be disclosed, it must be disclosed.

89. SARB make it impossible to undertake this exercise, by putting up blanket refusals based on a blanket justification:

⁵⁶ *CCII Systems (Pty) Ltd v Fakie and others (Open Democracy Advice Centre as amicus curiae)* NNO 2003 (2) SA 325 (T) at para 22.

89.1. It describes the records by category rather than individually; and

89.2. It does not disclose what is the information in the records which must be refused.

90. In **CCII Systems**, the respondent took a similar approach. He objected to disclosure on the grounds that the documents contained information which had been supplied in confidence by third parties on a guarantee of confidentiality, and that a breach of that guarantee might jeopardise his ability to carry out his functions in the public interest. He said that the documents were so voluminous that he could not reasonably be expected to analyse them in order to identify which of them were protected from disclosure. He also raised the defence that the volume of documents was so vast that processing them would substantially and unreasonably divert resources from his core business.

91. This Court criticised that approach, and found that the respondent had failed to discharge the onus in respect of the statutory grounds other than volume:

[16] In my view, and because of the onus created in s 81, it will be necessary for the information officer to identify documents which he wants to withhold. A description of his entitlement to protection is to be given, one would imagine, as in the case of a discovery affidavit in which privilege is claimed in respect of some documents. The question of severability may come into play. Paragraphs may be blocked out or annexures or portions may be detached. The provisions of s 82 of the Act read with s 80 cover the case where there is a dispute about the question whether a document or only a portion thereof is to be disclosed and the decision of the Court is required to rule whether a document is protected in whole or in part.

[17] The approach of the respondents, even in respect of the reduced record, makes it impossible to evaluate whether the respondents justifiably claim privilege in respect of documents and whether portions thereof are not to be given access to. In the result I agree with Mr Rogers that the only objection which has in fact been raised is the volume objection.

92. We submit that this aptly describes the position in this matter. The SARB's failure to disclose what there is in the documents which requires non-disclosure, and what else there is in the document, makes it impossible to find to what extent there is a justifiable statutory exclusion. The defences therefore have to fail.
93. An example of this is the reference in the answering affidavit to a draft letter from the Exchange Control Department to the Department of Finance regarding an article in the Sunday Times (28/7/1991) about Mr Palazzolo.⁵⁷ This plainly refers to the Sunday Times article described in the founding affidavit, in which it was reported that Mr Palazzolo was described in an internal Reserve Bank document as a "highly exceptional case", and that "unnamed senior authorities" had intervened to authorise the bending of exchange control rules in order to allow R14.5 million in Financial Rand to be released to Mr Palazzolo.⁵⁸ Mr Ellis stated that he could find no evidence of the "internal reserve bank document" referred to in the Sunday Times article.⁵⁹ The SARB has refused, without any explanation, to make disclosure of a draft Reserve Bank letter which deals with that very article. It has not explained whether there is something particular in that letter which prevents disclosure; if so, what it is; or whether (and if so, why) no part of the letter may be disclosed.
94. There is one redaction in the information placed before the Court, which is unexplained, and which SARB does not attempt to justify. SARB quotes the

⁵⁷ Answering Affidavit, page 150, para 77.9.

⁵⁸ Founding Affidavit, page 44, para 121.

⁵⁹ Founding Affidavit, page 147, para 75.

finding on the electronic database in respect of Mr Palazzolo, which states that the matter was discussed with a person whose name has been excised, and that it was decided that the investigation would be closed.⁶⁰ There is no explanation for why the name of one of the people responsible for that decision should be excised.

95. SARB has not attempted to give effect to its obligation under section 28. It does not even attempt to show, in relation to any one of the documents that it refuses to disclose, that it has considered whether there is part which may be disclosed – and if not, why the exemption ground applies to every part of that document.

PUBLIC INTEREST OVERRIDE

96. To the extent that SARB can show that certain of the records fall within the ambit of the exemptions, we submit that the public interest in disclosure of the documents manifestly outweighs the harm contemplated in any of the exemptions. In the circumstances, the records must be disclosed under section 46 of PAIA.⁶¹

97. Section 46 provides that an information office must grant a request for access to a record, despite the fact that it falls within the ambit of one of the exemption, if:

97.1. the disclosure of the record would reveal evidence of a substantial contravention of, or failure to comply with, the law; and

⁶⁰ Answering Affidavit, page 150, para 77.10.

⁶¹ Founding Affidavit, page 35, para 102.

97.2. the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question.

