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Applying PAIA: Legal, Political and Contextual Issues

Kate Allan

Introduction

In 2001 the South African History Archive (SAHA) uncovered the existence of 38 groups of military intelligence records that had been withheld from the Truth and Reconciliation Commission (TRC) by the Department of Defence (DOD).[1] The revelation immediately generated suspicions that the bulk of DOD's intelligence files had been deliberately withheld from the commission.[2] The military denied culpability and (former) TRC officials insisted that DOD had misled them,[3] but no call was made from any quarter for an examination of the records by the TRC, which was still operative at the time.[4] When SAHA sought access to the lists of records and the records referred to therein, a dispute ensued regarding the interpretation of the provisions of the Promotion of Access to Information Act No. 2 of 2000 (PAIA) and the intersecting operation of the Protection of Information Act No. 84 of 1982. The records were disclosed only after a protracted court battle challenging the notion that release would prejudice the defence, security and international relations of South Africa. The South African Human Rights Commission (SAHRC) and the minister of defence, who publicly stated that he would conduct an inquiry, did nothing. Access was granted only after the institution of court proceedings.

This case reveals that a number of factors hamper access to information, factors that are reflected in the chapters of this book. Pigou discusses the intersection of the Promotion of National Unity and Reconciliation Act No. 34 of 1996, the misconstrued application of exemptions, the inability of the bodies concerned to appoint competent decision makers, and the deflective approach of officials, which led to costly and lengthy disputes and, in some cases, court battles. Fig discusses the decentralised record-keeping practices of the Nuclear Energy Corporation of South Africa, which, coupled with that body's inherent secrecy and defensiveness, resulted in long delays in the provision of medical records, avoidance of requests, and little access to records regarding the environmental impact of nuclear energy. Similarly, the alleged destruction of records relating to the nuclear

weapons programme of the apartheid state, discussed by Gould, meant that PAIA yielded little information. In locating information regarding the treatment of homosexuals in the military, Pollecut was required to trawl through thousands of pages of lists and records in order to locate fragments that gave minute insights into the experience of persons labelled as deviants or with principled objection to the military programme, and into the mindset of the apartheid government.

What these chapters do not discuss in any detail, however, is the extent to which technical issues regarding the intersection of legislation and the use and interpretation of PAIA provisions has impacted on the utility of the Act and access to records. What I therefore aim to do is to discuss, firstly, the extent to which disputes regarding the interpretation of PAIA provisions have been used to avoid disclosure; secondly, the capacity for pre- and post-transition enactments to impact upon PAIA exemptions and access; and, thirdly, the extent to which prescribed appeal mechanisms have been facilitative in upholding the right of access to information. Before concluding, I will briefly consider the impact of record-keeping practices and the destruction of documents prior to and after the transition to democratic governance, and the lack of a shift from the culture of secrecy that pervaded the government during apartheid.

Before moving on to a consideration of these factors, it is important to put the work of SAHA into context. Its origins lie in documenting struggles against apartheid, a foundation that pervades and informs its contemporary work. Its points of focus are mostly historical inquiries relating to both human rights violations committed by the apartheid state and the activities of those in opposition to it. Where it steps into the contemporary arena, it does so on the basis that the issues about which it, or those it represents, needs to be informed are ones that more often than not relate to an infringement of constitutional rights. These issues around which it focuses its work tend towards sensitive, contested and controversial territory. The lens through which it views the achievement of transparency is therefore coloured by this terrain.

This chapter and this book, then, present a picture of contestation that is specific. While the experiences of SAHA will certainly be shared in many respects by other requesters and civil society organisations working in the field, I do not intend through this discussion to purport to provide a whole and finite picture of the problems encountered in exercising the right of access to information; organisations such as the Open Democracy Advice Centre (ODAC), which focuses primarily on the use of PAIA to facilitate the exercise of contemporary socioeconomic rights, will have their own specific experiences. It is also important to note that I do not attempt to provide clear recommendations for reform; the intersections of these issues are complex and require a range of interventions at parliamentary level and within public bodies. What I aim to do is to discuss the areas of influence raised throughout this book and elucidate starting points for reform that will lead to greater enjoyment of the right of access to information.

