

IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, JOHANNESBURG

CASE NO:

In the matter between:

THE SOUTH AFRICAN HISTORY ARCHIVE TRUST Applicant

and

THE AUDITOR GENERAL First Respondent

THE DEPUTY INFORMATION OFFICER: Second Respondent

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FOUNDING AFFIDAVIT

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I, the undersigned,

CATHERINE MOIRA KENNEDY

do hereby make oath and state the following:

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

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3 I am duly authorised to bring this application on behalf of the applicant. In this regard, I attach a copy of a resolution of the Trustees of the South African History Archive Trust marked "CMK1a".

**THE PARTIES**

4 The applicant is **THE SOUTH AFRICAN HISTORY ARCHIVE TRUST ("SAHA")**, a non-governmental organisation constituted as a trust in terms of the laws of South Africa. SAHA requested the information, which forms the subject matter of this application, from the first and second respondents.

5 The first respondent is the **AUDITOR GENERAL ("AGSA")** referred to in section 188 of the Constitution, with his principal office at 300 Middel Street, Brooklyn, Pretoria. The first respondent is responsible for the records that were subject to SAHA's request for information under the Promotion of Access to Information Act 2 of 2000 ("**PAIA**").

6 The second respondent is **THE DEPUTY INFORMATION OFFICER OF THE OFFICE OF THE AUDITOR GENERAL**, of 300 Middel Street, Brooklyn, Pretoria. The second respondent is cited in her official capacity as the officer who decides whether requests to the AGSA for access to information, in terms of PAIA, should be granted or refused.

7 In what follows, where I refer to the AGSA this is a reference to both respondents, unless the context indicates otherwise.

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## THE OBJECTIVES AND FUNCTION OF SAHA

- 8 SAHA's objectives are to preserve, collect and catalogue materials of historic, contemporary, political, social, economic and cultural significance, and to encourage the accessibility of such materials to the public as a whole. I attach a copy of SAHA's trust deed marked "CMK1b".
  
- 9 SAHA is an independent non-governmental organisation (NGO) dedicated to documenting and providing access to archival holdings that relate to past and contemporary struggles for justice in South Africa. In the late 1980's SAHA was established by anti-apartheid activists. Its founding mission was to promote the recapturing of South Africa's lost and neglected history and to record history in the making. SAHA aims to document, support and promote awareness of past and contemporary struggles for justice through archival practices and outreach, and the utilisation of access to information laws.
  
- 10 In 2001 SAHA launched its Freedom of Information Programme, which is dedicated to using PAIA as a method to test and extend the boundaries of freedom of information in South Africa. This programme further seeks to create awareness of, compliance with and use of PAIA.
  
- 11 Since 2001, SAHA has made over 1800 requests for information from various government departments and it has brought numerous applications in the High Court arising out of refusals of such requests. SAHA has also intervened as *amicus curiae* in a number of PAIA applications.

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12 SAHA has developed a comprehensive capacity training programme for NGOs and community based organisations on using PAIA. It has developed resource kits, workshop guides, PAIA case study DVDs, and a dedicated online management system for the submissions and monitoring of PAIA requests made by the PAIA Civil Society Network, an umbrella body of organisations, established in 2008, working to advance the right of access to information in South Africa. Since 2008 SAHA has also trained hundreds of activists, students, community members, NGO members, attorneys and paralegals in the use of PAIA.

13 In line with these objectives, SAHA made the PAIA requests which are the subject matter of this application after consulting with SAHA research associates. They included the Open Secrets project, a group of South African researchers based in Cape Town who are in the process of collecting and analysing apartheid-era archival material for the purpose of publishing a book that will focus on procurement practices and public accountability during apartheid; and Professor Jane Duncan, a media academic currently conducting research into communications surveillance and interception.

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

14 This application is brought in terms of section 78(2) read with section 82 of PAIA, in response to refusals by the AGSA of SAHA's requests for access to information.

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15 Section 78(2)(c) of PAIA provides that a requester aggrieved by a decision of the information officer of a public body referred to in paragraph (b) of the definition of 'public body' in section 1 to refuse a request for access may apply to court for appropriate relief in terms of section 82. The AGSA is a public body within the meaning of paragraph (b) of section 1 of PAIA.

16 Section 82 of PAIA provides that the court hearing an application of the present kind may grant any order that is just and equitable including orders:

- "(a) confirming, amending or setting aside the decision which is the subject of the application concerned;*
- (b) requiring from the information officer or relevant authority of a public body or the head of a private body to take such action or to refrain from taking such action as the court considers necessary within period mentioned in the order;*
- (c) granting an interdict, interim or specific relief, a declaratory order or compensation;*
- (d) as to costs; or*
- (e) condoning non-compliance with the 180-day period within which to bring an application, where the interests of justice so require.*

17 SAHA seeks relief in relation to three requests for information which it made to the AGSA in respect of records in the AGSA's possession. It does so in this one application in order to avoid the duplication of cost, and because it is, I submit, in the interests of the administration of justice and judicial economy for one application to be brought in respect of all of three requests rather than for multiple applications to be brought. As appears below, the PAIA applications in issue were made by the same applicant, they were refused by the same respondents for the same stated reasons, and they raise common questions of fact and law.

18 All three requests were submitted on the same day, namely 27 August 2015.

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The first decision was received by SAHA on 1 October 2015 (AGSA attempted to send the decision earlier, sent it to an incorrect email address), and the further two decision were received by SAHA 26 October 2015. The 180-period within which SAHA is permitted to lodge its application in terms of section 78 expires on 29 March 2016 in respect of the decision received on 1 October 2015, and on 23 April 2016 in respect of the decisions received on 26 October 2015.

- 19 This application is made in respect of all three decisions, and will be lodged on the earlier date, i.e. 29 March 2016.

**Jurisdiction**

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

**Structure of the Affidavit**

- 21 In this affidavit, I address the following issues in turn:

- 21.1 The factual background to this application;

- 21.1.1 The requests

- 21.1.2 The refusals

- 21.2 The importance of the right of access to information and the role of PAIA

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in giving effect to the constitutional right;

21.3 Background to the requests;

21.4 Why there is no basis in law for such refusals; and

21.5 The fact that public interest requires that access be granted.

22 Before dealing with those matters, I describe the requests which SAHA made, and summarise AGSA's response to those requests.

**The requests**

22.1 The first request, made on 27 August 2015, sought access to the following:

- "1. Annual reports of the Auditor-General of Intelligence to the Parliamentary Joint Standing Committee on Intelligence for each of the financial and/or calendar years from 1 January 2003 to 30 June 2015;*
- 2. The Pikoli Commission Report on enquiry into the structures of the intelligence services; (see assertion on p. 91 of <http://library.fes.de/pdf/files/bueros/suedafrika/07162.pdf> that release of report would not have jeopardised national security);*
- 3. The Ngcaba Commission Report on enquiry into technology issues in the intelligence services; and*
- 4. The Netshitenze Commission Report on enquiry into the intelligence services."*

22.2 The following further particulars were provided of the records sought:

*"See minutes from 2012 that state that certain elements of the reports, listed in items 2, 3 and 4 have already been declassified - <https://pmg.org.za/committee-meeting/14029/>;"*

22.3 The first paragraph of the first request was plainly intended to refer to all

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annual reports of the AGSA submitted to the Parliamentary Joint Standing committee on intelligence. As appears below, the AGSA understood it as such.

22.4 A copy of the request is attached hereto marked "CMK2." For ease of reference, I refer to this request as the "Intelligence Reports request".

23 The second request, made on 27 August 2015, sought access to the following:

*"Copies of any and all records, or part records, related to all investigations and reports made at any time into the export of uncut diamonds during the period 1992 – 1993 by the company 'De Beers', including but not limited to those records that were compiled in preparation of a briefing document on the matter to the Standing Committee on Public Accounts in 2007.*

23.1 A copy of the request is attached marked "CMK3." For ease of reference, I refer to this request as "the De Beers request".

24 The third request, also made on 27 August 2015, sought access to the following:

*"1. All audit reports related to the South African Defence Force Special Defence Account created under the Defence Special Account Act No 6. of 1974 for each financial year for the period 1 July 1976 to 1 July 1995, as referred to in the TRC Final Report, Volume 2, pages 534 and 540, as follows:*

*"The Defence Special Account Act No 6 of 1974, which came into effect on 6 March 1974, made provision for the establishment of the Special Defence Account. The Act allowed for funds in the account to be used, with the approval of the Minister of Finance, to defray expenditure incurred in connection with special defence activities (including secret services) as well as such purchases as the Minister of Defence deemed necessary*

...  
...The above amount of R15 285 000 does not reflect the amount that passed through the Defence Special Account. The Auditor-General has provided the Commission with a schedule that identifies a total amount of R49 648 737 969 passing through this account, with a further R586 501 609 being expended on 'sensitive line function projects' between the 1974-75 and 1994-95 financial years."

2. Report of the Auditor General on all secret funds from 1960 to 1994 as provided to the South African Truth and Reconciliation Commission (TRC), as referred to in the TRC Final Report, Volume 2, page 524, as follows:

".. the Auditor-General reported that a total of more than R2.75 billion was expended through the Secret Services Account between 1978 and 1994. ... As is clear in the Auditor-General's report, a vast number of projects would not have been formally registered as secret projects but were undertaken within departmental line functions...."

3. The schedule of secret projects compiled by the Auditor General provided to the TRC, as was referred to in the TRC Final Report, Volume 2, page 539, as follows:

"The Auditor-General has provided the Commission with a schedule of secret projects received from eight government departments: the NIA; the Department of Justice; the South African Police Services (SAPS); the Department of Foreign Affairs; South African Secret Services; the Department of State Expenditure, the South African National Defence Force (SANDF) and the Department of Arts and Culture, Science and Technology. This information was made available shortly before the termination of the work of the Commission."

- 24.1 A copy of the request is attached marked "**CMK4**." For ease of reference I refer to this request as the "**Secret Defence Fund request**".

### **Refusals**

25 On 1 October 2015 the second respondent refused access to the records referred to in the Secret Defence Fund request in the following terms.

*"The information/record you request constitutes third-party information. You are therefore advised to engage directly with the relevant departments/auditees to gain access to this information.*

*The Auditor General of South Africa (AGSA) keeps audit documentation/records for a period of seven years after finalisation of the audit and all finalised (signed) audit reports are submitted to departments/auditees for further action, hence it is important for you to engage these departments.*

*The AGSA gathers information only for audit purposes and is trusted by auditees to safeguard information obtained during the auditing process.*

*To comply with the provisions of section 18 of the Public Audit Act, 2004 (Act No. 25 of 2004, the Auditor General is obliged to guard against disclosure of information obtained in the process auditing."*

25.1 On 26 October 2015, the second respondent declined the Intelligence Reports request and the De Beers requests in identical terms. I annex the refusals relating to the Secret Defence Fund request, the De Beers request and the Intelligence Reports request as "CMK5", "CMK6" and "CMK7" respectively.

26 For the reasons outlined below, I submit that the AGSA has failed to engage meaningfully or at all with its obligations under PAIA and under sections 7 and 32 of the Constitution. Before dealing with the reasons for refusal, I address the importance of giving effect to the constitutional right of access to information, and

provide information to evaluate the respondents' response thereto.

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

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

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

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

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

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

*"... transparency, accountability and effective governance of all public and private bodies by including, but not limited to, empowering and educating everyone*

- i) to understand their rights in terms of this Act in order to exercise their rights in relation to public and private bodies;*
- ii) to understand the functions and operation of public bodies;*
- iii) to effectively scrutinise... decision-making by public bodies that affects their rights."*

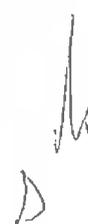
31 I am advised and submit that:

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

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

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

32 The refusal by the AGSA to provide SAHA with access to the requested records, and the manner of these refusals, demonstrates that the AGSA has only paid lip service to the right of all South Africans to access any information held by the State, as contained in section 32 of the Constitution and PAIA. This will be addressed further in argument at the hearing of this matter.



## BACKGROUND TO THE REQUESTS

33 As described above, SAHA submitted three PAIA requests to the AGSA in respect of the above records.

34 Before dealing with the deficiencies of the refusals, I explain why these information requested is of great public importance. Much of what I state in this regard is derived from information available on the Internet. Where I refer to such reports I have included references to the relevant web-site addresses. I will make the relevant material available to the parties on request, and to the court at the hearing of the matter.

### *The Intelligence request*

35 Intelligence services are notoriously susceptible to abuse, given the relative invisibility of their work. They can be abused to advantage incumbent political parties, or factions of those parties, and disadvantage, harass and even repress their critics. South Africa has such a history, and the new constitutional and legislative framework put in place after Apartheid is intended to ensure that such abuses never happen again. Intelligence work in a democracy is meant to serve the public interest, not the sectional interests of those in power, or those seeking power.

36 In 2005, information came to light that pointed to the South African domestic intelligence service being caught up in the presidential succession battle, and abused to advantage one faction. A Ministerial Review Commission on

Intelligence (excluding Crime and Defence Intelligence) was set up by the then Minister of Intelligence, Ronnie Kasrils, to investigate the 2005 crisis in the NIA. The Commission was chaired by the former Deputy Minister of Intelligence, Joe Matthews, and included Dr Frene Ginwala and Laurie Nathan and its report, entitled "Intelligence In a Constitutional Democracy" was submitted to the Minister on 10 September 2010. The report can be accessed at <http://r4d.dfid.gov.uk/PDF/Outputs/CrisisStates/ReviewComm.Sept08.pdf>.

37 The Commission found many weaknesses in the oversight mechanisms of the intelligence services. A key finding was that the then NIA's mandate was inappropriately broad: a problem it attributed to the overbroad definition of national security in the White Paper on Intelligence of 1994. At page 134 the Commission warned that "*...An overly broad domestic intelligence mandate can lead to the NIA focusing in an inappropriate manner on lawful political and social activities.*"

38 Other problems identified by the Commission included the fact that counter-intelligence functions (functions relating to the protection of a country from national security threats) were insufficiently regulated, which left them open to abuse. Furthermore, there was no legislative regulation or judicial oversight of intrusive intelligence gathering methods such as spying or infiltrating organisations (with the exception of the interception of communications), which made these forms of surveillance unconstitutional. The Inspector General of Intelligence was not sufficiently independent from the Executive arm of government, lacked resources and did not release its reports publicly.

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- 39 It is unclear whether the weaknesses identified in the Matthews Commission report have been addressed as there is too little information available in the public domain to make this assessment. The requested reports will shed light on this important question.
  
- 40 The reports requested contain policy and strategy matters that are in need of a public airing. The budgets should be released to assess whether the issue raised in the Matthews Commission report about the under-resourcing of the Inspector-General's office have been addressed.
  
- 41 SAHA accepts that secrecy in relation to operational methods is justifiable, subject to the caveat that if it is in the public interest for operational methods to be revealed (in cases of abuses, for instance), then the public interest must trump secrecy. A blanket denial of access to the reports is not defensible under the Constitution or PAIA. If there are operational secrets that are genuinely in need of protection, then those secrets can be maintained using less restrictive means than blanket secrecy, through the redaction of the reports. The AGSA's routine reports to Parliament are unlikely to contain such detail that they are incapable of being handled in this fashion.
  
- 42 Access to the requested information will allow the public to engage meaningfully in research and debate about the workings of the intelligence agencies, how they have functioned and how they are meeting their mandates. This can only lead to fostering greater public accountability of these agencies.

***De Beers request***

43 In 2007, the Standing Committee on Public Accounts ("SCOPA") met to question a delegation from De Beers regarding tax exemptions on the export of uncut diamonds from South Africa in 1992 and 1993, just prior to the democratic transition. The purpose was to hear evidence on allegations that:

43.1 There had been a significant spike in de Beers exports in 1992 and 1993, when de Beers exported approximately 20 million carats of uncut diamonds with a value of about 900 million USD.

43.2 The tax levy due on these exports was USD 135 million. This levy was not paid because De Beers claimed that it had been given an exemption by the South African Diamond Board.

44 As to the first accusation, De Beers claimed that there had been no material 'spike' in exports in the early 1990s. However, the AGSA provided a document to SCOPA on 11 September 2007 that indicated a significant difference in sales between 1991 and 1992, from R1.7 billion to R4.6 billion. The AGSA stated that this information had been supplied by the Department of Minerals and Energy. The Department confirmed this, as did the South African Diamond Board.

45 De Beers argued that this indicated a spike in sales, and not necessarily exports. The documents and records used to compile this submission, and the submission itself, are referred to in the request.

