**IN THE NORTH GAUTENG HIGH COURT OF SOUTH AFRICA**

**(HELD IN PRETORIA)**

**CASE NO: 67574/12**

In the matter between:

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| **MANDG CENTRE FOR INVESTIGATIVE JOURNALISM** | First Applicant |
| **BHARDWAJ, VINAYAK** | Second Applicant |
| and | |
| **MINISTER OF PUBLIC WORKS** | First Respondent |
| **INFORMATION OFFICER: DEPARTMENT OF PUBLIC WORKS** | Second Respondent |
| **THE SOUTH AFRICAN HISTORY ARCHIVE TRUST** | First Amicus Curiae |
| **DEMOCRATIC GOVERNANCE & RIGHTS UNIT** | Second Amicus Curiae |

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**HEADS OF ARGUMENT OF FIRST *AMICUS CURIAE* (SAHA)**

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# Contents

## INTRODUCTION

1 SAHA is a Non-Governmental Organisation constituted as a trust in terms of the laws of South Africa. SAHA's founding objectives were to collect, preserve and catalogue materials of historic, contemporary, political, social, economic and cultural significance, and to promote the accessibility of such materials to the general public.

2 SAHA is dedicated to documenting and providing access to archival holdings that relate to past and contemporary struggles for justice in South Africa. Established by anti-apartheid activists in the late 1980s, its founding mission was to promote the recapturing of South Africa's lost and neglected history and to record history in the making. Further, SAHA now 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.

3 SAHA made application for an order admitting it as *amicus curiae* in the main application in terms of Rule 16A of the Uniform Rules of Court. SAHA requested the consent of the parties to its admission as *amicus curiae* and received consent from all the parties to be admitted. At the hearing of this matter, SAHA will seek an order confirming its admission as *amicus curiae*.

4 The issues for final determination in this matter have shifted since SAHA made application to be admitted as *amicus curiae*.

5 At the stage of making its application, SAHA sought to adduce limited

evidence of research conducted by SAHA and its experience in relation to requests for access to information and to make legal submissions in relation to two trends that emerge from SAHA's research and which are illustrated by SAHA's own extensive experience of making access to information requests:

5.1 First, the culture of secrecy pervading public bodies, which is one of the primary limitations on the right of access to information; and

5.2 Secondly, the nature and extent of the reliance by the State on apartheid era legislation such as the National Key Points Act,[1] the Protection of Information Act,[2] and the misapplication of PAIA's security exemptions to withhold information from the general public.

6 Although both trends remain directly relevant to the issues before the court, the issues have taken on a different complexion in the light of three developments during the litigation:

6.1 The belated decision by the Department of Public Works ("the Department") to release a substantial number of records in response to the PAIA request, after the initial refusal of access, (deemed) refusal of the internal appeal and initial opposition to the application;

6.2 The apparent abandonment by the Department of reliance on the National Key Points Act and the Protection of Information Act; and

6.3 The position taken by the Department that there is reason to believe that a category of the requested records does not exist on the basis

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1 National Key Points Act 102 of 1980.

2 Protection of Information Act 84 of 1982.

that meetings were held by organs of state, decisions taken and instructions conveyed without keeping any written records.

7 SAHA makes submissions below in relation to the two trends – the 'culture of secrecy' and inappropriate reliance on security reasons to withhold records – in the specific context of the three recent developments in the litigation identified above. A third issue in respect of which submissions are made in this context is the obligations of organs of state to create and properly maintain written records.

**SAHA'S INTEREST IN THIS MATTER**

8 In 2001 SAHA launched the *Freedom of Information Programme* dedicated to using PAIA in order to test and extend the boundaries of freedom of information in South Africa. This programme seeks to create awareness of, compliance with and use of PAIA.

9 In seeking to achieve its objectives, SAHA has made over 1800 requests for information from various government departments since 2001. It has brought numerous applications in the High Court arising out of refusals of these requests. SAHA has also intervened as *amicus curiae* in the Constitutional Court in the matter of *Brummer v The Minister of Social Development and Others*.[3] Over the last few years, SAHA has developed a comprehensive capacity training programme for NGOs and community based organisations

[3] *Brummer v The Minister of Social Development and Others* 2009 (6) SA 323 (CC); 2009 (11) BCLR 1075 (CC).

on using PAIA, including the development of 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 general public. It has further trained hundreds of activists, students, community members, NGO members, attorneys and paralegals in the use of PAIA.