National

The truth commission has been horrified to discover that the SANDF hid thousands of military files crucial to its investigations

Army file shock for the TRC

Evidence wa ka Ngobeni

The South African National Defence Force (SANDF) hid key apartheid-era military intelligence information from the Truth and Reconciliation Commission (TRC).

The commission had investigated the wholesale disposal of apartheid-era information and concluded that all military intelligence had kept was three series of files. Each series contains thousands of pages of records kept of military operations inside and outside South Africa during apartheid.

Last week, in answer to an archivist who submitted a Promotion of Access to Information Act request to the Department of Defence, a list was provided of 38 series of top secret documents still in the SANDF archive.

Verne Harris, director of the South African History Archive, attached to the University of the Witwatersrand, asked the department for a list of files contained in three "series" which the SANDF told the TRC was all that was left after the mass destruction of sensitive documents before 1994.

The 38 series contains thousands of classified documents on covert operations conducted by the apartheid-era government. The covert operations targeted anti-apartheid organisations in South Africa and abroad.

SANDF spokesperson Louis Kirstein said on Thursday he was unable to provide the *Mail & Guardian* with comment as the chief of military intelligence was away.

"We have taken note of the allegations and the response is ready. But it cannot be sent to you because it has to be approved by the chief of military intelligence," Kirstein said. "The answer will come next week as we have already studied the allegations."

The South African History Archive's list of secret files still kept by the SANDF records the dates when the files were compiled. The oldest series file covers the period 1941 to 1977. One of the files was compiled from 1977 up until 1997, fuelling speculation that some apartheid-era covert operations carried on even after the 1994 general elections.

Former TRC officials expressed shock this week after being told about the new files. The TRC, they said, was only aware of three series files. This is reflected in the TRC's final report.

The report reads: "Although subjected to close scrutiny during the 1993 destruction exercise, a large volume of military intelligence files survived. The joint investigative team identified three discrete files groups from the SANDF archive."

This revelation is likely to buttress public belief that the TRC never managed to get to the truth of the apartheid-era atrocities.

Former TRC researcher Charles Villa-Vicencio, who led the TRC research team into the SANDF, said the new information shows that the

SANDF "deliberately misled the TRC".

Villa-Vicencio said the SANDF had told the TRC at the time that the three files series were the only ones that survived the systemic erasure of "sensitive" documents by the previous government.

"If these new files exist we believe that we were decidedly misled by the military. Their actions were morally reprehensible and are legally indefensible," he said.

Harris's response from the Department of Defence includes the number of boxes in which the files are kept. There are thousands of box numbers on the list.

It is highly unlikely that the South African public will ever know what is in those boxes, says Harris. The TRC, he says, "was the only window of opportunity to have access to those files".

The Promotion of Access to Information Act, he says, is one option the public can use to access information from the government. But there will be a problem. As the series files are classified "top secret" the SANDF will only release a "declassified" version to the public.

Villa-Vicencio said the TRC final report recommended, among other things, that a comprehensive audit of the military intelligence information be conducted.

This new information, he says, "demonstrates the necessity of such an audit. We cooperated with the military in good faith and from this it seems that they did not do so. Maybe they were seeking to hide the information, which of course undermined the TRC's objective to make the truth available to the public."

Villa-Vicencio said the three files, which were given to the TRC, did not "have pertinent information" and failed to serve the commission's objectives.

"The question one should be asking is; why did they hide the information?" he asked, adding the information allegedly concealed by the SANDF could have helped the TRC to present a "far more extensive report".

"The SANDF was obliged to disclose all the files to the TRC according to the law. The military did not assist the TRC in this regard."

A senior TRC researcher, who did not want to be named, said the SANDF consistently "stonewalled" the commission's requests.

"The unfortunate reality is that the SANDF always created problems for the TRC. When they granted us access to those three series files it was too late and meaningless.

"Instead what we did was check whether files were still intact. We could not do anything as we had to deal with constant difficulties created by the SANDF."

State info not easily available, Page 51

Figure 1. Press clipping, 'Army file shock for the TRC' *Mail & Guardian*, Evidence wa ka Ngobenei (2001, 12 to 18 October).