46 As to the second accusation, De Beers claimed that the South African Diamond Board had offered it an exemption agreement on the tax levy for those years. The exemption would have been offered in terms of section 59 of the 1986

Diamond Act (which allows for exemptions of the 15% export duty if the diamonds are sold at a diamond exchange). According to a Business Day article by Michael Hamlyn, attached marked "CMK8", the SA Diamond Board stated that it had no copy of such an agreement in its files, and that its request to De Beers for a copy had failed – they only received a copy of a de Beers 'board resolution'. De Beers produced several documents at the SCOPA hearing, but the 1992 document and several annexes were unsigned by any party. Overall, the cost of this to South Africa was substantial, as while *"duties paid to the Diamond Board ranged between R19-million and R56-million per year in the preceding decade, [they] plummeted to a derisory R15 000 in 1991."*

- 47 In May 2008, following the SCOPA investigation, Parliament decided to form a task team to more fully investigate claims that De Beers had exported large stockpiles of diamonds during the 1990s and that this might have constituted illegal capital flight and tax avoidance. A copy of the minutes of the SCOPA meeting is attached marked "CMK9".
- 48 As I have noted, it was suggested in the SCOPA meetings that approximately 20 million carats of diamonds with a value of USD\$900 million had been moved, avoiding payment of a possible tax liability of about USD\$135 million. Adjusting for inflation, using an independent non-commercial website curated by US and European academics with a focus on economics found at [www.measuringworth.com](http://www.measuringworth.com), this figure is equivalent to approximately USD\$221 million in March 2016. At current (March 2016) exchange rates this is equal to R.3.4 billion This is equivalent to more than 20% of what the SA Treasury budgeted for spending on HIV/Aids treatment and prevention in the 2016/2017



financial year.

- 49 The issue of De Beers exports and tax avoidance continues to be highly relevant today. A recent investigation by Khadija Sharife and Sarah Bracking, published by the Leverhulme Center for the Study of Value, University of Manchester available at <http://thestudyofvalue.org/wp-content/uploads/2014/06/Leverhulme-WP4-Bracking-Sharife-Revised-16June2014.pdf>. shows that South Africa continues to receive some of the lowest amount in duties and royalties from large mining corporations, of countries in Africa.
- 50 Sharife argues that "*from 2005 to 2012, diamond exporters, primarily De Beers, appear to have downplayed the market value of their rough diamond exports by \$3 billion, according to an analysis of declarations in corporate filings under the Kimberley Process Certification Scheme... The same undervalued gems were then sold at market prices around the world*". The information is available at Sharife, Khadija. *Rough and Polished: South Africa Shortchanged on Diamond Trade*, 16 May 2014 Website: <https://100r.org/2014/05/rough-and-polished/>
- 51 These kinds of activities (along with South Africa's very low mining royalty rate), cost the state at least hundreds of millions of Rand every year, which is badly needed for social spending requirements.
- 52 According to Sharife it would also appear that de Beers has engaged in aggressive transfer pricing. Until 2013 it had done so by channelling all diamonds mined in Namibia, Botswana and South Africa to London, before importing them

to South Africa at "exceptionally high prices" (often 5 times the price of other countries). This enables them to move profit offshore. At a SCOPA hearing in 2007, Mr. Bruce Cleaver (Group Director for Commercial Affairs and Legal Affairs at De Beers), is on record as saying that: "*De Beers had agreed in the 1992 agreement [with the SA Diamond Board] for the first time to mix South African diamonds to be exported to London with De Beers diamonds from all over the world, and re-import not only De Beers South African produced diamonds but diamonds from De Beers mines all over the world.*" The record of the hearing can be found at: <https://pmg.org.za/committee-meeting/8328/>.

- 53 This is a model that has been utilized by de Beers for decades. The SA government appointed a commission of enquiry to investigate allegations of corruption and incompetence in the Namibian administration in 1982. The Commission was headed by Natal Supreme Court Judge Peter Thirion. It found that de Beers used a number of subsidiaries to reduce its tax burden by channelling diamonds through subsidiaries in tax havens such as Bermuda. Judge Thirion, "*found the allegations of overmining and tax evasion proven and he accused the company of deliberately doctoring reports to state officials who were, in any event, incompetent.*" The issue is dealt with in a book entitled *South Africa Inc – The Oppenheimer Empire* by Pallister, David; Stewart, Sarah and Lepper, Ian. Corgi Books, Great Britain, 1988.

### ***Secret Defence Fund***

- 54 Chapter 6 of Volume 2 of the Truth and Reconciliation Commission's (TRC's) Final Report is entitled "*Special Investigation into Secret State Funding*". It



details the TRC's investigations into the "*use of secret funding to promote the policies of the former state*".

- 55 On the basis of investigations and submissions received from the AGSA and from various departments, the TRC estimated that between 1978 and 1994 the Treasury (later the Department of State Expenditure) transferred over R2.7 billion (R2 751 041 170) in secret funds, plus almost a further R50 billion (R49 648 737 969) through the Defence Special Account alone.
- 56 The Defence Special Account and the Secret Services Account were established by statute in order to facilitate the funding of secret services in the context of growing foreign and internal pressure on the Apartheid regime. They involved severely limited oversight.
- 57 The modern equivalent of the total estimate of secret apartheid spending of R52 billion, adjusted for inflation, is just under R480 billion. This is equivalent to over a third of government's total allocated expenditure for the 2016/2017 financial year, and is more than the year's budget for education and health combined. The total combined health and education budget for 2016/17 is R465.9 billion. The scale of secret spending is illustrated by the fact that by comparison, the estimated total cost of the Strategic Defence Procurement Package (more commonly known as the 'Arms Deal', which caused massive public controversy), excluding financing costs is in the region of R47 billion.
- 58 The TRC stressed in its report (chapter 6, volume 2 page 541) that it however had little assurance as to the accuracy or completeness of the figures it provided.

This was the result of the "need-to-know" principle that prevailed, the limitations on audit procedures, and "*the extent that information and documentation has been destroyed, and persons with the appropriate knowledge have left the relevant departments*".

59 Importantly, the TRC's final recommendations state that:

*"further research and investigation be done into the hundreds of projects thus funded in secret, and through which, the Commission confirmed, "dubious and illegal activities had been successfully woven into authorised and official operations".*

60 The promotion of transparency and accountability for possible Apartheid corruption requires disclosure of the requested information.

61 In seeking to make these records available to researchers such as the Open Secrets project, SAHA is thus also promoting the implementation of the TRC recommendations to further research and investigation.

62 The relevant parts of the TRC's final report to which I refer are voluminous, and have not been attached to these papers in order to avoid overburdening the record. Copies will be made available on request by the respondents, and at the hearing of this matter should this be necessary. The report is in any event publicly accessible on the website of the Department of Justice and Correctional Services.

#### THE RESPONDENTS' REFUSAL OF THE REQUESTS IS UNJUSTIFIED

63 The respondents have asserted pro forma, generic and identical grounds of

refusal of the three PAIA requests, which are very different from each other. These refusal decisions show that the decision-maker could not have considered the matter properly, and could not have had regard to relevant considerations, namely the individual facts and nature of each of the applications, and whether the exemptions in PAIA are actually applicable.

64 The refusals are all blanket refusals, applying to every part of every document covered by every request. I invite the respondents to state how many documents are governed by each of the requests. I submit that it is inconceivable that every part of every document may not be disclosed. It is clear the respondents have not properly considered every part of every record covered by each of the requests.

65 The respondents are required by PAIA to provide adequate reasons for the refusal of any request. I submit that the generic statement of the grounds of refusal, which are not applied to the facts of the case, does not amount to the giving of reasons at all, let alone adequate reasons. The failure to give adequate reasons gives rise to the inference that there are no justifiable or adequate reasons for the refusals.

66 The requests have been refused on the following grounds:

66.1 The information/record requested constitutes third-party information.

66.2 The AGSA gathers information only for audit purposes and is trusted by auditees to safeguard information obtained during the auditing process.

66.3 In terms of section 18 of the Public Audit Act 25 of 2004, the AGSA is obliged to guard against disclosure of information obtained in the process auditing.

66.4 The AGSA keeps audit documentation/records for a period of seven years after finalisation of the audit and all finalised (signed) audit reports are submitted to departments/auditees for further action.

67 I am advised and submit that these responses do not constitute valid reasons for refusal. No reference is made to any of the provisions of PAIA to justify refusal. SAHA is left guessing at the basis for the refusal and is obliged in this application to speculate at what could have informed the decision to refuse access.

68 In light of the general approach adopted by the respondents, I deal with the reasons in a consolidated manner to avoid prolixity. The analysis below, with the necessary adjustments, accordingly applies to all of the refusals.

69 I point out, at the outset, that to the extent that any grounds for refusal in PAIA apply to any, or any part of any, record requested, section 28 of PAIA obliges the AGSA to sever the relevant parts, and not to assert a blanket refusal.

### ***Third party information***

70 The refusal letters assert that the information/records requested constitute "*third-party information*", and advise SAHA to engage directly with the relevant "*departments/auditees*" for access to the information. They do not indicate who or what are the third parties which are affected.

- 71 No department or auditee is identified in any of the refusal letters. None of the departments audited by the AGSA qualifies as a "third party" as defined in section 1 of PAIA. Reference to third parties therefore appears to be inappropriate, except perhaps in relation to de Beers.
- 72 If the reason for refusal on which AGSA relies is that the information requested is no longer in its possession but is in the possession of another public body, section 20 of PAIA obliges the second respondent to transfer the request to that department. The AGSA cannot impose its own duty on SAHA, all the more so where it has failed to identify the departments/auditees it asserts are now in possession of the information.
- 73 SAHA wrote to the AGSA to remind it of the obligation to transfer the request in terms of section 20. The AGSA has simply refused to comply with its obligations. The letters referred to are annexed as "CMK10", "CMK11" and "CMK12" respectively.
- 74 Assuming that some of the information requested falls within the "third party" provisions of PAIA, it is inconceivable that all the records relevant to all three requests constitute third party information as alleged in the refusal letters. However, this is offered as a ground of refusal in respect of each request, without elaboration.
- 75 No indication is given in the refusal letter as to whether the third party information consists of information of a public or private body, and if a private body, whether the private body is a natural or a juristic person or whether the information is

personal or commercial information.

76 The respondents have not in their refusal letter given any indication that the following aspects were considered:

76.1 the application of section 28 relating to severability;

76.2 whether the requested records and/or parts of those records relate to trade secrets and/or financial or commercial information, other than trade secrets the disclosure of which would be likely to cause harm to the financial or commercial interests of the third party;

76.3 that the third party process required by PAIA has been followed; and

76.4 that consideration has been given to whether any of the information is already publicly available.

77 The respondents' blanket refusal is indicative of a failure to undertake a considered analysis of the requested records when deciding whether to release the requested records.

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

79 If the appropriate notices had been sent to third parties, there is a reasonable likelihood that some, or all, of the requested documentation would have been

released by consent under section 34(2)(a) of PAIA. Not following this process is a clear and obvious breach of the requirements of PAIA.

80 The second respondent has apparently also not considered section 34(2)(b) of PAIA. It states that a record containing personal information may not be refused if it was given to a public body by the individual to whom it relates, and the individual concerned was informed, before the information was given, that it belongs to a class of information that would or might be made available to the public.

81 The respondents have provided no indication that they have considered section 34(2)(c) of PAIA, which states that a record containing personal information about a third party may not be refused insofar as it consists of information already publicly available.

82 In this regard, I invite the respondents to demonstrate what steps they have taken to establish whether any of the information in any of the requested records is already publicly available.

83 I point out that the AGSA has already made some of the requested information available to other bodies.

83.1 The report of the AGSA on all secret funds from 1960 to 1994 appears to have been made available to the TRC (see TRC Final Report, Volume 2, pg. 524).

83.2 The schedule of secret projects compiled by the AGSA was provided to

the TRC (see TRC Final Report, Volume 2, pg. 539).

83.3 The records relating to the Special Defence Account (see TRC Final Report, Volume 2, pg. 532) and the Secret Service Account (see TRC Final Report, Volume 2, pg. 532) were provided to the TRC.

83.4 The AGSA provided a document to SCOPA on 11 September 2007 in relation to the De Beers request.

83.5 The SCOPA hearings were held in public and a minute of the meetings is available (in written and audio format) on the Parliamentary Monitoring Groups website: [https://pmg.org.za/committee\\_meeting/8328/](https://pmg.org.za/committee_meeting/8328/).

84 It appears that the respondents have also not considered section 34(2)(f) of PAIA which, in summary, states that a record containing personal information about a third party may not be refused insofar as it consists of information about an individual who is, or was, an official of a public body, and which relates to his or her position or functions in that capacity.

85 Given the nature and origin of the requested records, it seems unlikely that there is not a single record or part of a record to which this subsection is applicable. The respondents do not indicate that this aspect was ever considered. They do not say that they have not found a single document, or any part of a record, to which this applies.

86 To the extent that the provisions of section 39(1)(b)(iii)(dd) of PAIA may find application in respect of some, or some part of, the requested records, I submit

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that a proper application of section 28 would mean that the personal information of the person affected could be severed from the record(s) and that the record(s) could be provided in a redacted form.

***The obligation to safeguard audit information***

- 87 The AGSA asserts that it is obliged to guard against disclosure of information obtained in the auditing process, and implies that it is for this reason precluded from making disclosure under PAIA.
- 88 Section 18(1) of the Public Audit Act obliges the AGSA to take precautionary steps to guard against the disclosure of secret or classified information obtained in terms of section 15 (1), (2) or (3) or 16 of the Act.
- 89 I submit that section 18 does not prohibit disclosure which is required by another law, such as PAIA. It addresses matters such as internal safeguards to prevent inadvertent disclosure.
- 90 PAIA gives effect to a constitutional right. Section 18 of the Public Audit Act must be read in a manner which promotes the spirit, purport and objects of the Constitution and PAIA. I submit that this is achieved by interpreting it in the manner which I have set out above. I point out in this regard that section 5 of PAIA provides that PAIA prevails over other legislation prohibiting or restricting disclosure of information.
- 91 Further, the section relates only to "secret" or "classified" information obtained by

the AGSA. In the light of the provisions of section 15(3), this plainly refers to information which is secret or classified in terms of legislation. The respondents have not indicated which of the information is alleged to be secret or classified, and in terms of what legislation it is secret or classified.

92 In terms of section 18(2) of the Public Audit Act, steps taken to guard against disclosure may not prevent the disclosure of any audit finding on any unauthorised, irregular or fruitless and wasteful expenditure or criminal conduct relating to the financial affairs of an auditee. No indication is given that this aspect was considered when assessing whether disclosure is appropriate.

93 I note that the respondents have not claimed that the refusal is justified by reference to any other constitutionally protected claim. Given the blanket nature of the refusal, it could never pass muster as a justifiably proportional measure to limit the constitutionally protected right of access to information.

***The information sought was not supplied in confidence***

94 The refusal by the AGSA states that "*The AGSA gathers information only for audit purposes and is trusted by auditees to safeguard information obtained during the auditing process*". It is not clear whether this is intended to be a basis on which disclosure may lawfully be refused, and if so, on what section of PAIA the AGSA relies in this regard.

95 Section 37(1)(b) of PAIA provides that information can be refused if the record consists of information that was supplied in confidence by a third party and the

disclosure could reasonably be expected to prejudice the future supply of similar information, or information from the same source and it is in the public interest that similar information, or information from the same source, should continue to be supplied.

96 Government departments are obliged to provide information to the AGSA for audit purposes under the Public Audit Act, 2004. There can therefore be no suggestion that disclosure of the information supplied by them could in any way prejudice the future supply of such information.

97 The AGSA does not suggest that the information provided by De Beers was furnished in confidence. That was plainly not the case.

98 Section 37(1)(a) of PAIA provides that a PAIA request must be refused if the disclosure of the record would constitute an action for breach of a duty of confidence owed to a third party in terms of an agreement. Again, that is not alleged by the AGSA, and was plainly not the case in respect of any of the records requested.

99 In any event, the request may not be refused where the information is publicly available, which is the case in relation to certain of the records requested in the De Beers request and the Secret Defence Fund request.

***AGSA records returned to auditees after 7 years***

100 On 17 December 2015 SAHA wrote to the AGSA requesting, in respect of each

request, confirmation that the AGSA is in fact in possession of the documents referred to in the requests; and in respect of each document or report that the AGSA contends is no longer in its possession, asking to whom possession of each report was transferred, and when this was done.

101 AGSA was reminded of its obligation under section 20 of PAIA to transfer the request or part of the request to another body if any record or part of any record requested in terms was in the possession of, under the control of or more closely connected to the functions of another public body, or the information in the record / part of the record contained commercial information of another public body.