98. The final leg of the information officer's enquiry in response to a request is thus to consider whether, despite the existence of grounds prohibiting disclosure, the records must nevertheless be disclosed on public interest grounds.⁶²

99. Section 46 contemplates a two-part test, involving consideration of whether disclosure of the requested information would:

99.1. reveal evidence of "a substantial contravention of, or failure to comply with, the law"; and

99.2. "the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question."⁶³

100. The provisions are mandatory. If these conditions are met and the information officer does not grant access, the court will order him/her to do so.⁶⁴ This principle has been stated as follows:

"The override is an exception to the operation of the grounds of refusal to which it is applicable. The override is only operative once it has been determined that one or more of the grounds for refusal applies to a particular record. If none of the grounds is applicable, the requested information must be disclosed. The effect of the override is that, notwithstanding the applicability of a ground of refusal, the record must nonetheless be disclosed. Where it does apply, the public-interest override equals

⁶² *Qoboshiyane NO and Others v Avusa Publishing Eastern Cape (Pty) Ltd and Others* 2013 (3) SA 315 (SCA) at para 10.

⁶³ *De Lange and Another v Eskom Holdings Limited and Others* 2012 (1) SA 280 (GSJ) at para 135.

⁶⁴ *Qoboshiyane* at para 10. See also *De Lange* at para 133, which was upheld on appeal in *BHP Billiton Plc Inc and Another v De Lange and Others* 2013 (3) SA 571 (SCA).

*disclosure, i.e. the release of the requested record is mandatory.*⁶⁵

101. SAHA contends that the contents of the records are of public interest and importance.⁶⁶ It provides a series of considerations that demonstrate that the public interest in disclosure outweighs the harm contemplated in any of the exemption provisions.

101.1. The events – the alleged economic crimes – are events of great importance in South Africa's history.

101.2. Very little is known about the nature and extent of corruption under apartheid.⁶⁷

101.3. The lack of knowledge is a result of the culture of state secrecy. There is a strong public interest in not perpetuating the results of that culture.

101.4. There is a right to truth about the economic crimes that took place in the final decades of apartheid.

101.5. Many of these illicit activities were carried out with the objective of supporting the apartheid state. The public has the right to know information that sheds light on how and by whom the apartheid state and system were supported.

⁶⁵ *De Lange* at para 137.

⁶⁶ Founding Affidavit, page 36, para 106.

⁶⁷ Remarkably, SARB says that it is "not in a position to comment" on the assertion in the founding affidavit that very little detail is publicly known of economic crimes that occurred during apartheid as a result of the pervasive culture of secrecy at the time: "The allegation is vague, unsubstantiated and speculative": Answering Affidavit, page 187, para 156.2.

101.6. In some of these transactions the SARB itself was suspected of irregular conduct.

101.7. The disclosure of this information would allow researchers and the public to gain a better understanding of corruption under apartheid.

101.8. Disclosure would confirm the SARB's constitutionally required commitment to transparency and accountability.

101.9. It would assist with democratic transformation of the state and our society. Hidden histories undermine the democratic consolidation.

SARB misapplies the test

102. The SARB identifies and relies on considerations that it contends limit the public interest in the disclosure of the information.⁶⁸ But it misapplies the test in section 46 by weighing a range of factors that, in its opinion, favour or do not favour the disclosure of the information. The SARB is required to consider the public interest in disclosure, and then weigh this against any harm that may arise. The "harm" is limited to the harm which the exclusionary sections seek to avoid, not other factors which in the opinion of the public body may favour or not favour disclosure.

SARB's contentions on harm

103. The primary harms that SARB alleges will occur in respect of all of the requested records if they are disclosed are:

⁶⁸ Answering Affidavit, page 139, para 56.

103.1. Abuse of information gathering powers of the SARB, and therefore damage to the economic interests of South Africa;⁶⁹

103.2. Prejudice of future supply of similar information or information from the same or similar sources.⁷⁰

104. There is simply no factual evidence whatsoever that the regulated disclosure, under PAIA, of any particular record obtained during the SARB investigations would result in these harms. Again, there is simply a blanket allegation without any facts to support it, and without any link of the alleged harm to each of the specific records which SAHA seeks.

105. The documents are about events from 1 January 1980 to 1 January 1995. Dealing with section 44 of the Act (the operations of public bodies), this Court held that “it does not deal with historical situations”.⁷¹ The time which has elapsed is also plainly relevant to section 46. It is inherently unlikely that disclosure of information provided more than 20 years ago, in a different political dispensation, and from institutions that may no longer even exist, would prejudice the future supply of information to SARB.

106. SARB states that it “*places significant reliance*” on the disclosure of relevant information to it through the cooperation of parties such as banks and authorised dealers.⁷² But it accepts that it has other means of procuring

⁶⁹ Answering Affidavit, page 139, para 56.1.