The application of PAIA

This chapter appropriately starts by considering PAIA itself. Its provisions can be separated into two primary areas: substantive clauses that determine access, and procedural clauses that provide for review and enforcement. In regard to the former, I will discuss case studies in which the provisions have been broadly or incorrectly interpreted or applied, resulting in undue restrictions on access. In regard to the latter, I will discuss the limitations of the available enforcement mechanisms, as well as proposals for reform.

Interpretation

The legislation is largely unambiguous; however, there has been little consistency in the

approach followed by public bodies, and disputes about what the legislation intended have resulted. These disputes fall into three key areas: the distinction between public and private bodies, the application of exemptions and the public interest override. It is not the aim of this chapter to offer a comprehensive analysis of the provisions, but to present a selection of case studies that demonstrate that a number of external factors determine whether the application of PAIA provisions achieves the constitutional objective of access.

Public versus private bodies

We tend to think of 'public' and 'private' as mutually exclusive, as contrasting, as opposites. The Act has blurred this clean division by imposing a grey area in which a private body can be a public body or a public body private in certain circumstances. The distinction has also become distorted with the development of privatised utilities and contracted services. Not only is this confusing to requesters, but to many recipients of requests.

In 2002 SAHA assisted Mondli Hlatshwayo, a master's student at the University of the Witwatersrand, to request access to minutes of meetings held between 1965 and 1973 at Iscor's steel manufacturing plant in Vanderbijlpark.[5] Iscor refused to process the request on the basis that it did not comply with procedural requirements in that the form submitted was for a public rather than a private body. When the Wits Law Clinic argued on the student's behalf that the records sought were from the period when Iscor was a public body and therefore the public body provisions applied, Iscor responded the following day by stating that no records could be found. Wits Law Clinic rejoined that Iscor could not have conducted a search for records almost 40 years old in one day.[6] When ODAC agreed to represent Hlatshwayo and applied to the High Court for intervention, Judge van der Westhuizen held that, while Iscor had been privatised, the meetings in question occurred during the period of Iscor's exercise of power or performance as a public body. In reaching his decision, he considered the objectives of the company and the power wielded through government by virtue of its large shareholding and the provisions of the Iron and Steel Industry Act No. 11 of 1928 and the Conversion of Iscor, Limited, Act No. 57 of 1989. Iscor was unsuccessful in its appeal in the Supreme Court of Appeal.[7]

In early 2007 SAHA submitted requests to Bosasa Operations (Pty) Ltd[8] in the belief that it was contracted to manage the operation of the Lindela Detention Centre for undocumented migrants. In response, the head of Bosasa's legal group, Sonia Jonker, alleged that Bosasa had not been responsible for management at any time (despite numerous media reports regarding allegations of corruption in the awarding of the contract to the company in around 1996), that Leading Prospect Trading 111 (Pty) Ltd was the contracted party, and that SAHA could not obtain information from it because it was a private body and the records were subject to a contract with the Department of Home Affairs, which determined that they were confidential. Jonker stated that she did not have the contact details

for Leading Prospect Trading.[9]

When SAHA rebutted that Leading Prospect Trading was privately incorporated, but was contracted by a public body to fulfil a public function, and therefore its records were regarded as being records of a public body,[10] and threatened legal action, Jonker revealed that she was in fact the legal representative for both Bosasa and Leading Prospect Trading, and that the records belonged to the Department of Home Affairs, which would be responding to the requests. No further mention was made of the company's private body status or that she had made misleading statements about her knowledge of Leading Prospect Trading's contact details. Following SAHA's letter of demand and expression of its intention to pursue the matter in court, Bosasa and Leading Prospect Trading agreed to provide access to records they had in their possession.[11]

In both of these cases, the bodies concerned have attempted to exploit the subtleties of the division between public and private bodies; and they have attempted to hide behind private body provisions despite their clear present or past engagement in public operations. Iscor in particular presents a disturbing case of a body so intent on preventing access that it appealed to the Supreme Court. In all fairness, it had a right to do so. However, given its initial response that it could not find records from the 1960s and 1970s after searching for all of 24 hours, the intent behind its pursuit of judicial interpretation is questionable. Could it have been an attempt to deter a student from litigating against a well-resourced company? In any event, both bodies failed to consider that requesters have a right of access if they 'require' the information to exercise or protect another right.[12] The confidence displayed by private bodies in this regard may be attributed to judicial determinations that have narrowly interpreted the term 'require' and imputed an element of 'reasonableness', so as to set the bar impossibly high.[13] While the Supreme Court's interpretation is yet to be tested in the Constitutional Court, it has made requesters nervous about litigating against private bodies.