102 The relevant correspondence is annexed as **CMK10**, "**CMK11**" and "**CMK12**".

103 SAHA did not receive a response to any of its letters.

104 From this analysis of the 'reasons' given by the AGSA, I submit that it is evident that the respondents have not considered the merits of the requests. They have simply resorted to a knee-jerk and uniform and blanket refusal.

#### **THE PUBLIC INTEREST**

105 Even if there were potentially a valid ground for refusing access to the requested records, I submit that the public interest in the disclosure of the records is so significant that it would in any event outweigh any harm contemplated in any such ground.

106 Section 46 of PAIA provides:

*"Despite any other provision of this Chapter, the information officer of a public body must grant a request for access to a record of the body contemplated in section 34(1), 36(1), 37(1)(a) or (b), 38(a) or (b), 39(1)(a) or (b), 40, 41(1)(a) or (b), 42(1) or (3), 43(1) or (2), 44(1) or (2) or 45, if-*

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

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

108 The respondents do not suggest that they ever considered this issue at all.

109 The requested records are of profound public interest, as they are of great importance to public understanding of past and contemporary struggles for justice in South Africa. A nation that has understanding of its past is better placed to avoid repeating the mistakes of the past. It is of paramount importance for the people of South Africa to have access the records that form the basis of this application. South Africans are entitled to know the full extent of the activities of the Apartheid government so that they may move forward and ensure that these events are never again repeated.

110 There is reason to believe that the records demonstrate substantial contraventions of, or failure to comply with, the law. There is reason to believe that they demonstrate contraventions of exchange control regulations; of

international sanctions which were legally binding on parties with which the apartheid security services engaged in transactions; and of the laws governing the intelligence services.

- 111 The requests at issue, relate to practices and policies during the final phase of the apartheid regime (1976-1994) which may have enabled economic crime and corruption.
- 112 In the nature of things, I am not able to provide further detail beyond what is already stated herein, because SAHA has been refused access to the requested records. I refer further to this below in relation to section 80 of PAIA.
- 113 Two of the three requests relate to aspects of governance in South Africa which are largely focussed on a period of between 20 and 40 years ago. This period represented the height of militarisation of the state and the economy, and was characterised by repressive laws and practices. This not only gave context to the gross violations of human rights, it also limited the flow of information and favoured a culture of censorship and large-scale secrecy within the public and private sector.
- 114 The withholding of this information has had a negative effect on the ability of the South African public to engage with and understand the extent of illegal practices and their relationship to apartheid.
- 115 The longer the delay in accessing material, the more likely that key sources (some of whom will be identified by these documents) would have passed away.

Therefore, any delays in accessing the information will inhibit the ability of the researchers and the public to understand the documents in their full context.

116 In essence, these requests relate to important, but poorly researched and understood aspects of South Africa's recent past. It is critical that this material should be accessible. SAHA associates such as the Open Secrets project will undertake detailed research which will help South Africans understand the long term impact of this important aspect of our history.

117 In relation to the Intelligence reports, I submit that there can be no question that it is in the public interest that information about the structure, functioning and resources of our intelligence agencies be known so that South Africans can be better informed and equipped to contribute to the development of government policy and legislation in this area.

118 I submit that the public interest in the disclosure of the records clearly outweighs any harm contemplated in any of the grounds of refusal relied on by the respondents. Therefore, I am advised and submit that section 46 of PAIA is applicable and accordingly access must be granted to the requested records.

#### **SECTION 80 OF PAIA**

119 Section 80(1) of PAIA provides for what our courts have termed "a judicial peek".

It provides:

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

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

121 I am advised and submit that a "judicial peek" may be appropriate if there are any material disputes of fact as to what the records contain. The manner in which the respondents have given "reasons" has made it impossible for SAHA to engage further with the facts in these founding papers, because the respondents have simply not put up any facts which can be addressed.

122 The AGSA refused these requests on 1 October 2015 and 26 October 2015 respectively. This application is brought within 180 days of the date of refusal.

## CONCLUSION

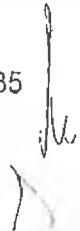
123 For all the reasons set out in this affidavit, I submit that:

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

123.2 There is no justifiable basis for the refusals of access to the information requested.

124 SAHA seeks the orders set out in the notice of motion.

125 If any of the records requested fall within section 20(1) of PAIA, then in respect only of those records SAHA seeks an order directing the First and Second Respondents to comply with their obligations under section 20(1) and (5) of PAIA,

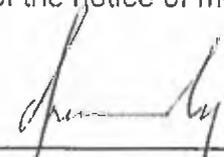


including the time limits set out therein, in respect of any of the.

126 If it is found that the First and Second Respondents are required to undertake the Third-party notification process in Chapter 5 of PAIA in respect of certain of the records requested, then in respect only of those records, SAHA seeks an order directing the First and Second Respondents to undertake the Third-party notification process in Chapter 5 of PAIA, in accordance with the time limits set out therein, and to report to the Court and to the Applicant on the outcome of that process.

127 SAHA also seeks leave thereafter to set that part of this application down for hearing on the papers, supplemented as appropriate.

128 I ask that the Court grant an order in terms of the notice of motion.

  
\_\_\_\_\_  
CATHERINE MOIRA KENNEDY

I hereby certify that the deponent stated that she knows and understands the contents of this affidavit and that it is to the best of her knowledge both true and correct. This affidavit was signed and sworn to before me at **JOHANNESBURG** on this the \_\_\_ day of MARCH 2016, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended, have been complied with.

  
\_\_\_\_\_  
COMMISSIONER OF OATHS  
Full names: *Dumiscani Meebhoo*  
Address: *No. 01 Hospital Street, Braamfontein*  
Capacity: *Senior Registrar Clerk*

*Dumiscani Meebhoo*  
\_\_\_\_\_  
KOMMISSARIS VAN EDE EX OFFICIO  
COMMISSIONER OF OATHS  
AMP/IRANK *Senior Registrar Clerk*  
CONSTITUTIONAL COURT/KONSTITUSIONELE HOF S.A.  
1 HOSPITAL STREET  
CONSTITUTION HILL  
BRAAMFONTEIN 2017

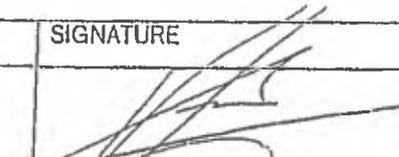
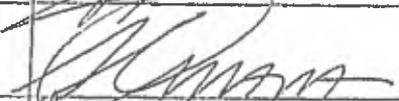
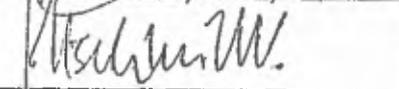
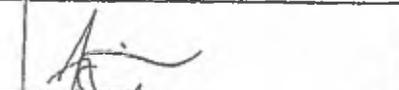
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**RESOLUTION BY THE TRUSTEES OF THE SOUTH AFRICAN HISTORY ARCHIVES TRUST**  
Pursuant to clause 9.6 of the Deed of Trust

It is resolved that:

1. The South African History Archive Trust ("SAHA") will launch applications in its own name in the High Court of South Africa, Johannesburg, challenging various compliance issues under the Promotion of Access to Information Act, 2000 ("PAIA") including relating to certain provisions around application of exemptions, providing adequate reasons, searches for records and obligations to respond to PAIA requests submitted in consultation with researchers, including Mr Hennie van Vuuren and Professor Jane Duncan.
2. That Lawyers for Human Rights Pretoria Law Clinic be appointed to act as attorneys of record and represent SAHA in the proceedings to be instituted against respondents to be confirmed and that the said attorneys do all things necessary in the application on behalf of SAHA.
3. That Catherine Moira Kennedy be authorised to depose to such affidavits in the said proceedings on behalf of SAHA, as may be required and further Catherine Moira Kennedy be authorised to give instructions from time to time as she may deem necessary to the said attorneys in relation to the proceedings.

Signed on this the 27th day of September 2014.

TRUSTEE	SIGNATURE	DATE
VERNE HARRIS ID: 5804215085085		30/9/2014
SELLO HATANG ID: 7504285846089		27/09/2014
HORST KLEINSCHMIDT ID: 4510175466089		28.11.14
ANTHONY MANION ID: 7604135132084		27/09/2014
MN NIEFTAGODIEN ID: 6410225158083		27/09/14

D  
ke  
N.V.



TRUSTEE	SIGNATURE	DATE
DUMISA NTSEBEZA ID: 4910315121083		01/10/2014
PIERS PIGOU ID: 6705305221184		27 Sept 2014
MARLENE POWELL ID: 5907270095087		27 Sep 2014
CIRAJ RASSOOL ID: 61.12275648084		28 Sept 2014
RAZIA SALEH ID: 6208080199089		27 Sep 2014
SPIRIDOULA WEBSTER (also known as Lull Callinicos) ID: 3611100106088		2 December 2014

Box 11719, Braamfontein 2017, Johannesburg - Tel: +27 (0) 11 718 2560 - Fax: +27 (0) 865 001 600 - Email: info@saha.org.za - www.saha.org.za

Trustees: D Ntsebeza (Chairperson), L Callinicos, V Harris, S Hatang, H Kleinschmidt, MN Nloftagodlen, P Pigou, M Powell, C Rassool, R Saleh, A Manion (ex officio)

Non-Profit Trust No. 2522/93 - 031-807-NPO

CMKIE  
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SOUTH AFRICAN  
HISTORY ARCHIVE

"SAHA"

DEED OF TRUST

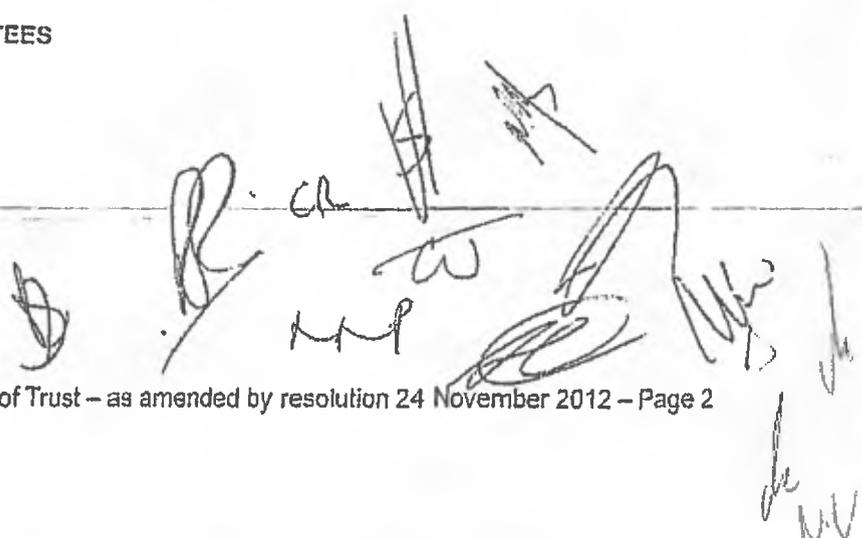
Amended by resolution 28 October 2002  
Further amended by resolution 09 April 2011  
Further amended by resolution 24 November 2012

SAHA Deed of Trust – as amended by resolution 24 November 2012 – Page 1

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## 1. ORIGINAL MOTIVATION

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

## 2. ESTABLISHMENT OF A TRUST

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

## 3. OBJECTIVES OF THE TRUST

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

## 4. ANCILLARY OBJECTIVES OF THE TRUST

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

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in new and innovative ways;

- 4.1.4 Extend the boundaries of freedom of information in South Africa;
- 4.1.5 Raise awareness, both nationally and internationally, of the role of archives and documentation in promoting and defending human rights.

5. GALA

- 5.1 It is recorded that in 1996 SAHA established the Gay and Lesbian Archives (GALA) as a project of SAHA.
- 5.2 In 2007, GALA formed a separate and independent trust. However, the work of SAHA and GALA remains closely aligned and the organisations continue to work in close collaboration.

6. INTERPRETATION

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

- 6.1 "Trust Fund" : shall mean the assets or funds held and administered by the Trustees from time to time, that is to say, the Trust capital together with donations and any additions or accruals thereto, including bequests from time to time from any sources and in any form.
- 6.2 "Trust Capital" : shall mean the capital of the Trust consisting of the Trust Fund and including that part of the net income which is not distributed and is accumulated as part of the capital after deducting:
  - 6.2.1 the aggregate of the liabilities of the Trust, both actual and contingent, and
  - 6.2.2 the sum of all provisions for depreciation, renewals or diminution in value of assets or for liabilities (actual or contingent) the amount of which cannot be determined with substantial accuracy.
- 6.3 "Fund Raising Act" : shall mean the Fund Raising Act 107 of 1978 as amended from time to time.
- 6.4 "Nonprofit Organisations Act" : shall mean the Nonprofit Organisations Act 71 of 1997 as amended from time to time.
- 6.5 "Income Tax Act" : shall mean the Income Tax Act 58 of 1962 as amended from time to time.
- 6.6 "Trust" : shall mean the Trust created under this Deed of Trust.
- 6.7 "Trustees" : shall mean the signatories to this Deed as Trustees and any other persons appointed to that office in terms of this Trust Deed from time to time for so long as they hold office as such, who shall be deemed to be members of the trust for all purposes

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under the Fund Raising Act and the Nonprofit Organisations Act.

7. THE AFFAIRS OF THE BUSINESS

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

8. TRUSTEES PROVISIONS

8.1 The parties listed in Annexure A of this Trust Deed were the first Trustees of the Trust;

8.2 The parties listed in Annexure B of this Trust Deed are the Trustees of the Trust at the date of amendment of this Trust Deed.

8.3 Upon the death, permanent incapacity, removal or resignation of anyone of the Trustees, the Trustees then remaining shall, as soon as possible, appoint another Trustee to the office of Trustee, which person shall be decided upon by the remaining Trustees as they in their sole and absolute discretion may determine, it being the intention of the parties hereto that there shall always be a minimum of 5 Trustees and not more than 15 Trustees of the Trust in office. Between 2 and 4 Trustees shall serve as members of the Management Committee, as nominated by the Trustees on an annual basis.

8.4 Where the death, permanent incapacity, removal or resignation of one of the Trustees results in the number of remaining Trustees being less than 5, those remaining Trustees may appoint a further Trustee in the manner outlined in clause 8.3 but may take no other action in relation to the operation of the Trust until such appointment has been made, restoring the number of Trustees to at least 5;

8.5 The Trustees shall at any time from time to time be entitled to accept the resignation of any other Trustee;

8.6 The Trustees shall at any time from time to time have unlimited power of co-option of further Trustees, subject to the maximum referred to in 8.3 above, which shall be exercised on such terms and conditions and for such period as they in their sole discretion may determine;

8.7 Any appointment, removal or resignation, delegation of powers or co-operation shall not be valid unless recorded in writing;

8.8 A Trustee shall vacate his/her office if:

8.8.1 he/she commits any Act of insolvency as defined in the insolvency law from time to time in force;

8.8.2 he/she becomes of unsound mind or is declared incapable of managing his/her own affairs;

8.8.3 he/she resigns his/her office by written notice to the other Trustees;

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8.8.4 he/she fails to attend three (3) consecutive meetings of the Trustees without the leave of the remaining Trustees;

8.8.4 he/she is removed from office by the decision of the majority of the remaining Trustees after he/she has been given written notice of the intention of the remaining Trustees to remove him/her and given an opportunity to address the remaining Trustees or furnish them with reasons in writing why he/she should not be removed as a trustee.

9. PROCEEDINGS OF TRUSTEES

9.1 A quorum for a meeting of the Trustees shall be 50 per cent of the Trustees, at least one of whom shall be a member of the Management Committee. In the event of the meeting being inquorate thirty (30) minutes after the time of commencement, it shall stand adjourned to a date which all Trustees shall be notified of in writing, but which shall be not less than seven (7) days after the date of the inquorate meeting, and at such adjourned meeting all those Trustees present shall constitute a quorum.

9.2 Subject to the Trustees giving effect to the terms and conditions of this Deed, administering the Trust and its affairs, they shall adopt such procedures and take such administrative steps as they shall, from time to time, deem necessary and advisable including the appointment of a management committee from amongst themselves which shall be responsible for the disbursement of monies, application by criteria for such disbursement, reporting to funders on a quarterly basis, and control an administration of activities;

9.3 The Trustees shall meet together for the despatch of business, adjourn and otherwise regulate their meetings as they think fit, but not less than twice a year. The date and the place of the meetings shall be as determined by the Trustees. The Chairperson shall, however, have the power to call a meeting of the Trustees when in his or her opinion circumstances justify such a step and will be obliged to do so on receipt of a written request signed by not less than three (3) Trustees specifying the business to be transacted at such a meeting. Reasonable notice will be given to Trustees of all meetings of the Trustees, which notice may be given by letter, telegram, telex, telefax, electronic mail, or orally.