10 SAHA therefore has a substantial interest in the outcome of these proceedings as it will affect applications to court presently contemplated by SAHA and have a significant impact on future requests for information that SAHA will make. The present matter has the potential to impact substantially on the effective implementation of PAIA where disclosure is resisted on grounds relating to alleged national security concerns or because records have not been properly kept.

11 SAHA does not seek to enter the fray regarding the disputes of fact between the principal parties concerning the existence of specific documents or how to resolve those disputes of fact.

**THE LIMITED EVIDENCE ADDUCED BY SAHA**

12 The limited evidence that SAHA seeks to adduce consists of the following:

12.1 The report entitled '*Paper Wars: Making access to information in South Africa 2001 – 2007*'.[4] This report documents the nature and extent of the reliance by organs of state on security-related justifications to

[4] Annexure "CMK2" to SAHA's founding affidavit: Vol 4 p 294 to Vol 6 p 592.

refuse to release information.

12.2 The contents of SAHA's founding affidavit (to the extent that it goes beyond the Paper Wars report), in which SAHA set out certain relevant examples of specific PAIA requests and High Court applications.

13 SAHA gave notice to the parties of its intention to place this limited evidentiary material before the Court when requesting consent to SAHA's admission as *amicus curiae*. All the parties gave their consent.

14 In any event, it is submitted that much of the limited evidence sought to be adduced is merely of a statistical nature and that all of the evidence is substantially incontrovertible.

15 In relation to the examples of specific PAIA requests that are included in its affidavit, SAHA does not put up facts that are (or could be) placed in dispute. The Court is not invited to make factual findings in respect of any of these discrete disputes. The examples are put up for the limited purpose of illustrating the trends referred to above.

16 Against the backdrop of the limited evidence arising from SAHA's research and its experience as a frequent requester of access to information, legal submissions are made on the following three issues:

16.1 The culture of secrecy taking hold in some public bodies;

16.2 The obligations of organs of state to create and properly maintain written records;

16.3 The reliance by the state on security-based objections and 'classification' of documents, including reliance on apartheid-era security legislation.

## THE CULTURE OF SECRECY PERVADING PUBLIC BODIES

17 In SAHA's experience, a culture of secrecy exists in South African public bodies. This culture has a permeating effect, and without intervention it will continue to act as a 'wall' between government and the general public.

18 The culture of secrecy manifests itself in responses to PAIA requests, in particular in that:

18.1 requests are generally only considered once there is a threat of litigation or an appeal;

18.2 requests are routinely met with an initial 'knee-jerk', unreflective refusal, generally –

18.2.1 without adequate (or any) reasons as required in terms of section 25(3) of PAIA,

18.2.2 refusing access to all requested records, without considering the obligation to sever materials that may be disclosed in terms of section 28 of PAIA,

18.2.3 without considering whether the public interest override in section 46 of PAIA may require disclosure even where a valid ground to refuse disclosure is present; and

18.3 refusal is eventually withdrawn when litigation is instituted.

19 This culture frustrates the legislative scheme envisaged by PAIA.

20 In 2012, SAHA surveyed all the PAIA requests that it had administered in the past year:

20.1 Of 159 requests for information held by various public and private bodies, 102 were either outright refused or simply received no answer (which is a deemed refusal under PAIA). This equates to a 64 per cent refusal rate.

20.2 Out of 11 PAIA requests directed to the Office of the Presidency during the same period, ten were refused (over 90 per cent).[5]

21 In its founding affidavit, SAHA illustrated this overall trend with reference to specific examples arising from its own requests for access to information.[6]

22 The clear trend that emerges from the statistics and examples is of an emergent culture of secrecy characterised by:

22.1 The failure to respond to PAIA requests timeously, or at all;

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5 SAHA founding affidavit, Vol 3 p 267 para 27.

6 SAHA founding affidavit, Vol 3 p 267 para 28.

22.2 The failure to give reasons for refusals of PAIA requests;

22.3 The 'knee-jerk' and unreflective refusal of requests, forcing requesters to resort to litigation; and

22.4 The belated withdrawal of resistance to disclosure once litigation is instituted, presumably on advice that there is no lawful basis to refuse disclosure.

23 Considered in the light of the growing culture of secrecy, although relatively high-profile, the present matter is not 'exceptional' – it typifies the trend.

24 Indeed, the belated disclosure of substantial documents in the present matter only after litigation was underway – and after SAHA's application to be admitted as *amicus curiae* – was the increasingly predictable final step in the cycle identified by SAHA based on its research and its own experience as a frequent PAIA requester.