⁷⁰ Answering Affidavit, page 139, para 56.2.

⁷¹ *CCH* at para 333.

⁷² Answering Affidavit, page 131, para 42.

necessary information through the powers afforded to it by the Exchange Control Regulations.⁷³

107. The blanket claim, without any factual underpinning, is simply far-fetched and untenable and ought to be disregarded by the Court.

108. SARB seeks to justify non-disclosure by asserting that disclosure may result in “speculative” and “unsubstantiated” commentary.⁷⁴

109. This is the classic defence of the censor: the truth should not be disclosed, because some people may make “speculative” or “unsubstantiated” comments on it. This approach is fundamentally inconsistent with a democratic society in which there is not only a right of access to information, but also a right to freedom of expression which includes “*freedom to receive or impart information or ideas*”.⁷⁵ By raising this contention, SARB demonstrates that it is out of touch with the spirit that animates the democratic order. It is, regrettably, still wedded to the culture of secrecy.

110. Then SARB seeks to justify non-disclosure on the ground that SAHA’s interest is merely “academic”: there is no pressing or current issue.⁷⁶

111. SARB fails to understand the fundamental recognition in our Constitution that in order to avoid repetition of the wrongs of the past, it is necessary to know and understand what happened in the past. This is not an “academic” matter – it is

⁷³ Answering Affidavit, pages 131 – 132, paras 42 – 43.

⁷⁴ Answering Affidavit, page 159, para 91.1. Answering Affidavit, page 171, para 125.1.

⁷⁵ Section 16(1)(b) of the Constitution.

⁷⁶ Answering Affidavit, page 159, para 91.2. Answering Affidavit, page 172, para 125.2.

fundamental to building a just society. Those who do not know and understand history are doomed to repeat it.

112. The information concerns alleged serious violations and criminal conduct. The founding affidavit demonstrates that serious allegations are already in the public domain. The public has the right to know the facts in this regard, and to know what the records of public bodies reveal in that regard. There is no justifiable reason for limiting the public's right to receive and impart information with regard to the records sought. It is simply untenable that disclosure and speech regarding allegations of serious violations and criminal conduct during apartheid should be limited by SARB on the misconceived basis that it thinks the matter is "academic".

113. SARB contends that disclosure may infringe privacy rights of the companies and the trust which are referred to in the documents.⁷⁷ This is without any basis. Again, the documents refer to events which occurred more than 20 years ago. SARB has not demonstrated that these entities still exist, let alone made any attempt to contact them. SARB may sever personal details of third parties in order to protect the personal information of natural persons. And severance is also available to deal with any other demonstrated harm. The "privacy" allegation, unsubstantiated by any facts, provides no basis for blanket non-disclosure.

114. For all these reasons, we submit that notwithstanding the existence of any valid ground of refusal relied on by SARB, the records ought to be disclosed in the public interest and as contemplated by section 46 of PAIA.

⁷⁷ Answering Affidavit, page 165, para 104.2.

POINT IN LIMINE: NON-JOINDER

115. SARB asserts that Brig Blaauw, Mr Ricci, Mr Botha, Mr Hill, Mr Ekon, Mr Palazzolo, Mr Williamson and Mr Basson should have been joined as parties because the orders sought by SAHA affect their interests,⁷⁸ and that the non-joinder has the result that SAHA is non-suited to proceed with the application. It is now necessary only to consider the late Brig Blaauw, Mr Hill and Mr Palazzolo.

116. We submit that the point in limine is without substance.

117. Section 79(1) of the Act provides that the Rules Board for Courts of Law must make rules for procedure for applications to court in terms of section 78.

118. The Rules Board has made those Rules.⁷⁹ Rule 3(5)(a) requires the information officer to notify all persons affected of the application, and attach a copy of the application to that notice. SARB has done so in respect of Mr Palazzolo and Mr Hill. It could not do so in respect of Brig Blaauw, who is deceased. There is nothing to suggest that his next of kin are affected by an application in respect of documents relating to Brig Blaauw which are more than 20 years old. Nothing in the documents referred to by the SARB suggests that they would be so affected by their disclosure. Rule 3(5)(a) is therefore not applicable to them.

⁷⁸ Answering Affidavit, page 115, paras 8 – 20.

⁷⁹ GN R965 in GG 32622 of 9 October 2009.