9.4 A notice dispatched to the last address of a Trustee as made known to the Secretary of the Trust when appointed shall be valid;

9.5 Decisions are made by majority vote indicated by way of a show of hands;

9.6 A resolution in writing signed or approved by other written means, such as by email, by majority vote is valid and effectual as if it had been passed at a meeting of the said Trustees and shall be noted at the next meeting. Such a resolution is constituted at the time of the last signature or approval of the resolution and may consist of several documents in like form each signed by one or more of the Members. If a resolution is written by email, an actual signature is not required. Emails from the Trustees are sent

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

9.7 The Trustees shall elect from amongst their number a chairperson who shall remain in office until he/she resigns as a Trustee or as chairperson or if the remaining Trustees remove him/her from office by resolution to that effect;

9.8 The Director shall provide written notice to the Director of Nonprofit Organisations of the names, physical business and residential addresses of the Trustees and Director of the Trust one month after any appointment or election of such persons, even if their appointment or election did not result in any changes to the persons occupying those positions , in accordance with section 18(1)(b) of the Nonprofit Organisations Act.

9.9 If the chairperson is absent from any meeting the remaining Trustees shall elect a chairperson for the purposes of that meeting;

10 DISPENSATION OF SECURITY

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

10.2 If despite the provisions of clause 10.1 hereof, security is lawfully required to be furnished, then the costs of providing the same shall be borne by the Trust.

11 VESTING, COLLECTION, UTILISATION OF FUNDS AND CONTRIBUTIONS

11.1 The Trustees are hereby empowered to accept for the purposes of the Trust any gift, bequest or payment of any nature whatsoever from any person which may be given or paid to them with the intention that it form part of the Trust Fund. Any assets so accepted shall be administered and dealt with subject to the terms of this Deed of Trust. All donations of the Trust shall be irrevocable and subject to the terms and conditions of the Trust.

11.2 Contributions may be collected in and from any portion of the Republic of South Africa and outside its borders provided that the contributions from outside the Republic of South Africa shall be actually received in the Republic of South Africa.

11.3 The funds of the Trust shall be utilised solely for investment or for the objects for which it has been established.

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

12. TAX ISSUES

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

12.1 in the year of assessment preceding the year of assessment in which the donation is received, distribute at least 75% of its S18A (of the Income Tax Act, 1962) donations received;

12.2 issue a receipt for the donation on which the following details are provided-

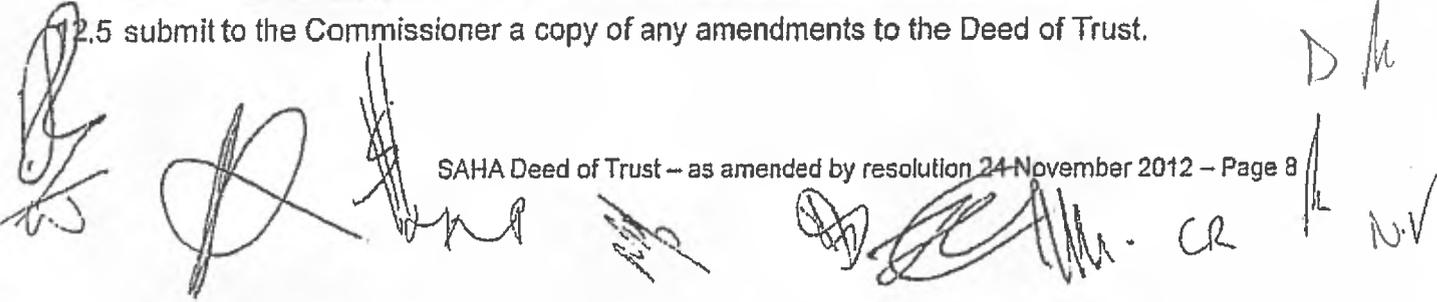
- 12.2.1 the reference number issued by the Commissioner;
- 12.2.2 the name and address of the SAHA Trust;
- 12.2.3 the date of receipt of the donation;
- 12.2.4 the amount of the donation
- 12.2.5 the name and address of the donor;
- 12.2.6 a certificate to the effect that the receipt is issued for purposes of Section 18A of the Income Tax Act, 1962 and that the donation has been or will be used exclusively for the object of the SAHA Trust;

12.3 on dissolution transfer its assets to any similar approved public benefit organisations;

12.4 not accept any donation-

- 12.4.1 which is revocable at the instance of the donor for reasons other than a material failure to conform to the designated purposes and;
- 12.4.2 conditions of such donation, including any misrepresentation with regard to the tax deductibility thereof in terms of section 18A; or
- 12.4.3 in circumstances where a donor has imposed conditions which could enable that donor or any connected person in relation to such donor to derive some direct or indirect benefit from the application of such donation,

12.5 submit to the Commissioner a copy of any amendments to the Deed of Trust.


 SAHA Deed of Trust – as amended by resolution 24 November 2012 – Page 8

13 DUTIES OF TRUSTEES

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

13.1.1 The Trustees shall appoint a person as Director. The Director shall have responsibility for the day to day management of the accounts of the Trust and such other responsibilities as delegated to the Director from time to time by the Trust. The Director shall be at all times subject to the direction and control of the Management Committee in the performance of their duties.

13.1.2 The Trustees shall take and maintain written minutes of the meetings held pursuant to the provisions of clause 9 above. An official minute book shall be retained at the Trust's principal office.

13.1.3 The Trustees shall, at the expense of the Trust, cause proper books of accounts to be kept, which books of account together with all other papers and documents connected with or relating to the Trust shall be kept as such place as may be agreed upon by the Trustees.

13.1.4 The Trustees at the expense of the Trust shall be entitled to cause accounts of the Trust to be audited by an auditor appointed by the Trustees from time to time, which auditor shall be charged with drawing up the financial statements of the Trust at the end of each and every year. The first financial statements of the Trust shall be prepared on 31 December following the date of resignation of this Trust Deed in terms of the Trust Property Control Act. The auditor may be one of the Trustees or a firm of which he is a member and he/she or his/her firm may charge their reasonable fee for such services.

13.1.5 The financial statement shall be prepared as at the last day of each succeeding year for this purpose every year shall commence on 1 January and shall end on 31 December of each succeeding year.

13.1.6 All monies received on behalf of the Trust shall be paid by the Trustees into a banking account or other account maintained by the Trustees at a registered commercial bank or building society or other financial institution in terms of the Financial Institutions (Investment of Funds) Act 1984 and all payments made on behalf of the Trust shall be drawn from such account. All withdrawals may be made on the signature of such persons as the Trustees may determine from time to time.

13.1.7 All charges, expenses and disbursements including reasonable travelling expenses reasonably incurred by the Trustees in or arising from their administration of the Trust (including the costs of attending meetings of the Trust) shall be a first charge on the income of the Trust and the Trust Assets and shall be paid on demand.

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14 INDEMNIFICATION OF THE TRUSTEES

14.1. Subject to the foregoing a Trustee shall in performance of his/her duties and in the exercise of his/her power act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another;

14.2 No Trustee shall be liable for any loss of the Trust arising by reason of any investment made on behalf of the Trust whether authorised in terms of the Trust Deed or not, or for negligence or fraud of any agent employed by such Trustee (although the employment of such agent was not strictly necessary or expedient) , or by any other Trustee or by reason of any mistake or omission made in good faith by any Trustee hereof or by reason of any matter or thing whosoever, except as is occasions by such Trustees own personal, wilful act of dishonesty.

14.3 The Trustees shall be indemnified out of the Trust Assets against all claims or demands of whatever nature that may be made upon them arising out of the exercise, purported exercise or omission to exercise any of the powers conferred upon them by this Deed of Trust. Nothing herein contained shall be deemed to exempt a Trustee from or indemnify him/her against liability for breach of trust where he/she failed to show the degree of care diligence and skill referred to above.

15 TRADING ACTIVITY

15.1 SAHA will not carry on any business undertaking or trading activity, otherwise than to the extent that-

15.1.1 if the undertaking or activity—

15.1.1.1. is integral and directly related to the sole or principal object of that public benefit organisation as contemplated in paragraph (b) of the definition of "public benefit organisation " in section 30 of the Income Tax Act 1962 (as amended)1;

15.1.1.2. is carried out or conducted on a basis substantially the whole of which is directed towards the recovery of cost; and

15.1.1.3. does not result in unfair competition in relation to taxable entities;

15.1.2 if the undertaking or activity is of an occasional nature and undertaken substantially with assistance on a voluntary basis without compensation;

15.1.3 if the undertaking or activity is approved by the Minister by notice in the Gazette, having regard to—

15.1.3.1 the scope and benevolent nature of the undertaking or activity;

15.1.3.2 the direct connection and interrelationship of the undertaking or

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

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

16. POWERS OF TRUSTEES

16.1 The Trustees in their discretion shall have plenary powers to perform all acts and execute all documents relevant to the carrying out of the objects of the Trust and the administration thereof. Without derogating from the generality of the foregoing, the Trustees shall have the power to open and operate any banking account and/or building society account and to draw and issue cheques and promissory notes and to endorse any of the same for collection. The Trustees shall determine the manner of operating the banking or other accounts of the Trust.

16.2 The Trustees shall be subject to a majority resolution, have the power to acquire, lease, renovate, restore immovable property in pursuance of the objectives of the Trust. In addition, to buy or sell and transfer Trust Assets and invest the proceeds (including dividends accruing on the Trust Fund) and sign and execute any agreement in regard thereto provided that the Trustees shall not have the power to:

- 16.2.1 enter into any transactions of a patently speculative nature in relation to property;
- 16.2.2 carry on business including inter alia ordinary trading operations in the commercial sense as well as the administration of any immovable property acquired by the Trust.

16.3 The Trustees shall have the power to:

16.3.1 hold the whole or any part of the Trust Fund or any investments made by them from time to time during the administration of the Trust in their own names or in the name of any person or institution which is nominated by them from time to time for that purpose or, in the name of the Trust; and

16.3.2 exercise the voting power attached to any share, stock or debenture in such manner as they may deem fit, exercise and take up or realise any rights of conversion or subscription appertaining to any or debenture forming part of the Trust;

16.3.3 From time to time to borrow such monies on such terms and conditions as they

deem fit:

16.3.3.1 for the payment of any liability (including taxes payable in respect of the Trust); or

16.3.3.2 which may be required from time to time for the protection or better or further investment of all or any of the Trust Assets; or

16.3.3.3 generally for such other purposes in connection with all or any of the assets forming part of the Trust Fund.

16.3.4 Invest any funds that are not required for immediate use of the Trust, provided that investments may only be made in:

16.3.4.1 a financial institution as defined in section 1 of the Financial Institutions (Investment of Funds) Act, 1984;

16.3.4.2 securities listed on a licensed stock exchange as defined in section 1 of the Stock Exchanges Control Act, 1985;

16.3.4.3 in other prudent investments in financial instruments and assets as the Commissioner may determine after consultation with the Executive Officer of the Financial Services Board and Director of Non-Profit Organisations.

16.3.5 Obtain such legal advice from time to time as the said Trustees in their discretion require and in which event all costs of and in connection therewith shall be borne by the Trust.

16.3.6. Engage the service of financial advisers, brokers, property administrators, consultants, accountants, auditors, architects and experts of all kinds and to make payment of their fees.

16.3.7 Institute or defend any proceedings in any court of law or arbitration proceedings in the name of the Trust.

16.3.8 Decide (which decision shall be final and binding and shall not be subject to dispute or challenge) whether any monies or assets received by them from time to time as part of the Trust Assets constitutes "capital" or "income" and for the purpose they shall be entitled to make such apportionment in the Trust's account.

16.3.9 Apply all or any of the Trust assets or monies held by them towards payment of any tax levied on the Trust or the income of the Trust, if any.

16.3.10 Leave the capital of the Trust or any part thereof invested as it may be when it is handed over to them.

16.3.11 Sell, realise, call in or convert into cash so much of the Trust assets as the Trustees may from time to time deem fit and make such further investments of the same in such form and in such manner as the Trustees may determine from time

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

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

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

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

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

## 17 BOOKS OF ACCOUNTS, RECORDS OR OTHER DOCUMENTS

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

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

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

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

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

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

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

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

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

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

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

and,  
17.4.3 The Trust has complied with the provisions of the Nonprofit Organisations Act and this Deed of Trust which relate to financial matters.

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

18 AMENDMENTS

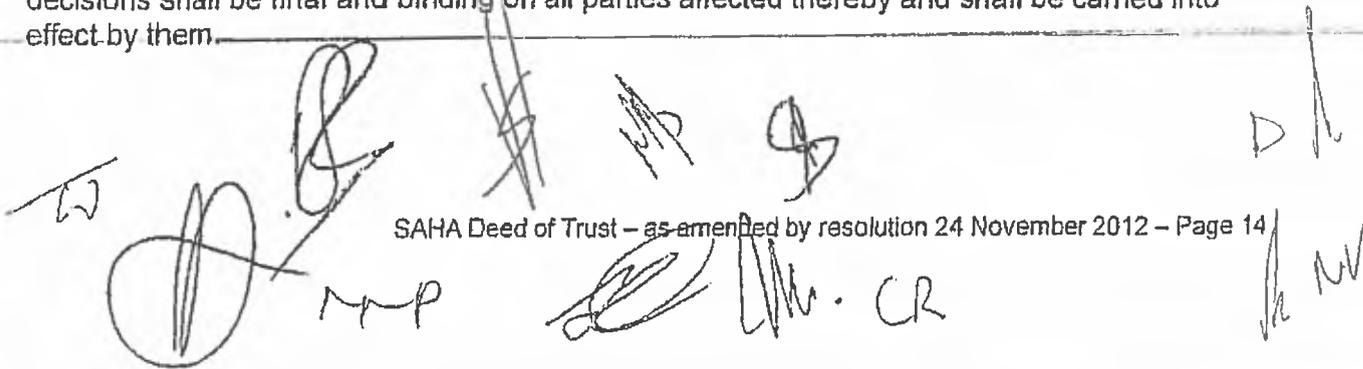
- 18.1 A Resolution approved by at least two thirds of the Trustees then in office shall be required for any amendment to this Deed of Trust.
- 18.2 Any amendments to this deed of Trust shall be submitted to the Commissioner of the South African Revenue Service.
- 18.3 In addition, the Trust must send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

19. TERMINATION OF TRUST AND DISTRIBUTION OF ASSETS

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

20 DISPUTES

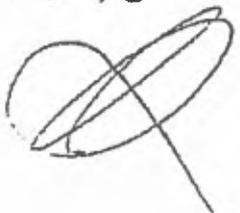
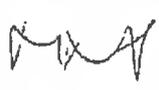
Should any question arise as to whether the interpretation of this Deed or any of the provisions hereof as to the true construction thereof or as to the administration of the Trust or otherwise howsoever, the Trustees shall have the power to decide such questions either acting on their own judgement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


 A series of handwritten signatures and initials are present below the text. From left to right, there is a large signature, a signature with 'MP' written below it, another signature, a signature with 'CR' written below it, and a signature with 'NW' written below it. There are also some other initials scattered around.