25 SAHA does not seek to convey this trend to the Court in order to visit the sins of other organs of state on the current respondents or score cheap political points; nor to seek relief directly related to the discrete disputes put up as examples.

26 SAHA places this material before the Court to assist the court to appreciate the increasingly pervasive culture of secrecy that is taking root in certain government bodies and its impact on the implementation of PAIA and the enjoyment of the constitutional right of access to information. It is submitted that the culture of secrecy provides crucial context in assessing:

26.1 the conduct of the Respondents in resisting the PAIA request, including the failure to give full or adequate reasons, the failure to decide the internal appeal and the failure to place adequate evidence before the Court to enable it to consider the objections; and

26.2 an appropriate remedy that will not merely vindicate the rights of the requester in the immediate dispute but safeguard the implementation of PAIA.

**THE DUTY OF ORGANS OF STATE TO KEEP PROPER RECORDS**

27 The respondents resist any order being made in relation to a category of documents that they allege cannot be found because the records have been lost or because no record was ever kept of meetings, discussions or instructions issued by government officials.

28 The respondents contend that it is reasonable that meetings were held without being minuted, instructions were given orally and that some documents were lost during the implementation of the project. The point of departure of the respondents appears to be that it is perfectly reasonable to issue instructions and convene meetings at which decisions are taken without keeping a written record.

29 On its own version, the Department's conduct in this regard reflects a failure to generate records and a failure of record-keeping and management, a matter central to SAHA's mission and activities. The failure to create and keep records of state activities is constitutionally problematic for a range of reasons:

29.1 First, because it frustrates the right of the public to access such information and to know about such activities, including the right of the media to publish such information;

29.2 Secondly, it is inimical to transparent and accountable governance; and

29.3 Thirdly, and of particular importance to SAHA, such practices will impoverish the historical record which is legally required to be maintained in the National Archives.

***The obligation to <u>create</u> records***

30 The Constitution and a wide range of legislation recognise the obligation to reduce decisions and instructions to writing and to minute deliberations of government officials in a range of situations:

30.1 Section 101 of the Constitution provides that any decision of the President must be in writing if it is taken in terms of legislation or has legal consequences;

30.2 In the context of any administrative action (including public procurement), the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") provides for the giving of written reasons for a decision and the delivery of the physical record of the materials that served before decision-maker;

30.3 The Public Finance Management Act 1 of 1999 requires many key

steps in terms of the Act to be carried out in writing, including:

30.3.1 The accounting officer of a department who discovers unauthorised, irregular or fruitless and wasteful expenditure must immediately report it *in writing* to the relevant treasury;[7]

30.3.2 Delegations of powers under the PFMA must be in writing;[8]

30.3.3 Section 64(1) provides that *"[a]ny directive by an executive authority of a department to the accounting officer of the department having financial implications for the department must be in writing."* In the present context, the "executive authority" is the Minister of Public Works.[9] Accordingly, any directive from the Minister to the Director-General in the context of the procurement in issue in relation to the Nkandla project was required to have been in writing. An oral directive would be in breach of the PFMA.

30.4 Obligations to keep written records are also imposed by the Municipal Finance Management Act 56 of 2003 and the Electronic Transactions Act 25 of 2002.[10]

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7 Section 38(1)(g) of the PFMA.

8 For example, section 44(1)(a), dealing with the delegation of the powers of the accounting officer.

9 "Executive authority" is defined in section 1 of the PFMA to mean, in relation to a national department, the Cabinet member accountable to Parliament for that department.

10 In the context of environmental regulation, the National Environmental Management Act 107 of 1998 also imposes record-keeping obligations in sections 9(2)(d), 16(5), 22(2)(a) and 41(2).

31 It is, therefore, not a constitutionally sound principle of governance that it is sufficient to issue oral instructions or to fail to minute meetings and keep written records of decisions by organs of state. In particular where they have financial implications, the PFMA will generally require that such steps be recorded in writing.

***The obligation to maintain records***

32 In relation to the proper keeping of records that have been created, the National Archives and Record Service of South Africa Act 43 of 1996 ("the National Archives Act") was enacted to provide for a National Archives and Record Service, the proper management and care of the records of government bodies and the preservation and use of a national archival heritage.