119. It follows that the SARB has served the application on the two persons who are potentially affected by the orders which the SARB seeks. Neither of them has indicated any interest in participating in these proceedings.
120. Rule 2(2) provides in effect that in proceedings in this Court, unless as otherwise provided in the PAIA Rules, the Uniform Rules shall apply “with appropriate changes”.
121. In this Court, joinder is ordinarily governed by Rule 10 of the Uniform Rules. The Rules Board has however made a different rule in respect of applications under section 78 of PAIA: it requires the information officer to give all persons affected notice of the application, and to provide them with a copy of the application. If Rule 10 joinder was required, the Rule 3(5)(a) process would be superfluous and senseless. Rule 10 is therefore not applicable to these proceedings – the Rules Board has “otherwise provided” for this matter. The purpose which Rule 10 seeks to achieve – to give affected parties notice and an opportunity to participate - is achieved in section 78 applications by a different method, namely through Rule 3(5)(a). The plain intention of the Rules Board was to replace Rule 10 joinder with the Rule 3(5)(a) notice process.
122. From this it follows that the PAIA Rules do “otherwise provide” in respect of rule 10, and that the “appropriate change” to the Uniform Rules is that the requirement of joinder under Rule 10 does not apply, because that matter is dealt with by the PAIA Rules.
123. In any event, we submit that joinder of necessity (as opposed to joinder of convenience) would not be required in this matter.

124. In **Judicial Service Commission v Cape Bar Council** Brand JA dealt with the question of non-joinder in the following terms:

*"It has now become settled law that the joinder of a party is only required as a matter of necessity – as opposed to a matter of convenience – if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned (see e.g. **Bowring NO v Vrededorp Properties CC and Another 2007 (5) SA 391 (SCA) par 21**). The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder plea. The right of a party to validly raise the objection that other parties should have been joined to the proceedings, has thus been held to be a limited one."⁸⁰*

125. In **Burger v Rand Water Board**, Brand JA summarised the principles applicable to joinder as follows:

"The right to demand joinder is limited to specified categories of parties such as joint owners, joint contractors and partners, and where the other party(ies) has (have) a direct and substantial interest in the issues involved and the order which the Court might make."⁸¹

126. We submit that at best for SARB, the joinder of these persons may be competent under Rule 10 on the grounds of convenience. There is no basis for the point in limine.

COSTS

127. We submit that there is no reason to depart from the normal rule regarding costs in constitutional matters.

⁸⁰ *Judicial Service Commission and another v Cape Bar Council (Centre for Constitutional Rights as amicus curiae)* 2012 (11) BCLR 1239 (SCA); 2013 (1) SA 170 (SCA) at para 12.

⁸¹ *Burger v Rand Water Board and another* 2007 (1) SA 30 (SCA) at para 7.

128. In **Biowatch Trust**, the Constitutional Court held that the general rule is that in constitutional litigation, an unsuccessful litigant in proceedings against the State ought not to be ordered to pay costs.⁸² Sachs J noted that “*courts should not lightly turn their backs on the general approach.*”⁸³

129. The applicant seeks to vindicate its constitutional rights. Its conduct has not been vexatious or frivolous. The issues are genuine and substantive, and the application raises constitutional considerations relevant to the adjudication.⁸⁴

130. We submit that it follows that if the application is unsuccessful, the applicant ought not to be ordered to pay the costs.

131. If the application is successful, the usual rule applies, and the applicant is entitled to its costs. This too flows from the judgment of the Constitutional Court in **Biowatch**.

CONCLUSION

132. SAHA submits that there is no factual or legal basis for the operation of any of the PAIA exemptions to the records held by SARB.

133. To the extent that SARB can demonstrate a basis for the application of one of the statutory exemptions, SAHA submits that the section 46 override applies, and the public interest favours disclosure.

134. In either event, SAHA should be granted access to the records sought in its PAIA request in respect of Mr Blaauw, Mr Palazzolo and Mr Hill.

⁸² *Biowatch Trust v Registrar, Genetic Resources and Others* 2009 (6) SA 232 (CC) para 21.

⁸³ *Biowatch* at para 24.

⁸⁴ *Biowatch* at para 25.

135. In the alternative, in respect only of Mr Hill, we submit that the Court should order SARB to engage in an exercise of the kind ordered by this Court in the CCII case, in order to achieve a pragmatic *via media* which prevents a blanket refusal in respect of every part of every document, and has regard to the resources which will be involved in achieving this.

136. The applicant seeks an order in terms of the Notice of Motion and the costs of three counsel.

Geoff Budlender SC

Nasreen Rajab-Budlender

Frances Hobden

7 October 2016

Chambers, Cape Town and Sandton

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3. Biowatch Trust v Registrar, Genetic Resources and Others 2009 (6) SA 232 (CC)
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