21 COSTS

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





  
 CR

ANNEXURE "A" : ORIGINAL TRUSTEES

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

AND

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

AND

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

AND

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

AND

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

AND

LULI CALLINICOS  
(born: 10/11/1936)

AND

MICHELE PICKOVER  
(born: 1/8/1959)

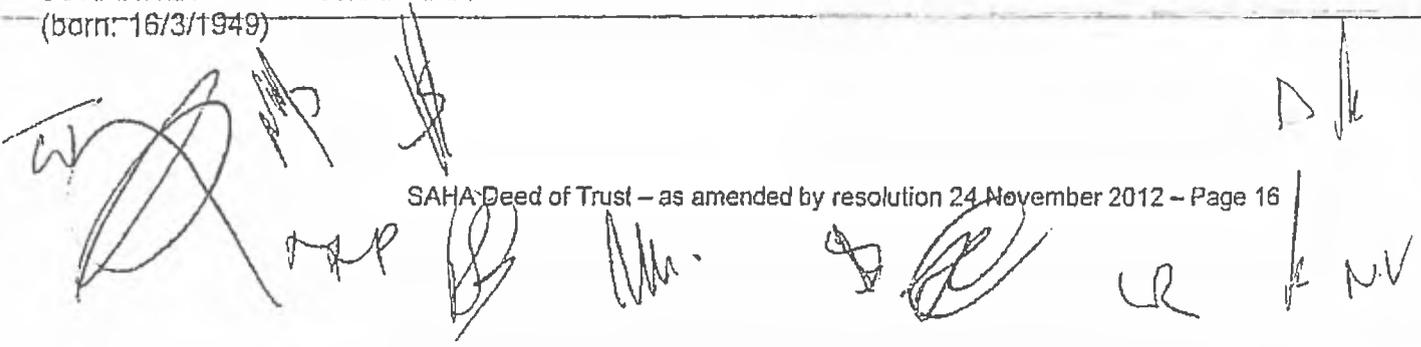
AND

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

AND

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

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APPENDIX B: CURRENT TRUSTEES

HORST GERHARD HERMANN KLEINSCHMIDT

(born: 17/10/1945)

and

SPIRIDOULA WEBSTER (also known as LULI CALLINICOS)

(born: 10/11/1936)

and

MARLENE MERCER POWELL

(born: 07/27/1959)

and

DUMISA BUHLE NTSEBEZA

(born 31/10/1949)

and

CIRAJ SHAHID RASSOOL

(born 27/12/1961)

and

MOHAMED NOOR NIEFTACODIEN

(born 25/10/1964)

and

RAZIA SALEH

(born 08/08/1962)

and

ANTHONY ANDREW MANION

(born 13/04/1976)

Signature: 

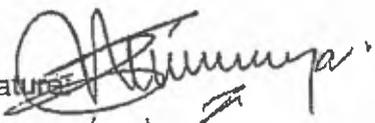
Date: 3.4.2014.

Signature: 

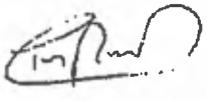
Date: 6.12.2013

Signature: 

Date: 07/12/2013

Signature: 

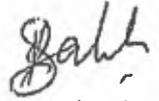
Date: 07/12/2013

Signature: 

Date: 07/04/2014

Signature: 

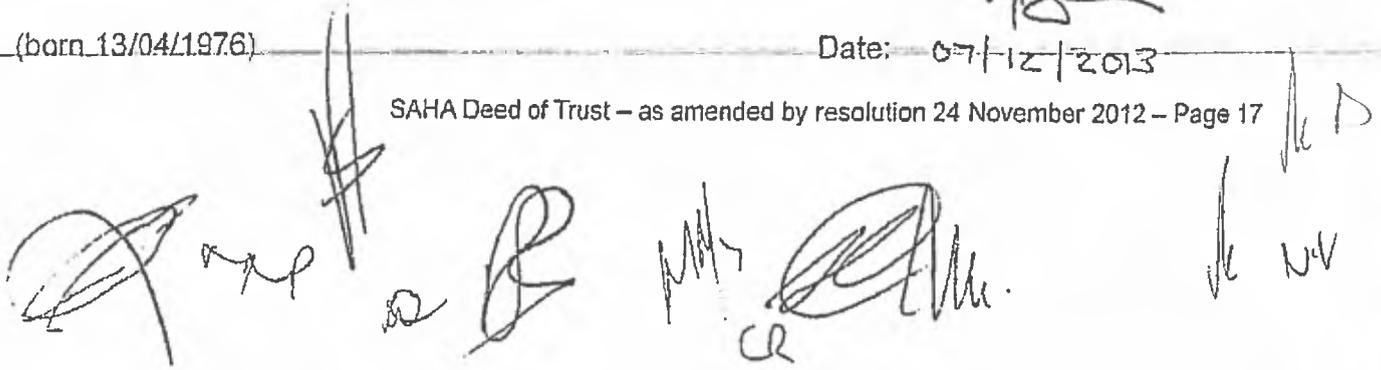
Date: 15/01/14

Signature: 

Date: 15/01/2014

Signature: 

Date: 07/12/2013



and

VERNE SHELDON HARRIS

(born 21/04/1958)

and

PIERS ASHLEY PIGO

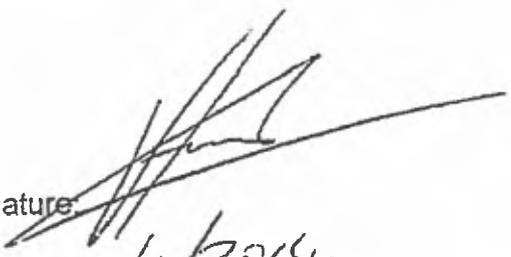
(born 30/05/1967)

and

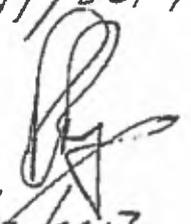
SELLO KOOS HATANG – 7504285846089

(born 28/04/1975)

(hereinafter collectively referred to as "the Trustees")

Signature: 

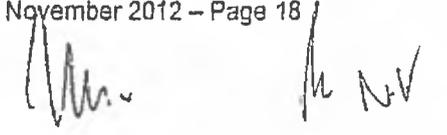
Date: 15/1/2014

Signature: 

Date: 07/12/2013

Signature: 

Date: 14/01/2014



CMK2  
61

FORM A  
REQUEST FOR ACCESS TO RECORD OF PUBLIC BODY  
(Section 18 (1) of the Promotion of Access to Information  
Act, 2000  
(Act No. 2 of 2000)  
[Regulation 2]

**FOR DEPARTMENTAL USE**

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

**Request received**

by: \_\_\_\_\_

(state rank, name and surname of information officer/deputy information officer) on  
\_\_\_\_\_ (date) at \_\_\_\_\_ (place).

Request fee (if any): R \_\_\_\_\_

Deposit fee (if any): R \_\_\_\_\_

Access fee: R \_\_\_\_\_

\_\_\_\_\_  
SIGNATURE OF INFORMATION  
OFFICER/DEPUTY  
INFORMATION OFFICER

**A. Particulars of public body**

The Deputy Information Officer: Nkululo Dlamini  
Office of the Auditor General  
PO Box 446  
Pretoria

↓  
D

South Africa  
0001

Telephone: +27124268000  
Fax: +27124268257  
Email: [agsa@agsa.co.za](mailto:agsa@agsa.co.za)

CC: [nkululon@agsa.co.za](mailto:nkululon@agsa.co.za)

**B. Particulars of person requesting access to the record**

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

**Full names and surname:** South African History Archive (SAHA)  
**Identity/Passport number:** Non-Profit Trust No. 2522/93  
**Postal address:** P.O.Box 31719, Braamfontein, 2017  
**Fax number:** +27866491491  
**Telephone number:** +27117182563  
**E-Mail Address:** foip@saha.org.za

**SAHA Ref Number:** SAH-2015-OAG-0004

Capacity in which request is made, when made on behalf of another person:

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

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

Full names and surname:  
Identity number:

J D

D. Particulars of record

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

- Description of record or relevant part of the record:

1. Annual reports of the Auditor-General of Intelligence to the Parliamentary Joint Standing Committee on Intelligence for each of the financial and/or calendar years from 1 January 2003 to 30 June 2015;
2. The Pikoli Commission Report on enquiry into the structures of the intelligence services; (see assertion on p. 91 of <http://library.fes.de/pdf/files/bueros/suedafrika/07162.pdf> that release of report would not have jeopardised national security);
3. The Ngcaba Commission Report on enquiry into technology issues in the intelligence services; and
4. The Netshitenze Commission Report on enquiry into the intelligence services

- Reference number, if available:
- Any further particulars of record:

a. See minutes from 2012 that state that certain elements of the reports, listed in items 2, 3 and 4., have already been declassified -

<https://pmg.org.za/committee-meeting/14029/>; and

b. Noting specifically in relation to this request that:

i. Section 5 of PAIA provides for the supremacy of PAIA over any other legislation prohibiting or restricting disclosure of information and that this includes any provisions in the Public Audit Act, 2004 that limits or restricts the disclosure of information, such as section 18 of that Act (see South African Human Rights Commission notice on supremacy of PAIA - [http://www.sahrc.org.za/home/21/files/Notice on the supremacy of PAIA.pdf](http://www.sahrc.org.za/home/21/files/Notice%20on%20the%20supremacy%20of%20PAIA.pdf));

ii. To the extent that any grounds for refusal in Chapter 4 of PAIA may apply to any, or any part of any, record falling within this request, section 46 of PAIA places an obligation on a Requestee body to apply the public interest override test provided for in that section to each and every such record or part of a record;

iii. To the extent that any grounds for refusal in Chapter 4 of PAIA may apply to any, or any part of any, record falling within this request, section 28 of PAIA places an obligation on a Requestee body to severability in terms of the provisions of that section; and

*[Handwritten signature]*

iv. To the extent that any record or part of any record requested in terms of this request is in the possession of, under the control of or more closely connected to the functions of another public body or where the information in the record / part of the record contains commercial information of another public body, section 20 of PAIA places an obligation on the Requestee body to transfer the request or part of the request to such other body.

**E. Fees**

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

Reason for exemption from payment of fees:

**F. Form of access to record**

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

Disability: \_\_\_\_\_

Form in which record is required: \_\_\_\_\_

Mark the appropriate box with an "X".

NOTES:

- Your indication as to the required form of access depends on the form in which the record is available.
- Access in the form requested may be refused in certain circumstances. In such a

case you will be informed if access will be granted in another form.

(c) The fee payable for access to the record, if any, will be determined partly by the form in which access is requested.

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

*Handwritten mark resembling 'D' or '1 D'*

<input checked="" type="checkbox"/>	Copy of record*		Inspection of record
2. If record consists of visual images: (this includes photographs, slides, video recordings, computer-generated images, sketches, etc).			
	view the images	<input checked="" type="checkbox"/>	copy of the images* transcription of the images*
3. If record consists of recorded words or information which can be reproduced in sound:			
	Listen to the soundtrack (audio cassette)	<input checked="" type="checkbox"/>	transcription of soundtrack* (written or printed document)
4. If record is held on computer or in an electronic or machine ? readable form:			
	Printed copy of record*	<input checked="" type="checkbox"/>	Printed copy derived from the record* copy in computer readable form*(stiffy or compact disc)
			YES
			NO
* If you requested a copy or transcription of a record (above), do you wish the copy or transcription to be posted to you?			<input checked="" type="checkbox"/>
<b>A postal fee is payable.</b>			
<i>Note that if the record is not available in the language you prefer, access may be granted in the language in which the record is available.</i>			
In which language would you prefer the record? ENGLISH			

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

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

How would you prefer to be informed of the decision regarding your request for access to the record?

*Handwritten signature or initials*

IN WRITING preferably via email to foip@saha.org.za

Signed at Johannesburg this 27<sup>th</sup> day of August 2015.



SIGNATURE OF REQUESTER / PERSON ON WHOSE BEHALF REQUEST IS MADE

Ms Toerien Van Wyk (FOIP Coordinator)

South African History Archive (SAHA)



CMK3  
67

FORM A  
REQUEST FOR ACCESS TO RECORD OF PUBLIC BODY  
(Section 18 (1) of the Promotion of Access to Information  
Act, 2000  
(Act No. 2 of 2000)  
[Regulation 2]

**FOR DEPARTMENTAL USE**

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

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

(state rank, name and surname of information officer/deputy information officer) on  
\_\_\_\_\_ (date) at \_\_\_\_\_ (place).

Request fee (if any): R \_\_\_\_\_

Deposit fee (if any): R \_\_\_\_\_

Access fee: R \_\_\_\_\_

\_\_\_\_\_  
SIGNATURE OF INFORMATION  
OFFICER/DEPUTY  
INFORMATION OFFICER

**A. Particulars of public body**

Deputy Information Officer: Nkululo Dlamini  
Office of the Auditor General  
PO Box 446  
Pretoria

*Nkululo Dlamini*  
D

South Africa  
0001

Telephone: +27124268000  
Fax: +27124268257  
Email: [agsa@agsa.co.za](mailto:agsa@agsa.co.za)

CC: [nkululon@agsa.co.za](mailto:nkululon@agsa.co.za)

**B. Particulars of person requesting access to the record**

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

**Full names and surname:** South African History Archive (SAHA)  
**Identity/Passport number:** Non-Profit Trust No. 2522/93  
**Postal address:** P.O.Box 31719, Braamfontein, 2017  
**Fax number:** +27866491491  
**Telephone number:** +27117182563  
**E-Mail Address:** [foip@saha.org.za](mailto:foip@saha.org.za)

SAHA Reference Number: SAH-2015-OAG-0005

Capacity in which request is made, when made on behalf of another person:

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

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

Full names and surname:  
Identity number:

*[Handwritten signature]*

D. Particulars of record

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

- o Description of record or relevant part of the record:

Copies of any and all records, or part records, related to all investigations and reports made at any time into the export of uncut diamonds during the period 1992 – 1993 by the company 'De Beers', including but not limited to those records that were compiled in preparation of a briefing document on the matter to the Standing Committee on Public Accounts in 2007.

- o Reference number, if available:
- o Any further particulars of record:
  - Noting specifically in relation to this request that:
    - i. Section 5 of PAIA provides for the supremacy of PAIA over any other legislation prohibiting or restricting disclosure of information and that this includes any provisions in the Public Audit Act, 2004 that limits or restricts the disclosure of information, such as section 18 of that Act (see South African Human Rights Commission notice on supremacy of PAIA - [http://www.sahrc.org.za/home/21/files/Notice on the supremacy of PAIA.pdf](http://www.sahrc.org.za/home/21/files/Notice%20on%20the%20supremacy%20of%20PAIA.pdf));
    - ii. To the extent that any grounds for refusal in Chapter 4 of PAIA may apply to any, or any part of any, record falling within this request, section 46 of PAIA places an obligation on a Requestee body to apply the public interest override test provided for in that section to each and every such record or part of a record;
    - iii. To the extent that any grounds for refusal in Chapter 4 of PAIA may apply to any, or any part of any, record falling within this request, section 28 of PAIA places an obligation on a Requestee body to severability in terms of the provisions of that section; and
    - iv. To the extent that any record or part of any record requested in terms of this request is in the possession of, under the control of or more closely connected to the functions of another public body or where the information in the record / part of the record contains commercial information of another public body, section 20 of PAIA places an obligation on the Requestee body to transfer the request or part of the request to such other body.

*MP*

E. Fees

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

Reason for exemption from payment of fees:

F. Form of access to record

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

Disability: \_\_\_\_\_

Form in which record is required: \_\_\_\_\_

Mark the appropriate box with an "X".

NOTES:

- Your indication as to the required form of access depends on the form in which the record is available.
- Access in the form requested may be refused in certain circumstances. In such a

case you will be informed if access will be granted in another form.

(c) The fee payable for access to the record, if any, will be determined partly by the form in which access is requested.

1. If the record is in printed form:

X	Copy of record*		Inspection of record
---	-----------------	--	----------------------

2. If record consists of visual images:

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

view the images	copy of the images*	transcription of the images*
	X	

h D

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

Listen to the soundtrack (audio cassette)	X	transcription of soundtrack* (written or printed document)
---	---	--

4. If record is held on computer or in an electronic or machine ? readable form:

Printed copy of record*	X	Printed copy derived from the record*	copy in computer readable form*(stiffy or compact disc)
-------------------------	---	---------------------------------------	---

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

A postal fee is payable.

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

In which language would you prefer the record? ENGLISH

G. Notice of decision regarding request for access

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

How would you prefer to be informed of the decision regarding your request for access to the record?

IN WRITING preferably via email to foip@saha.org.za

Signed at Johannesburg this 27th day of August 2015.

SIGNATURE OF REQUESTER / PERSON ON WHOSE BEHALF REQUEST IS MADE  
Ms Toerien Van Wyk (FOIP Coordinator)  
South African History Archive (SAHA)

CMK4  
72

FORM A  
REQUEST FOR ACCESS TO RECORD OF PUBLIC BODY  
(Section 18 (1) of the Promotion of Access to Information  
Act, 2000  
(Act No. 2 of 2000)  
[Regulation 2]

**FOR DEPARTMENTAL USE**

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

**Request received**

**by:** \_\_\_\_\_

(state rank, name and surname of information officer/deputy information officer) on  
\_\_\_\_\_ (date) at \_\_\_\_\_ (place).