33 The scheme of the National Archives Act is to require government bodies to maintain public records[11] and to provide for the transfer of such records to an archives repository 20 years after they came into existence,[12] at which point

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11 Section 13(5) provides:

*"(5) (a) The head of a governmental body shall, subject to any law governing the employment of personnel of the governmental body concerned and such requirements as may be prescribed, designate an official of the body to be the records manager of the body.*

*(b) The records manager shall be responsible to see to it that the governmental body complies with the requirements of this Act.*

*(c) Additional powers and functions may be prescribed to a records manager."*

12 Section 11 of the National Archives Act, providing for the transfer of public records identified as having "enduring value".

the public may also be granted access to such public records.[13]

34 In terms of Regulation 10 of the National Archives and Record Service of South Africa Regulations, until public records are transferred to an archives repository:[14]

> *"(1) The head of a governmental body shall be responsible for ensuring that all records of such body—*
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> *(a) receive appropriate physical care;*
>
> *(b) are protected by appropriate security measures; and*
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> *(c) are managed in terms of standing orders of that body and other relevant legislation."*

35 Acting in terms of section 13(5) of the National Archives Act, the National Archivist has issued the **'Records Management Policy Manual'** dated October 2007,[15] dealing with the control and management of records by government bodies.

35.1 Clause 6.9 of the Policy Manual provides:

> *"6.9.1 Every staff member shall create records of transactions while conducting official business.*
>
> *6.9.2 Every staff member shall manage those records efficiently and effectively by:*

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13 Section 12.

14 GNR.1458 of 20 November 2002: National Archives and Record Service of South Africa Regulations

15 A copy of the Policy Manual will be filed with these heads of argument, but is publicly accessible on the website of the National Archives at: http://www.national.archives.gov.za/

- *allocating reference numbers and subjects to paper-based and electronic*
- *records according to the file plan;*
- *sending paper-based records to the registry for filing;*
- *ensuring that records are destroyed/deleted only in accordance with the written disposal authority issued by the National Archivist.*"

35.2 The Policy Manual also recognises the particular archival value of minutes of meetings and discussions and, in directing government bodies to file minutes separately from "ephemeral documents" such as agendas and meeting arrangements, states that *"[t]he minutes and reports of the meetings are archival in value and will warrant long term preservation."*[16]

36 This obligation of record-keeping is an appropriate counter-point to the obligation to provide access to information that PAIA imposes on the information officer of each department. Put differently, unless an organ of state manages and maintains its records appropriately, as required by the National Archives Act, it will not be able to discharge its obligations to provide access to information in terms of PAIA and section 32 of the Constitution.

37 In particular, the obligation in terms of section 23 of PAIA to "*take all reasonable steps*" to find a requested record depends crucially on proper record-keeping by public bodies. It is submitted that it does not suffice for a public body to fail adequately to create and maintain records and then later to

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[16] Policy Manual p 118 para 3.7.3.

resist proceedings in terms of PAIA on the basis that a search of its records has not yielded the requested record.

## RELIANCE ON SECURITY & THE 'CLASSIFICATION' OF DOCUMENTS

38 The second trend which SAHA has observed, from its research and its activity as a requester and keeper of records, is the nature and extent of reliance by organs of state on security legislation, including apartheid-era legislation, to resist PAIA requests.

39 SAHA submitted 1297 requests to public bodies between 2001 and 2011. Out of this number, 79 requests received refusals with reasons relating to the content of the requested records, of which 16 requests were initially refused in full or in part on grounds relating to national security.[17]

40 Accordingly, security concerns were invoked to refuse access in over 20 per cent of all requests actively[18] refused during this period for reasons relating to content.[19]

41 SAHA refers to a number of practical examples of refusals premised on the

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17 SAHA founding affidavit, Vol 3 p 269 para 34.

18 That is, excluding deemed refusals in terms of section 27, refusals where no reasons were cited, and those requests for which records could not be found in terms of section 23.

19 SAHA appealed decisions in seven of these 16 requests, refusals were overturned in full or in part at the internal appeal stage for one of these requests, and documents were released in out of court settlements relating to three of these requests. SAHA is still awaiting judgment in one case.

National Key Points Act and the Protection of Information Act, which examples also illustrate the misapplication of PAIA's security exemptions to withhold information from the general public.[20]

42 SAHA's research and the examples drawn from its own experience as a PAIA requester reveal a problematic trend among organs of state to resist disclosure on the basis of alleged concerns relating to 'security' where such objections cannot be sustained.