Exemptions

There are a few key points to make about the exemptions before going on to consider their application. They are objective grounds, which may be broken down into three categories:

- exemptions that require the information to fall within a specified category;
- exemptions that require particular consequences to flow from disclosure; or
- exemptions with both content and consequence requirements.[14]

They also place on the recipient of the requests the onus to justify that the information is of a type considered by the exemption; that, where necessary, harm will result from

disclosure; and that, where discretion is exercised to refuse access, it was appropriately applied. It is important to note that the grounds are limitations that must be read narrowly; ambiguities must be determined in favour of access.[15]

i. Privacy and protection from harm

PAIA provides that access must be refused where it involves an unreasonable disclosure of personal information about a third party, i.e. a breach of privacy,[16] or where disclosure could reasonably be expected to endanger the life or physical safety of an individual.[17] These exemptions require, where an exception to the exemption does not apply, that the public body afford any third parties affected by the request an opportunity to consent to or oppose disclosure.[18]

These exemptions have been the most frequently utilised in requests for apartheid era records. Pigou discusses the use of the exemptions by the Department of Justice (DOJ) to refuse access to TRC records. The privacy exemption was also used by the national archivist to refuse access to listings of security police files, a decision that was upheld on appeal to the minister of arts and culture, Pallo Jordan. The response was perplexing, as SAHA had been provided with a list of security police records in the possession of the South African Police Service (SAPS) in 2002, and the records listed on the document now being refused had been transferred by SAPS to the National Archives in around 2004. SAHA was also somewhat confused, given, at an earlier meeting at the Nelson Mandela Foundation, that the national archivist had advised that he held a list of security police files that would be useful for a proposed apartheid victims database. When SAHA appealed on the basis that at least some, if not all, of the information must be 'publicly available', as it had been released pursuant to a request only a few years earlier, it was again refused.

The application of the exemptions raises three key issues. Firstly, the exemptions are being applied to all records, irrespective of whether the document/s had been aired in public hearings or were in the public domain in some other manner (such as the amnesty applications and evidence utilised in hearings related to the Cradock 4), or whether the person who furnished the information was aware that it was of a class that was likely to made publicly available (such as the amnesty application of Eugene de Kock). The privacy exemption specifically provides for exceptions in these instances,[19] and it is arguable that where information is already in the public domain, it is not reasonable to expect that disclosure could endanger the life or physical safety of an individual.

Secondly, the third-party notification provisions are being inappropriately and inconsistently applied. In matters where the documents have been aired in public hearings or are in the public domain and privacy rights have therefore lapsed, DOJ persists in providing third parties mentioned in such documents with an opportunity to consent to or oppose release. In the case of the Cradock hearing records, notification was taken one

step further by DOJ when it sought affidavits from the widows of the deceased, who had no privacy rights to protect (see chapter 2 of this volume), because the information did not relate to them.[20] Any right that they may have held regarding their husbands expired 20 years after their husbands' deaths, which was some four months after the obtaining of the affidavits.[21] In another disturbing case, DOJ sent approximately 22,000 third-party notices to addresses up to ten years old, despite the fact that SAHA specified in its request that it did not want access to personal information.[22] Conversely, upon a request for access to in camera hearing testimonies of the TRC, where DOJ should have issued third-party notices, it failed to do so.