Request fee (if any): R \_\_\_\_\_

Deposit fee (if any): R \_\_\_\_\_

Access fee: R \_\_\_\_\_

\_\_\_\_\_  
SIGNATURE OF INFORMATION  
OFFICER/DEPUTY  
INFORMATION OFFICER

**A. Particulars of public body**

The Deputy Information Officer: Nkululo Dlamini  
Office of the Auditor General  
PO Box 446  
Pretoria

J. D.

South Africa  
0001

Telephone: +27124268000  
Fax: +27124268257  
Email: [agsa@agsa.co.za](mailto:agsa@agsa.co.za)

CC: [nkululon@agsa.co.za](mailto:nkululon@agsa.co.za)

**B. Particulars of person requesting access to the record**

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

**Full names and surname:** South African History Archive (SAHA)  
**Identity/Passport number:** Non-Profit Trust No. 2522/93  
**Postal address:** P.O.Box 31719, Braamfontein, 2017  
**Fax number:** +27866491491  
**Telephone number:** +27117182563  
**E-Mail Address:** foip@saha.org.za

**SAHA Ref Number:** SAH-2015-OAG-0006

Capacity in which request is made, when made on behalf of another person:

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

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

Full names and surname:  
Identity number:

*Handwritten signature/initials*

**D. Particulars of record**

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

- o Description of record or relevant part of the record:

Copies of any and all records, or part of records as follows:

1. All audit reports related to the South African Defence Force Special Defence Account created under the Defence Special Account Act No 6. of 1974 for each financial year for the period 1 July 1976 to 1 July 1995, as referred to in the TRC Final Report, Volume 2, pages 534 and 540, as follows:

*"The Defence Special Account Act No 6 of 1974, which came into effect on 6 March 1974, made provision for the establishment of the Special Defence Account. The Act allowed for funds in the account to be used, with the approval of the Minister of Finance, to defray expenditure incurred in connection with special defence activities (including secret services) as well as such purchases as the Minister of Defence deemed necessary.*

....

*...The above amount of R15 285 000 does not reflect the amount that passed through the Defence Special Account. The Auditor-General has provided the Commission with a schedule that identifies a total amount of R49 648 737 969 passing through this account, with a further R586 501 609 being expended on 'sensitive line function projects' between the 1974-75 and 1994-95 financial years."*

2. Report of the Auditor General on all secret funds from 1960 to 1994 as provided to the South African Truth and Reconciliation Commission (TRC), as referred to in the TRC Final Report, Volume 2, page 524, as follows:

*".. the Auditor-General reported that a total of more than R2.75 billion was expended through the Secret Services Account between 1978 and 1994. ... As is clear in the Auditor-General's report, a vast number of projects would not have been formally registered as secret projects but were undertaken within departmental line functions...."*

h D

3. The schedule of secret projects compiled by the Auditor General provided to the TRC, as was referred to in the TRC Final Report, Volume 2, page 539, as follows:

*"The Auditor-General has provided the Commission with a schedule of secret projects received from eight government departments: the NIA; the Department of Justice; the South African Police Services (SAPS); the Department of Foreign Affairs; South African Secret Services; the Department of State Expenditure, the South African National Defence Force (SANDF) and the Department of Arts and Culture, Science and Technology. This information was made available shortly before the termination of the work of the Commission."*

- o Reference number, if available:
- o Any further particulars of record:

Noting specifically in relation to this request that:

- i. Section 5 of PAIA provides for the supremacy of PAIA over any other legislation prohibiting or restricting disclosure of information and that this includes any provisions in the Public Audit Act, 2004 that limits or restricts the disclosure of information, such as section 18 of that Act (see South African Human Rights Commission notice on supremacy of PAIA - [http://www.sahrc.org.za/home/21/files/Notice on the supremacy of PAIA.pdf](http://www.sahrc.org.za/home/21/files/Notice%20on%20the%20supremacy%20of%20PAIA.pdf));
- ii. To the extent that any grounds for refusal in Chapter 4 of PAIA may apply to any, or any part of any, record falling within this request, section 46 of PAIA places an obligation on a Requestee body to apply the public interest override test provided for in that section to each and every such record or part of a record;
- iii. To the extent that any grounds for refusal in Chapter 4 of PAIA may apply to any, or any part of any, record falling within this request, section 28 of PAIA places an obligation on a Requestee body to severability in terms of the provisions of that section; and
- iv. To the extent that any record or part of any record requested in terms of this request is in the possession of, under the control of or more closely connected to the functions of another public body or where the information in the record / part of the record contains commercial information of another public body, section 20 of PAIA places an obligation on the Requestee body to transfer the request or part of the request to such other body.

#### E. Fees

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

*J. D*

Reason for exemption from payment of fees:

**F. Form of access to record**

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

Disability: \_\_\_\_\_

Form in which record is required: \_\_\_\_\_

Mark the appropriate box with an "X".  
NOTES:

- Your indication as to the required form of access depends on the form in which the record is available.
- Access in the form requested may be refused in certain circumstances. In such a

case you will be informed if access will be granted in another form.

(c) The fee payable for access to the record, if any, will be determined partly by the form in which access is requested.

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

X  Copy of record\*  Inspection of record

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

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

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

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

Listen to the soundtrack (audio cassette)	<input checked="" type="checkbox"/>	transcription of soundtrack* (written or printed document)
---	-------------------------------------	--

**4. If record is held on computer or in an electronic or machine ? readable form:**

Printed copy of record*	<input checked="" type="checkbox"/>	Printed copy derived from the record*	copy in computer readable form*(stiffy or compact disc)	YES	NO
					<input checked="" type="checkbox"/>

*JD*

* If you requested a copy or transcription of a record (above), do you wish the copy or transcription to be posted to you?		
<b>A postal fee is payable.</b>		

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

In which language would you prefer the record? ENGLISH

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

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

How would you prefer to be informed of the decision regarding your request for access to the record?

**IN WRITING** preferably via email to foip@saha.org.za

Signed at Johannesburg this 27th day of August 2015.



SIGNATURE OF REQUESTER / PERSON ON WHOSE BEHALF REQUEST IS MADE

Ms Toerien Van Wyk (FOIP Coordinator)

South African History Archive (SAHA)





Toerien van Wyk &lt;toerien@saha.org.za&gt;

**[FOIP] FW: PAIA request referenced SAH-2015-OAG-0006**

Nocha,Nkululo &lt;NkululoN@agsa.co.za&gt;

1 October 2015 at 11:22

Reply-To: foip@saha.org.za

To: foip@saha.org.za

Cc: "Mulaudzi ,Tshimangadzo (SM)" &lt;MangiW@agsa.co.za&gt;

Good morning

See the response and also take consideration of the highlighted details.

**From:** Mulaudzi ,Tshimangadzo (SM)**Sent:** 02 September 2015 12:23 PM**To:** foip@mail134-16.atl141.mandrillapp.com**Cc:** Nocha,Nkululo; Hlongwa,Musa (BE); Zikode,Thamsanqa (BE); Myburgh,Corne (BE); Van Vuuren,Lourens (BE)**Subject:** PAIA request referenced SAH-2015-OAG-0006

Good morning

Your PAIA request referenced SAH-2015-OAG-0006 has been received and acknowledged.

The information/record you request constitutes third-party information. You are therefore advised to engage directly with the relevant departments/auditees to gain access to this information.

The Auditor-General of South Africa (AGSA) keeps audit documentation/records for a period of seven years after finalisation of an audit and all finalised (signed) audit reports are submitted to departments/auditees for further action, hence it is important for you to engage these departments.

The AGSA gathers information only for audit purposes and is trusted by auditees to safeguard information obtained during the auditing process.

To comply with the provisions of section 18 of the Public Audit Act, 2004 (Act No. 25 of 2004), the Auditor-General is obliged to guard against disclosure of information obtained in the process of auditing.

Given the above, you are advised to contact the relevant departments directly.

Mangi Mufaudzi

Head of • Information and Knowledge Management • Auditor-General of South Africa  
Tel: +27(0)12 426 8454 • Fax: +27(0)12 426 8293 • Mobile: +27(0)82 568 6691 • Email: [\\_MangiW@agsa.co.za](mailto:_MangiW@agsa.co.za)

*Environmental awareness starts with each of us – think before you print this page*

**AGSA e-mail disclaimer and confidentiality note**

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Freedom of Information Programme (FOIP)  
South African History Archive (SAHA)  
<http://foip.saha.org.za>

CMK 6

Toerien van Wyk <toerien@saha.org.za>

80



**[FOIP] RE: Submission of PAIA request SAH-2015-OAG-0005**

Nocha, Nkululo <NkululoN@agsa.co.za>  
Reply-To: foip@saha.org.za  
To: "foip@saha.org.za" <foip@saha.org.za>

26 October 2015 at 13:42

Good afternoon

Your PAIA request referenced SAH-2015-OAG-0005 has been received and acknowledged.

The information/record you request constitutes third-party information. You are therefore advised to engage directly with the relevant departments/auditees to gain access to this information.

The Auditor-General of South Africa (AGSA) keeps audit documentation/records for a period of seven years after finalisation of an audit and all finalised (signed) audit reports are submitted to departments/auditees for further action, hence it is important for you to engage these departments.

The AGSA gathers information only for audit purposes and is trusted by auditees to safeguard information obtained during the auditing process.

To comply with the provisions of section 18 of the Public Audit Act, 2004 (Act No. 25 of 2004), the Auditor-General is obliged to guard against disclosure of information obtained in the process of auditing.

Given the above, you are advised to contact the relevant departments directly.

Kind regards

Nkululo Nocha

Manager: Records Management Services • Auditor-General of South Africa

Tel. +27(0)12 426 8035 • Email: [NkululoN@agsa.co.za](mailto:NkululoN@agsa.co.za)

12/4/2015

South African History Archive Mail - [FOIP] RE: Submission of PAIA request SAH-2015-OAG-0005

*Auditing to build public confidence*



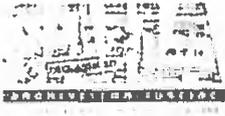
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Freedom of Information Programme (FOIP)  
South African History Archive (SAHA)  
<http://foip.saha.org.za>

*h D*

CMK7  
82

Toerien van Wyk &lt;toerien@saha.org.za&gt;

**[FOIP] RE: Submission of PAIA request SAH-2015-OAG-0004**

Nocha, Nkululo <NkululoN@agsa.co.za>  
Reply-To: foip@saha.org.za  
To: "foip@saha.org.za" <foip@saha.org.za>

26 October 2015 at 13:40

Your PAIA request referenced SAH-2015-OAG-0004 has been received and acknowledged.

The information/record you request constitutes third-party information. You are therefore advised to engage directly with the relevant departments/auditees to gain access to this information.

The Auditor-General of South Africa (AGSA) keeps audit documentation/records for a period of seven years after finalisation of an audit and all finalised (signed) audit reports are submitted to departments/auditees for further action, hence it is important for you to engage these departments.

The AGSA gathers information only for audit purposes and is trusted by auditees to safeguard information obtained during the auditing process.

To comply with the provisions of section 18 of the Public Audit Act, 2004 (Act No. 25 of 2004), the Auditor-General is obliged to guard against disclosure of information obtained in the process of auditing.

Given the above, you are advised to contact the relevant departments directly.

Kind regards

Nkululo Nkomo

---

Manager: Records Management Services • Auditor-General of South Africa

Tel. +27(0)12 426 8035 • Email: [NkululoN@agsa.co.za](mailto:NkululoN@agsa.co.za)

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10/27/2015

South African History Archive Mail - [FOIP] RE: Submission of PAIA request SAH-2015-OAG-0004

*Auditing to build public confidence*

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**AGSA e-mail disclaimer and confidentiality note**

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—  
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South African History Archive (SAHA)  
<http://foip.saha.org.za>

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84

Ocnus.Net

## BUSINESS

### MPs challenge De Beers Over Mysterious Exports

By Michael Hamlyn, Business Report 13/6/07

Jun 13, 2007 - 8:23:35 AM

Cape Town - MPs are considering whether to call De Beers to give evidence to the financial watchdog committee on public accounts on how it came suddenly to export huge numbers of uncut diamonds shortly before apartheid officially ended and the new democratic government came to power.

The committee was told yesterday that the export of uncut diamonds each year amounted to about R1.8 billion, but that in 1992 there was a sudden spike to R4.67 billion. But the Diamond Board said it had not been able to discover a copy of any agreement allowing the export of diamond without payment of the export levy.

It had no copy in its files, according to Abbey Chikane, who chairs the board. And when the board wrote to De Beers asking for the company's copy, all it received was a copy of a board resolution on the subject.

The chairman of the committee, Themba Godi, asked: "Where is the agreement that allowed De Beers to loot the diamonds out of the country?"

ANC MP Pierre Gerber referred to what happened in Namibia just before that country's independence, when uncut diamonds were similarly exported to be stockpiled in London, in what the MP called "a scorched earth policy".

The committee will consider the possibility of legal action against the company to recover the unpaid levies. The levies arise from clauses in the Diamond Act that require that gems be first offered to local polishers or cutters before being exported. Offering the diamonds locally allows the diamonds to be exported free of the 15 percent levy.

But Catinka Smit of the litigation department of the SA Revenue Service told the committee that the law was very imprecisely drawn. It did not, for example, specify in what way or how often the diamonds should be offered locally. Nor did it prescribe what form an agreement to export should take. It could even be a simple oral agreement, she said.

The director-general of minerals and energy, Sandile Nogxina, told MPs that the imprecision of the act encouraged the government to draw up a new bill that would tighten up the law. That bill, which was first to be called the Beneficiation Bill, has now taken the form of the Diamond Export Levy Bill before parliament.

The bill lays down specific terms under which uncut diamonds should be offered to local cutters and polishers.

De Beers spokesperson Tom Tweedy said uncut diamonds were exported when an equivalent amount of diamonds were imported, and when the diamonds themselves were not of sufficient quality or size to make it worthwhile cutting them here. "Local cutters are more expensive than those in India or Asia."

He later said: "De Beers keeps a record of its agreements and we are happy to assist the board should it require copies of agreements that we have." An agreement in section 59 of the Diamond Act "has been an evergreen agreement, which is reviewed annually by passing a resolution, unless there are material changes in any of the terms or technical details".

This had happened last year, when particular types of diamond were added to a section that deals with specials, which are diamonds of a colour, size or type of a higher value reserved for South African diamond cutters and not exported."

Source: Ocnus.net 2007

MB

C11K9  
85Published on *Parliamentary Monitoring Group* | *Parliament of South Africa monitored* (<http://www.pmg.org.za>)

Home &gt; De Beers on Tax Exemptions of Export Diamonds; Fidentia: hearings

## De Beers on Tax Exemptions of Export Diamonds; Fidentia: hearings

Public Accounts [1]

Meeting Report Information

Date of Meeting: 12 Sep 2007

Minutes:

### STANDING COMMITTEE ON PUBLIC ACCOUNTS

12 September 2007

### DE BEERS ON TAX EXEMPTIONS OF EXPORT DIAMONDS; FIDENTIA: HEARINGS

Acting Chairperson: Mr V Smith (ANC)

#### Relevant documents:

De Beers briefing document – strictly for Members only

AG's briefing document on De Beers

Standing Committee on Public Accounts: 12 June 2007 meeting: interaction with the Minister of Minerals and Energy on

SCOPA 62nd report 2005: South African Diamond Board [2]

Business Report news article June 13 2007: MPs challenge De Beers over mysterious exports (see Appendix)

#### Audio recording of meeting [3]

#### SUMMARY

The Committee interrogated the De Beers delegation on the tax exemptions relating to the export of diamonds in order to conclude the matter and submit its report to Parliament. It was the Committee's view that there had been a 'spike' in the export of diamonds just prior to the coming to power of a democratic government. The Department of Minerals and Energy, the South African Diamonds Board, and the Office of the Auditor-General expressly concurred with this view. De Beers denied that there had been a 'spike'.

The Committee was concerned that tax revenues had thereby been lost through the tax exemptions that De Beers claimed it had been granted by the South African Diamonds Board. De Beers denied that there was any irregularity in its being granted tax exemptions.

De Beers agreed to co-operate with the Committee by providing requested documentation promptly. The Committee's view was that no corporation or individual was above the law.

The Committee interacted with the curator and co-curator of the Fidentia Group and urged them to bring the matter of the Fidentia Group to a conclusion as soon as possible and recover the money that was intended for Fidentia's beneficiaries. The curator and co-curator said that they wanted to co-operate fully, without prejudice to the assets that they hoped to recover. The Committee was concerned about the cost of the curatorship and its duration. The curator said that he had offered to serve at no charge, but this offer had been declined; as for the duration of curatorship, they were constrained by court proceedings and processes; they were also frustrated by non-recognition in South Africa of the doctrine of conversion, whereby assets could be attached to exact payment of debts.