43 In respect of the Protection of Information Act and the National Key Points Act, SAHA makes the following general legal submissions:

43.1 In terms of section 5 of PAIA, PAIA applies to the exclusion of both statutes to the extent that they purport to prohibit or restrict the disclosure of a record and are materially inconsistent with an object or a specific provision of PAIA;

43.2 Both statutes need to be approached with caution, cognisant of the fact that they are laws made to entrench the apartheid security state, prior to the adoption of the Constitution;

43.3 To the extent that either statute applies – and subject to any future constitutional challenge – its provisions must be interpreted so as to promote the spirit, purport and objects of the Bill of Rights in terms of section 39(2) of the Constitution;

43.4 When interpreting these statutes, the context in which they are

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20 SAHA founding affidavit, Vol 3 pp 270 to 272 para 35.

implemented, including the trends towards a culture of secrecy and reliance on 'security' concerns to resist disclosure, must be taken into account;

43.5 The provisions of both statutes that purport to restrict disclosure of information or impose civil or criminal liability have the potential to limit the right of access to information in section 32 of the Constitution and must be narrowly construed.

44 SAHA notes that the second *amicus curiae*, the DGRU, makes detailed legal submissions relating to the proper interpretation of this legislation and accordingly does not expand further on these submissions.

45 SAHA instead limits itself to making submissions relating to the system of 'classification' of documents and the approach to classified documents in terms of PAIA, an issue not addressed in any detail in argument by any of the other parties.

46 The respondents rely on the fact that certain security assessments conducted by the SAPS and the SANDF carry a classification of "Top Secret" as one basis for resisting their disclosure,[21] in addition to reliance on sections 38 to 41 of PAIA. The respondents further take issue with the public release by the applicant of classified documents.[22]

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21 Respondents' further affidavit, Vol 8 p 633 para 12. See also Annexure VB3 to the founding affidavit, in which the respondents invoked the Protection of Information Act and the MISS policy: Vol 1 p 37.

22 Respondents' further affidavit, Vol 8 p 635 paras 16-19.

47 The respondents state the following in respect of the effect of classification:

> *"What the applicants fail to appreciate is that the document remains a Top Secret document until it is declassified. Until this happens, disclosure is prohibited by section 4 of the Protection of Information Act."*

48 The scheme of classification consists of two elements: a policy governing security classification and a set of statutory prohibitions on disclosure of classified information.[23]

48.1 The national information security policy, known as Minimum Information Security Standards (MISS), was adopted by the Cabinet on 4 December 1998.[24] It applies to all departments of state that handle classified information in the national interest. It provides for measures to protect classified information and empowers the Minister for Intelligence Services to protect information by classifying it as "restricted" or "confidential" or "secret" or "top secret".[25]

48.2 In addition national legislation and regulations prohibit the disclosure of certain classified information. Section 4 of the Protection of Information Act, which the respondents invoke, prohibits the disclosure of protected documents or information in relation to, amongst other

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23 For a discussion of this regulatory scheme, see *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services (FXI as amicus curiae) In re: Masetlha v President of the Republic of South Africa* 2008 (5) SA 31 (CC).

24 MISS can be accessed by visiting http://www.kzneducation.gov.za/policies/MISS96.pdf.

25 This classification is provided for in Chapter 2 of MISS.

things, security matters [26]

49 The Constitutional Court considered the legal effect of classification, in the context of a claim by the media to have access to classified documents forming part of the court record, in ***Independent Newspapers***. Writing for the majority, Moseneke DCJ emphasised that, even in the absence of proceedings to review the decision to classify documents, the court's jurisdiction to decide whether the documents should be disclosed is not ousted.[27] Moseneke DCJ held as follows:

> *"A mere classification of a document within a court record as 'confidential' or 'secret' or even 'top secret' under the operative intelligence legislation or the mere ipse dixit of the minister concerned does not place such documents beyond the reach of the courts. Once the documents are placed before a court, they are susceptible to its scrutiny and direction as to whether the public should be granted or denied access."*[28]

50 ***Independent Newspapers*** was concerned with the power of the courts to regulate their own process in terms of section 173 of the Constitution and the right of access to courts in terms of section 34. However, it is submitted that

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26 See also sections 26(1)(a)(iii), (f)(i) and (g) of the Intelligence Services Act, which makes it an offence for any person, members or former members of any intelligence service to disclose classified information without permission of the relevant government official; and regulation E of Part II of Chapter 1 of the Public Service Regulations, 2001 GN R1 GG 21951, 5 January 2001, which prohibits an employee from releasing official information to the public without the necessary authority.

27 *Independent Newspapers* para 53.

28 *Independent Newspapers* para 54.

the same principles apply where classification is invoked in resisting disclosure in terms of PAIA and section 32 of the Constitution.