#### MINUTES

Mr V Smith (ANC) as Acting Chairperson in the temporary absence of Mr N Godi (African People's Convention) opened the meeting. Mr Godi arrived subsequently, but Mr Smith continued as Acting Chairperson.

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**Interaction with De Beers**

The Acting Chairperson welcomed the De Beers delegation, which the Committee in its 12 June 2007 meeting had agreed should be summoned to appear before it. The delegation consisted of Mr David Noko, Managing Director, Mr Bruce Cleaver, Group Director for Commercial Affairs and Legal Services, and Mr Barend Petersen, Director of Information Services. Also welcomed were Mr W Van Heerden, Corporate Executive, Office of the Auditor-General, Mr Sandile Noguina, Director-General: Department of Mineral Affairs and Energy, and Mr Abbey Chikane, Chairman: South African Diamond Board.

The Acting Chairperson said that he hoped that the outcome of the meeting would be resolution and closure of the matter of the tax exemptions related to the export of diamonds by De Beers and that the Committee would thereupon be in a position to report on the matter to Parliament.

The Acting Chairperson said that the Committee had one and a half hours to deliberate on the De Beers matter. He asked that Members should ask only pertinent questions so as not to prolong the deliberations. He asked that respondents should answer the questions completely but strictly to the point so that the Committee could conclude its deliberations on the evidence before it and thereafter report to Parliament.

The Acting Chairperson asked Mr Pierre-Jean A Gerber (ANC) to summarise the background to the matter.

Mr Gerber thereafter began the Committee's interrogation of De Beers. He said that in 1993 at the dawn of democracy in South Africa, De Beers took out approximately 20 million carats of uncut diamonds. These had a value of about 900 million US dollars. The tax levy due on these was some 135 million US dollars. This was equivalent to about 1 billion rands. This tax levy was not paid, because De Beers claimed that it had been given an exemption by the South African Diamond Board.

The objectives of the Diamonds Act were to regularise the activities of the diamond industry and to establish a more effective control structure. It was a fact that the diamond industry was an industry that lent itself to suspicion. The Government had found it necessary to order no fewer than three formal and three informal investigations.

Since 1999 SCOPA had raised this issue. It had been in the media. It had been raised in Parliament. Various ministers had raised it. De Beers at no time and nowhere had produced evidence of its permission for the export of the diamonds without paying tax.

Only when SCOPA had asked De Beers to appear before the Committee did De Beers produce a document.

The Acting Chairperson asked the Committee Members if they were familiar with the document about which Mr Gerber was talking, namely, the agreement between the South African Diamond Board and De Beers Consolidated Mines

Mr Gerber asked the De Beers delegation for the names of those who had signed on behalf of De Beers Consolidated Mines Ltd. The De Beers signature was illegible. He further asked who had signed on behalf of the Diamond Board.

Mr Bruce Cleaver, Group Director for Commercial Affairs and Legal Services: De Beers, said that there were two signatures: one was of Mr Gary Ralfe [De Beers Non-Executive Director], the second was not clear.

Mr Gerber further asked who had signed on behalf of the Diamond Board.

Mr Cleaver said that he was not in a position to say.

Mr Gerber, addressing the Acting Chairperson, said that the document that he was now referring to consisted of seven pages. All pages had been signed by the Diamond Board managers and by the members of De Beers.

With regard to the diamonds that De Beers had exported in 1993, Mr Gerber asked the De Beers delegation if he could ask them questions on the 1992 agreement that De Beers had from the Diamond Board. He asked if De Beers had a copy of that document. That was the document that had been approved on 03 December 1992.

~~Mr Cleaver replied: "Yes, we do."~~

Mr Barend Petersen, Director for information services: De Beers, said that he confirmed that on behalf of De Beers.

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Mr Gerber asked the De Beers delegation for the names of those who had signed the 1998 agreement, which had five signatures, and if De Beers could show him any of the names of signatories to the 1992 agreement. The 1992 agreement, unlike the 1998 agreement, lacked signatures. He again asked for the names of those who had accepted this agreement on behalf of De Beers.

Mr Cleaver replied that the document had been submitted to De Beers on 13 January 1993. There was a copy of the document dated 12 February 1993. The Diamond Board had agreed and its officials had signed. He said further that the 1992 agreement consisted of a suite of documents, that together constituted a written agreement, although not all parties had signed the annex. No party had signed the attachment.

Mr Gerber said that he had in front of him a letter addressed to Mr Link; this was the letter that they had been looking for 13 years. This letter had many smudge marks.

Mr Cleaver asked if that was the letter that bore the date 13 January 1993 in the top right hand corner.

Mr Gerber said that was correct.

Mr Gerber said that there were three different kinds of lettering on this letter. This was significant, since in 1993 word processing facilities that would easily enable a writer to use three different kinds of lettering in the same letter were not readily available.

Mr Cleaver asked Mr Gerber to enlighten him with regard to his observation.

Mr Gerber said that the lettering for 'Yours sincerely' was different.

Mr Cleaver replied that De Beers had no knowledge as to how the South African Diamond Board had composed the letter, but De Beers regarded it as 'a solid letter'.

Mr Gerber asked De Beers why, if in their view the 1992 agreement constituted a valid legal document, did they feel the need in 1998 to go and ask the Diamond Board for another agreement.

Mr Cleaver said that in the attachment to the 1992 agreement there was a sentence 'The agreement will be subject to annual review'. Each year the Diamond Board had confirmed continuation of the 1992 agreement, and De Beers had felt no reason to doubt the validity of these yearly reconfirmations. In 1998, however, there had been, after negotiations, a new, formal agreement with slightly different terms. He said that both were perfectly valid legal documents. He could not shed any further light upon these agreements, since he was not present at the time. However, the 1998 agreement clearly referred to the terms of the 1992 agreement.

Mr Gerber asked if the 1992 agreement had come about through protracted negotiation or had it been the result of one Diamond Board meeting.

Mr Cleaver said that in 1990 and 1991 the industry had asked De Beers to provide a more consistent mix of diamonds. It was his impression that there had been negotiations behind the 1992 agreement. De Beers had agreed in the 1992 agreement for the first time to mix South African diamonds to be exported to London with De Beers diamonds from all over the world, and re-import not only De Beers South African produced diamonds but diamonds from De Beers mines all over the world. He confirmed that it was his understanding that there had been negotiation preliminary to the 1992 agreement.

Mr Cleaver thereupon informed the Acting Chairperson that he, Mr Cleaver, had just been offered an original of the letter issued to De Beers by the South African Diamond Board in January 1993. He would be happy to hand out a copy of the letter.

The Acting Chairperson asked Mr Gerber to continue.

Mr Gerber asked Mr Cleaver if he had copies of the discussion with the Diamond Board preliminary to the 1992 agreement or had the discussion documents been given to a subcommittee.

Mr Cleaver asked if he could confer with a colleague.

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Afterwards, Mr Cleaver said that they did not have with them any of those documents; they know that there had been lengthy discussions, and that the Diamond Board subcommittee was involved. They could investigate that. Nonetheless, they could confirm that there had been lengthy discussions.

The Acting Chairperson asked if the Diamond Board could enlighten the Committee.

Mr A Chikane, Chairperson: South African Diamond Board, said that they were aware only that there had been some resolutions.

The Acting Chairperson emphasized that the Committee really wanted to conclude the matter that day, and so he appealed to De Beers to conduct that investigation and return to the Committee as soon as possible.

Mr Cleaver reiterated that De Beers had a valid agreement. However, De Beers would do its best to conduct the investigation regarding the documents. They would search for any relevant minutes.

The Acting Chairperson said it was in the interests of De Beers, if they had substantial documentation related to the agreement, to produce that documentation. It was in everybody's interest to produce that documentation. Failure to do so would leave the Committee to draw its own conclusions.

Mr Gerber asked De Beers what had motivated the company, on the eve of a new democratic South Africa, to ship 20 million carats of uncut diamonds to London, only to re-import some of them afterwards. These diamonds were worth 900 million US dollars free of tax. For a company such as De Beers, that was and remains an institution in South Africa, it really raised many questions.

Mr Cleaver said that that, in De Beers' view, was a misconception. De Beers had comprehensive evidence for every diamond. It was De Beers' view, based on its own records and evidence, that no more than its usual number of diamonds were exported in 1993. De Beers had comprehensive records and could substantiate that for every shipment of diamonds it had a certificate of exemption. There was not a material 'spike' in De Beers' export of diamonds in the year prior to the 1994 election.

The Acting Chairperson said that the Committee had documentation from the Office of the Auditor-General that gave a different picture. The Committee's information was contrary to that of De Beers, which argued that its exports had remained constant. He asked the Auditor-General's representative to confirm the information given by the Office of the Auditor-General to the Committee, in particular the information given on page seven of the document that the Auditor-General had provided on 11 September 2007. According to that document, there was a substantial difference in the sale of South African diamonds in the year 1992 from any other year. He asked for the source of that information.

Mr W Van Heerden, Corporate Executive: Office of the Auditor-General, said that the information had been supplied by the Department of Minerals and Energy.

The Acting Chairperson asked if the Committee could assume that De Beers had exported all those diamonds, or if any other company or organisation had contributed to the total. He asked if they were all De Beers' diamonds.

Mr Van Heerden said that the total included the products of other companies or organisations, but that De Beers was the biggest diamond producer at the time.

The Acting Chairperson thanked Mr Van Heerden, saying that the Committee just wanted to set the record straight.

The Acting Chairperson said that the export of uncut diamonds to the value of R4.6 billion in 1992, compared with R1.7 billion in the year before, was, contrary to what De Beers had said, clear evidence of 'a spike'.

Mr Petersen said that it was necessary to distinguish exports from sales. The document in question referred to sales.

The Acting Chairperson said that the Committee had a problem in reconciling the figures given by De Beers with the figures given by the Auditor-General to Parliament. It was a frustrating situation for the Committee. He asked the Department of Minerals and Energy if it had any information that could assist the Committee in its interrogation and if there had been 'a spike' in diamond exports.

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Mr Sandile Nogxina, Director-General: Department of Minerals and Energy, said that the Department could confirm what the Auditor-General's representative had said.

The Acting Chairperson asked Mr E W Trent (DA) if the above constituted an answer to his question.

Mr Trent said that his question was answered.

Mr Gerber asked De Beers if he was correct in assuming, with reference to the 1992 agreement, which De Beers insisted was legal, that De Beers had not paid any export levies up to 2007.

Mr Cleaver said that De Beers had a valid certificate of exemption.

The Acting Chairperson said that he did not want to open a debate between De Beers and the Auditor-General's Office. He asked De Beers, that if they disputed the figures that the Committee had received from the Auditor-General's Office, they should submit their figures to the Committee in writing so that the Committee could itself interrogate them. He said that the question that the Committee was now asking De Beers was whether or not they had been paying duties on exports since 1992. He asked Mr Gerber to repeat his question.

Mr Gerber asked if De Beers could give details of the exemption certificates.

Mr Cleaver said that De Beers had not paid duties on exports since 1992 since De Beers had been given exemption. De Beers could provide the Committee with copies of exemptions granted since 1993. The delegation members had with them the exemption for 1993, and could leave a copy with the Committee.

The Acting Chairperson asked De Beers to confirm, for the record, that De Beers had an exemption.

Mr Cleaver confirmed that De Beers had an exemption.

The Acting Chairperson asked that De Beers furnish the Committee with copies of the exemption.

Mr Gerber asked if De Beers had had an exemption for every parcel of stones that had been exported.

Mr Cleaver replied that De Beers had valid certificates of exemption for every shipment. De Beers would be happy to provide the Committee with copies of exemption for the year in question, 1993; it was a very large file, but De Beers would provide 1993 certificates to the Committee before they left that day, and subsequently any other documentation that the Committee required. They did not have with them the documentation for other years.

The Acting Chairperson thanked Mr Cleaver and said that the Committee would certainly examine the documents, either on the Committee's premises or on De Beers' premises.

The Auditor-General's representative said that the 1992 exemptions were wanted as well.

Mr Gerber asked where the head office of De Beers was located.

Mr Cleaver said that it was in Kimberley.

The Acting Chairperson asked if De Beers would confirm that it had not deliberately held back any of its production as a stockpile. It was necessary to move away from being 'nice' and instead be 'frank' He asked De Beers if they were disputing that prior to 1992 there had been a big stockpile that had been shipped to London. He understood De Beers to be saying that there had been nothing untoward in its actions. However, the Committee was sure that there was something untoward in the shipment of a large stockpile to London just before the 1994 elections.

Mr Cleaver admitted that De Beers held stockpiles around the world. De Beers, however, maintained that the stockpile that it held at the time in question was substantially less than the Committee had alleged, and it was certainly not accumulated to avoid any kind of duty. It was shipped in 1992 in order to be mixed with other diamonds in London. De Beers denied any stockpiling in order to ship an abnormally large number of diamonds prior to the 1994 elections.

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Mr Trent asked if it was De Beers' view that De Beers had no liability to pay any duty whatsoever on those exports.

Mr Cleaver acknowledged that De Beers had a requirement to comply with the law, but De Beers had obtained an exemption

Mr Gerber asked if members of the Auditor-General's Office who had gone to London could supply the Committee with information.

The Acting Chairperson said that, before any question was put to the Auditor-General's representative, he wanted to ask the Director-General of the Department of Minerals and Energy whether or not there had been a stockpile. Also he wanted to ask the South African Diamond Board if there had been a stockpile.

Mr Van Heerden said that the Diamond Board evaluator had commissioned in London two audit reports by PKF to investigate the stockpile.

Mr Nogxina said that according to the Department's understanding there had been a stockpile.

Mr Chikane said that there had indeed been a stockpile.

Mr Godi observed that the issue had been before the Committee for a long time. It appeared that De Beers was now more willing to provide information. He asked why they had not been willing to provide that information previously, which raised Mr Gerber's question.

The Acting Chairperson asked for the reason for the difficulty in providing documentation. He asked why it had taken such a long time and such effort to provide it.

Mr Chikane said that the Diamond Board had instituted an investigation.

Mr Petersen said that De Beers had supplied the required information in February 2006 within two days.

Mr Cleaver said that in 1999 it was quite likely that a stockpile might have been built up. He said further that the 1998 agreement was a written agreement in the form of a letter from the South African Diamond Board with the terms and conditions attached. De Beers accepted the agreement by way of a letter dated 13 February 1998. De Beers' position was that it was a valid agreement in writing, and De Beers had the originals. However, the relevant statute, in De Beers' view, had not required a written agreement.

The Acting Chairperson said that the Committee was composed not of lawyers but of 'mere mortals'. He asked for a copy of the agreement, and if De Beers could tell the Committee who was the chief executive officer of the Diamond Board at the time.

Mr Cleaver said that the letter appeared to have been signed by a Mr C J Hambley, Chief Executive Officer, as far as De Beers could tell, for the Diamond Board.

Acting Chairperson said that the Committee was not going to dispute that now, but take that as De Beers' position for purposes of the Committee's final deliberations. He asked the Auditor-General's representative please to help. He asked for any further input from the Auditor-General's representative in order that the Committee could take an informed decision.

Mr Van Heerden asked if the Committee had copies of the 1987-1991 agreements, and did the 1992 agreement differ in format from the other agreements referred to.

Mr Cleaver said that it was his understanding that there was in 1987 a one-page letter from the Diamond Board indicating an agreement. It was not a formal agreement.

~~Mr Trent asked if members of the Diamond Board at the time were available and could be called to appear before the Committee.~~

Mr Chikane said that he wished that the matter could be brought to a logical conclusion. He said that it would be helpful if

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De Beers and the Treasury could agree on figures to determine whether anything was owed to the state. The legal side of the matter, Mr Chikane felt, could be settled without recourse to the courts.

The Acting Chairperson said that definitely there would not be another hearing on De Beers. That was why he had been determined not to involve the Committee in legalistic discussions.

The Acting Chairperson repeated that the Committee's view was that De Beers had an obligation to pay any taxes that it should have paid but which it had not paid. If De Beers had not paid taxes that it should have paid, the question remained how the Committee should proceed in the matter. If De Beers did not owe taxes, then that chapter could be closed.

Mr Trent said that he was satisfied that there was nothing more to be gleaned from the parties present.

Mr Gerber said that the 1992 agreement had been open-ended. He asked why there was a need for another agreement in 1998.

Mr Cleaver replied that the 1992 agreement had not been intended as a permanent agreement. Changes in circumstances by 1998 led to negotiation of a new agreement. He was aware that the Section 59 committee had reviewed the agreement.

The Acting Chairperson asked if any other Committee Member wished to ask a question.

Mr Gerber asked if the South African Revenue Service (SARS) had at any time audited De Beers.