51 Where a PAIA request covers a document that is classified in terms of MISS, read with the applicable legislation, and the document is covered by a PAIA request, it is submitted that the following general principles apply:

51.1 The mere fact of classification is not, in itself, a basis to refuse disclosure. In light of the provisions of section 5 of PAIA, PAIA overrides other legislation that prohibits disclosure.

51.2 The requirements in terms of one or more of the provisions of sections 38 to 41 of PAIA must be met to justify refusal. The fact that a document is classified will, however, be relevant to the court's consideration whether the refusal is justified in terms of PAIA.

51.3 Classification does not oust the jurisdiction of the court to consider whether a ground for refusal has been established or the power of the court to exercise a 'judicial peek' in terms of 80(1) of PAIA.

**CONCLUSION**

52 SAHA accordingly places before the Court evidence demonstrating two trends, which emerge from SAHA's research and its own experience as a very frequent PAIA requester:

52.1 First, the culture of secrecy pervading public bodies, which is one of the primary limitations on the right of access to information; and

52.2 Secondly, the nature and extent of the reliance by the State on apartheid era legislation such as the National Key Points Act,[29] the Protection of Information Act,[30] and the misapplication of PAIA's security exemptions to withhold information from the general public.

53 In respect of the 'culture of secrecy', the clear trend that emerges from the statistics and examples is characterised by:

53.1 The failure to respond to PAIA requests timeously, or at all;

53.2 The failure to give reasons for refusals of PAIA requests;

53.3 The 'knee-jerk' and unreflective refusal of requests, forcing requesters to resort to litigation; and

53.4 The belated withdrawal of resistance to disclosure once litigation is instituted, presumably on advice that there is no lawful basis to refuse disclosure.

54 In relation to the second trend, SAHA's research and the examples drawn from its own experience as a PAIA requester reveal a problematic trend among organs of state to resist disclosure on the basis of alleged concerns relating to 'security' where such objections cannot be sustained.

55 At a general level, SAHA submits that the legislation – including the Protection of Information Act and the National Key Points Act – that are usually invoked to justify such refusals:

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29 National Key Points Act 102 of 1980.

30 Protection of Information Act 84 of 1982.

55.1 In terms of section 5 of PAIA, apply subject to the requirements of PAIA and are overridden by the provisions of PAIA;

55.2 Must be interpreted consistently with the Constitution in terms of section 39(2), which requires a narrow interpretation of laws that purport to authorise the refusal of disclosure on grounds of security.

56 Where a PAIA request covers a document that is classified in terms of MISS, read with the applicable legislation, and the document is covered by a PAIA request the following general principles apply:

56.1 The mere fact of classification is not, in itself, a basis to refuse disclosure. In light of the provisions of section 5 of PAIA, PAIA overrides other legislation that prohibits disclosure.

56.2 The requirements in terms of one or more of the provisions of sections 38 to 41 of PAIA must be met to justify refusal. The fact that a document is classified will, however, be relevant to the court's consideration whether the refusal is justified in terms of PAIA.

56.3 Classification does not oust the jurisdiction of the court to consider whether a ground for refusal has been established or the power of the court to exercise a 'judicial peek' in terms of section 80(1) of PAIA.

**Jason Brickhill**

Counsel for the first amicus curiae (SAHA)

Chambers, Johannesburg

29 October 2013

## LIST OF AUTHORITIES

### Legislation, Regulations & Policy Documents

1. Electronic Transactions Act 25 of 2002
2. Intelligence Services Act 65 of 2002
3. Municipal Finance Management Act 56 of 2003
4. National Archives and Record Service of South Africa Act 43 of 1996
    - National Archives and Record Service of South Africa Regulations: GNR.1458 of 20 November 2002
    - 'Records Management Policy Manual' dated October 2007
5. National Environmental Management Act 107 of 1998
6. National Key Points Act 102 of 1980
7. Promotion of Access to Information Act 2 of 2000
8. Promotion of Administrative Justice Act 3 of 2000
9. Protection of Information Act 84 of 1982
    - Minimum Information Security Standards (MISS), adopted by the Cabinet on 4 December 1998
10. Public Finance Management Act 1 of 1999

**Case law**

1. *Brummer v The Minister of Social Development and Others* 2009 (6) SA 323 (CC); 2009 (11) BCLR 1075 (CC)

2. *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services (FXI as amicus curiae) In re: Masetlha v President of the Republic of South Africa* 2008 (5) SA 31 (CC)