Mr Cleaver said that De Beers had been subject to many audits by SARS.

The Acting Chairperson said that he would now review the proceedings and bring them to a close.

He said that the Committee required De Beers to submit its export duty exemption certificates for 1992 and 1993.

The Committee also wanted De Beers to investigate to see if it had paid RSC levies.

The Committee also wanted to indicate here that the Department of Minerals and Energy, the Diamond Board, and the Office of the Auditor-General had all confirmed that there had been a stockpile of diamonds in 1992.

He said that De Beers had a different view. The Committee asked De Beers therefore to give the Committee its information as soon as possible because that was critical to the Committee's position.

He affirmed that the Members of the Committee were politicians. The Committee had received a report from the Office of the Auditor-General that a large corporate citizen of South Africa had had a stockpile and had taken it out of the country just before the 1994 elections. It had not paid duty.

The South African Diamond Board, which was supposed to be the regulator, had ruled in favour of business rather than the government.

A regime change was imminent.

These factors had aroused the Committee's concern, and the Committee could not shirk its responsibility to Parliament to ask these questions.

He said that the Committee wanted to send a strong message. No corporation or individual was untouchable. There must be no perception that anyone was above being held accountable. If a corporation or individual had broken the law, the Committee would investigate the matter, as mandated by the Constitution. The Committee could call anyone to account, whether it be a director-general or even an ordinary civilian. In that context the Committee had summoned De Beers. In that context the Committee sent a message that everyone was accountable.

So De Beers was going to co-operate, and there would not be another engagement like the present one. The Committee would make its ruling and stand by it. The Auditor-General would live by it, in terms of reputation and otherwise. De Beers would live with it, and so would the present Diamond Board, and the future Board. The Committee would pronounce on all

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these matters, including the future role of the Board.

The Acting Chairperson thanked De Beers for appearing before the Committee and trusted that De Beers would provide the documentation requested as soon as possible.

The Auditor-General, the Board, and the Department would help the Committee by reaching agreement on the financial aspect of the matter.

If the Committee had any further questions of the parties present at the meeting, it would ask them telephonically or by letter. There would be no further meetings.

The Committee would complete its report and submit it to the matter to Parliament.

Mr Cleaver expressed De Beers' thanks for the opportunity to appear before the Committee and assured the Committee of De Beers' co-operation.

#### **Interaction with Mr Dines Gihwala, curator of the Fidentia Group**

The Committee interacted with the curator and co-curator of the Fidentia Group and urged them to conclude the matter as soon as possible. The Committee explained that its aim was to recover money intended for Fidentia's investors and beneficiaries, including money intended for the use of training.

The curator, Mr Dines Gihwala, said that he and his co-curator, Mr George Papadakis, wanted to co-operate fully, without prejudice, with regard to the assets that they hoped to recover. He asked if the curator and co-curator had privilege in the meeting, to which the Acting Chairperson replied that, in so far as they were appearing before the Committee, they had privilege. However, members of the media were present and the Committee could give no guarantees that what was said might not be reported in the media.

Mr Gihwala said that on taking up the administration of Fidentia, the curator and co-curator had sought to cut costs; other than the Fidentia Football Club, they had not sold a single asset. R49 million had been paid to beneficiaries. Of this, R16 million had been repaid to the Transport Education Training Authority (Teta).

Mr Gerber asked how long would it take to resolve the Fidentia matter. The Committee wanted 'an end to this debacle'.

Mr Gihwala said that when he took up his appointment as curator, he was told to prepare himself for a task that would take ten years. He said that the curator and co-curator were handicapped in their process. The Financial Services Board was aware of that handicap. It was hoped to produce a final liquidation account by the end of 2007. It was then hoped to make an award.

Mr George Papadakis, co-curator, said that the curator and co-curator had identified Fidentia's assets to be in three groups: firstly, an equity portfolio, secondly, a property portfolio, and, thirdly, a cash portfolio.

Mr Godi (African People's Convention) said that the curators had not been categorical with regard to the R49 million, and asked if that sum had included the R16 million.

Mr George Papadakis said that it was separate.

Mr Trent asked what was a reasonable time for curatorship.

Mr Dines Gihwala replied, 'How long is a piece of string?' Because of the urgent need of widows and orphans to be repaid, the curators lacked the time and space to build up assets.

To this, the Acting Chairperson responded that the Committee wanted to focus on Teta.

Mr Dines Gihwala said that, subject to court approval, it was hoped to make a distribution by 31 December 2008. The curator and co-curator said that they would try to achieve the highest price in the sale of assets.

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Mr Gerber asked, in the interests of the taxpayer, what was the cost of curatorship.

Mr Gihwala said that the curatorship fees were at a discounted rate.

Mr Papadakis said that the Auditor-General had approved the rates.

Mr Gihwala said that he had offered to serve at no charge, but this offer had been declined, because it was thought that if he undertook to do the work *pro bono* then, because it was a difficult case, the work might be delayed behind more straightforward cases for which normal fees were applicable. So he had agreed upon a fee. However, with due respect to the Committee, the curator had to decline to disclose the agreed fee. He said that it was 'not appropriate to put my private business on display.' Moreover, Mr Gihwala, an attorney by profession, did not want to disclose to the Committee the level of the fees that he was charging for fear that he would be subjected by his profession to disciplinary proceedings for charging fees below those recommended by his profession. It was his view that the creditors of Fidentia were getting good value for their money.

Mr Gerber said that the Committee respected his view.

Mr Gihwala said that Teta had also informed them that Teta had engaged lawyers and forensic accountants. It was for Teta to decide if it was getting value for money. Lawyers could not accelerate the speed of what the curator and co-curator were doing already, since the curator and co-curator were constrained by the requirements and processes of the courts.

Mr Papadakis said that liquidation would not have helped.

The Acting Chairperson asked Mr Hennie J Bekker (IFP) if he had any questions.

Mr Bekker replied that he had no questions.

Mr G Koomhof (ANC) asked about Sunset Beach. It was a low valuation. He asked the curator and co-curator if they were going to sue for that money.

Mr Gihwala said that their valuation was R20 million. The curator and co-curator were constrained by the non-recognition in South African law of the doctrine of conversion, whereby property could be attached to exact payment of debt. This meant that a thief could profit from what he had stolen and keep his profit. However, this would not stop the curator and co-curator from suing for the money. He wanted to challenge this doctrine. Since the courts were inundated, the earliest likely trial date was in the first part of 2009.

Mr Koomhof said that the process did not make much sense.

Mr Gihwala said that there were pleadings. Mr J Arthur Brown, former head of Fidentia, had frustrated them every step of the way. January 2009 remained the earliest likely date for a trial. It was better to err on the side of caution.

Gihwala and Mr Papadakis gave the Committee their unequivocal commitment to conclude the matter as soon as possible, but reminded the Committee that they were subject to external procedural constraints such as those of the court. Mr Gihwala said that Members should feel free to contact him. He had left his telephone number with the Committee Secretary, Mr Gurshwyn Dixon.

The meeting was adjourned.

#### Appendix:

Business Report news article: MPs challenge De Beers over mysterious exports  
June 13, 2007

By Michael Hamlyn

Cape Town - MPs are considering whether to call De Beers to give evidence to the financial watchdog committee on public

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accounts on how it came suddenly to export huge numbers of uncut diamonds shortly before apartheid officially ended and the new democratic government came to power.

The committee was told yesterday that the export of uncut diamonds each year amounted to about R1.8 billion, but that in 1992 there was a sudden spike to R4.67 billion. But the Diamond Board said it had not been able to discover a copy of any agreement allowing the export of diamond without payment of the export levy.

It had no copy in its files, according to Abbey Chikane, who chairs the board. And when the board wrote to De Beers asking for the company's copy, all it received was a copy of a board resolution on the subject.

The chairman of the committee, Themba Godi, asked: "Where is the agreement that allowed De Beers to loot the diamonds out of the country?"

ANC MP Pierre Gerber referred to what happened in Namibia just before that country's independence, when uncut diamonds were similarly exported to be stockpiled in London, in what the MP called "a scorched earth policy".

The committee will consider the possibility of legal action against the company to recover the unpaid levies. The levies arise from clauses in the Diamond Act that require that gems be first offered to local polishers or cutters before being exported. Offering the diamonds locally allows the diamonds to be exported free of the 15 percent levy.

But Catinka Smit of the litigation department of the SA Revenue Service told the committee that the law was very imprecisely drawn. It did not, for example, specify in what way or how often the diamonds should be offered locally. Nor did it prescribe what form an agreement to export should take. It could even be a simple oral agreement, she said.

The director-general of minerals and energy, Sandile Nogxina, told MPs that the imprecision of the act encouraged the government to draw up a new bill that would tighten up the law. That bill, which was first to be called the Beneficiation Bill, has now taken the form of the Diamond Export Levy Bill before parliament.

The bill lays down specific terms under which uncut diamonds should be offered to local cutters and polishers.

De Beers spokesperson Tom Tweedy said uncut diamonds were exported when an equivalent amount of diamonds were imported, and when the diamonds themselves were not of sufficient quality or size to make it worthwhile cutting them here. "Local cutters are more expensive than those in India or Asia."

He later said: "De Beers keeps a record of its agreements and we are happy to assist the board should it require copies of agreements that we have." An agreement in section 59 of the Diamond Act "has been an evergreen agreement, which is reviewed annually by passing a resolution, unless there are material changes in any of the terms or technical details".

This had happened last year, when particular types of diamond were added to a section that deals with specials, which are diamonds of a colour, size or type of a higher value reserved for South African diamond cutters and not exported."

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**Links:**

- [1] <http://www.pmg.org.za/minutes/18>
- [2] <http://www.pmg.org.za/viewminute.php?id=9145>
- [3] <http://www.pmg.org.za/mp3/2007/070912pcpaccounts.mp3>

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Auditor-General of South Africa (AGSA)  
Lefika House  
300 Middel Street  
Muckleneuk, Pretoria

Per email: [nkululon@agsa.co.za](mailto:nkululon@agsa.co.za)

17 December 2015

Dear Nkululo Nocha,

● PAIA request SAH-2015-OAG-0004

SAHA made a request under PAIA for access to annual reports of the Auditor-General to the Parliamentary Joint Standing Committee on Intelligence for each of the financial years from 1 January 2003 to 30 June 2015, and certain other records.

On 26 October 2015 you stated that the Auditor General keeps audit documentation / records for a period of seven years after finalisation of an audit and all finalised (signed) audit reports are submitted to departments / auditees for further action.

Certain of the records requested fall within that seven-year period.

● We request that you clarify the following:

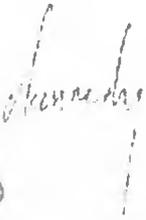
1. With regard to the annual reports of the Auditor-General to the Parliamentary Joint Standing Committee on Intelligence for each of the years from 1 January 2003 to 30 June 2015:
  - a. Does the AGSA have possession of any of the annual reports for any of the years from 1 January 2003 to 30 June 2015?
  - b. If so, which of those reports does it have in its possession?
  - c. With respect to each report that the AGSA no longer has in its possession, to whom was possession of each report transferred?
  - d. With respect to each report that the AGSA no longer has in its possession, when was possession of that report transferred?

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2. With regard to the Pikoli Commission Report on enquiry into the structures of the intelligence services:
  - a. Does the AGSA have possession of the Pikoli Commission Report?
  - b. If not, to whom was possession of the report transferred, and when was it so transferred?
  
3. With regard to the Ngcaba Commission Report on enquiry into technology issues in the intelligence services:
  - a. Does the AGSA have possession of the Ngcaba Commission Report?
  - b. If not, to whom was possession of the report transferred, and when was it so transferred?
  
4. The Netshitenze Commission Report on enquiry into the intelligence services:
  - a. Does the AGSA have possession of the Netshitenze Commission Report?
  - b. If not, to whom was possession of the report transferred, and when was it so transferred?

We respectfully request a response to these questions by no later than Monday 18 January 2016, in order to enable us to take a decision on how to proceed with this request.

Yours faithfully,



Catherine Kennedy  
SAHA Director



CAK 11  
97



Auditor-General of South Africa (AGSA)  
Lefika House  
300 Middel Street  
Muckleneuk, Pretoria

Per email: [nkululon@agsa.co.za](mailto:nkululon@agsa.co.za)

17 December 2015

Dear Nkululo Nocha,

● PAIA request SAH-2015-OAG-0005

SAHA made a request under PAIA for access to records related to investigations and reports made at any time into the export of uncut diamonds during the period 1992 – 1993 by the company 'De Beers', including but not limited to the records that were compiled in preparation of a briefing document on the matter to the Standing Committee on Public Accounts in 2007.

On 26 October 2015 you replied by email that these records were not available. Your decision letter states that the Auditor General of South Africa (AGSA) keeps audit documentation/records for a period of seven years after finalisation of an audit and all finalised (signed) audit reports are submitted to departments/auditees for further action.

Certain of the records requested fall within that seven-year period.

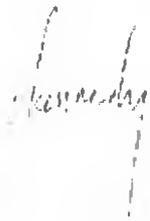
● We request that you clarify the following:

1. As to records related to investigations into the export of uncut diamonds over the period 1992 – 1993 by De Beers (including but not limited to records that were compiled in preparation of a briefing document on the matter to the Standing Committee on Public Accounts in 2007):
  - a. Does AGSA have any records at all related to such investigations?
  - b. If so, what such records does it have?
  - c. To the extent that AGSA no longer has possession of such records, to whom was each of these records transferred?

- d. To the extent that AGSA no longer has possession of any of these records, when was each of these records so transferred?
2. As to reports related to investigations into the export of uncut diamonds over the period 1992 - 1993 by De Beers (including but not limited to reports that were compiled in preparation of a briefing document on the matter to the Standing Committee on Public Accounts in 2007):
    - a. Does AGSA have any reports at all related to such investigations?
    - b. If so, what such reports does it have?
    - c. To the extent that AGSA no longer has possession of any of these reports, to whom was each of these reports transferred?
    - d. To the extent that AGSA no longer has possession of any of these reports, when was each of these reports so transferred?

We respectfully request a response to these questions by no later than Monday 18 January 2016, in order to enable us to take a decision on how to proceed with this request.

Yours faithfully,

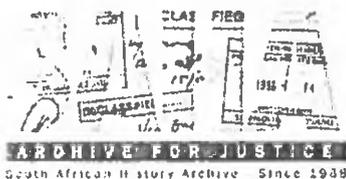


Catherine Kennedy

 SAHA Director



CMK 12  
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Auditor-General of South Africa (AGSA)  
Lefika House  
300 Middel Street  
Muckleneuk, Pretoria

Per email: [nkululon@agsa.co.za](mailto:nkululon@agsa.co.za) / [MangiW@agsa.co.za](mailto:MangiW@agsa.co.za)

17 December 2015

Dear Nkululo Nocha and Mangi Mulaudzi

PAIA request SAH-2015-OAG-0006

SAHA made a request under PAIA for access to reports related to the South African Defence Force Special Defence Account created under the Defence Special Account Act 6 of 1974.

On 2 September 2015 and 1 October 2015 your office replied that the Auditor General keeps audit documentation / records for a period of seven years after finalisation of an audit and all finalised (signed) audit reports are submitted to departments / auditees for further action.

1. In relation to the audit reports mentioned in the TRC Final Report Volume 2 on pages 534 and 540, that relate to the South African Defence Force Special Defence Account (created under the Defence Special Account Act No.6 of 1974) for the financial years covering the period 1 July 1976 to 1 July 1995:

- a. Does the AGSA have possession of any of these audit reports?
- b. If so, which such reports does it have in its possession?
- c. With respect to each report that the Auditor-General no longer has in its possession, to whom was possession of each report transferred, and when was it so transferred?

2. In relation to the AGSA's report to the TRC, related to all secret funds over the period 1960 to 1994, which report is referred to in the TRC Final Report Volume 2 on page 524:

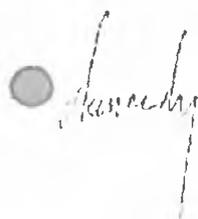
- a. Does the AGSA have possession of this report?
- b. If not, to whom was it transferred, and when was this done?

3. in relation to the schedule of secret projects that was compiled by the AGSA and provided to the TRC and which is referred to in the TRC Final Report Volume 2 on page 539:

- a. Does the AGSA have possession of this schedule?
- b. If not, to whom was it transferred, and when was it so transferred?

We respectfully request a response to these questions by no later than Monday 18 January 2016, in order to enable us to take a decision on how to proceed with this request.

Yours faithfully,



Catherine Kennedy  
SAHA Director