Thirdly, the utilisation of the privacy exemption by DOJ has often been framed in terms of the disclosure of the perpetration of offences, indicating that the persons protected may often be informers or perpetrators. In this context, where some members of the public want to know who informed on, or committed crimes against, them or their families, the privacy of individuals is a difficult issue to balance. The right to privacy does discriminate to a certain extent: a high-profile and influential individual espousing 'say no to drugs' campaigns has been found to have her right to privacy limited when it concerned her treatment for drug addiction.[23]

However, should access to information be used to expose informers, and thereby serve as a form of justice? In 2006 Poland passed a law opening communist era files revealing the names of large numbers of informers. There was debate in the media regarding the integrity of the files and the fact that many people lost their jobs as a result of unsubstantiated allegations.[24] In some cases, the public interest override (discussed later) may compel disclosure if, for example, the record revealed that the informer was involved in a plot to murder. However, simply being an informer without evidence of a resultant link to a criminal offence is not sufficient to satisfy the override. The balancing of these competing interests will never be subject to clear rules: the side upon which the determination falls is largely determined by shifting societal objectives and norms. In terms of protection from harm, the exemption's application in these circumstances commences from an assumption that persons will commit a criminal offence following disclosure; that is, they will threaten the life of the person being protected or commit some violent act against him/her. This is a grave presumption and one that would be difficult to prove if the matter proceeded for judicial determination.

ii. Confidentiality

The confidentiality exemption prevents disclosure where:

- an agreement of confidentiality binds the parties; or
- information was supplied in confidence; and
  - disclosure will prejudice the future supply of information and it is in the public

interest that information continues to be supplied;[25]
- the person supplying the information does not consent to its disclosure; and
- the information is not already in the public domain.[26]

In 1975 South Africa and Israel entered into a confidentiality agreement regarding the exchange of supplies for the development of South Africa's nuclear weapons programme. The agreement was designed to prevent disclosure of information regarding their relations. It may not be off the mark to speculate that the agreement aimed to avoid scrutiny for engaging in nuclear weapons development without complying with international monitoring requirements, and for breaching international sanctions against trade of goods with South Africa. The agreement is still being relied upon to prevent access to records relating to the now defunct programme. When SAHA gained access to it pursuant to a PAIA request to DOD, it was so heavily masked that it revealed little about the information being secreted, and therefore little grounds upon which to challenge refusals relying on it.

DOJ applied the confidentiality provision to TRC records without distinguishing among the records themselves; that is, whether they record testimony given in public or during in camera hearings, or whether they are applications made with knowledge of the likelihood of their public disclosure. In the request relating to the hearings about the death of the Cradock 4, the department alleged that the records could not be released because, among other things, the amnesty applicants provided the information subject to an agreement of confidentiality. It failed to demonstrate, however, that 'agreements' of confidentiality exist (see the discussion regarding the Promotion of National Unity and Reconciliation Act below and chapter 2 of this volume). DOJ is therefore limited to the second discretionary limb of the exemption. This limb may only apply, however, where information is not in the public domain, which can only be the case where the information was provided through in camera hearings and was not later disclosed at the TRC's discretion in public hearings.[27] It can also only apply where it is likely that the person who provided the information will be called upon to provide further information, and it is in the public interest that he/she does so.

While the public interest in evidence regarding human rights violations committed during apartheid cannot be contested, DOJ has not demonstrated that it has a need for further information from all persons who deposed to affidavits requested by SAHA.[28] In the case of information provided in camera, it is questionable whether the information was supplied in confidence in any event. Sections 28 and 29 of the TRC Act specifically provide that no article or information collected by the TRC investigators or the TRC itself in connection with a hearing should be made public until a public hearing commenced. The persons who provided the information in such forums were witnesses or the deponents of amnesty applications who submitted to the jurisdiction without knowledge of whether their application or testimony would be aired in subsequent public hearings.[29] While a

mechanism to apply to provide information in confidence existed, it was in fact the case that, in most instances, the TRC unilaterally determined that the information should be held in confidence at that time.

The exemption raises a number of issues. The confidentiality exemption is being inappropriately used in a blanket fashion to prevent access to records without giving due consideration to their substantive content. The Durban High Court in The State v Dirk Johannes Coetzee & 5 others[30] held that the TRC was not permitted to prevent Dirk Coetzee from gaining access to Joseph Tshepo Mamasela's in camera testimony. In refusing the TRC's application seeking a declaration that the head of the investigating unit was not required to release the document, Justice Combrink stated that:

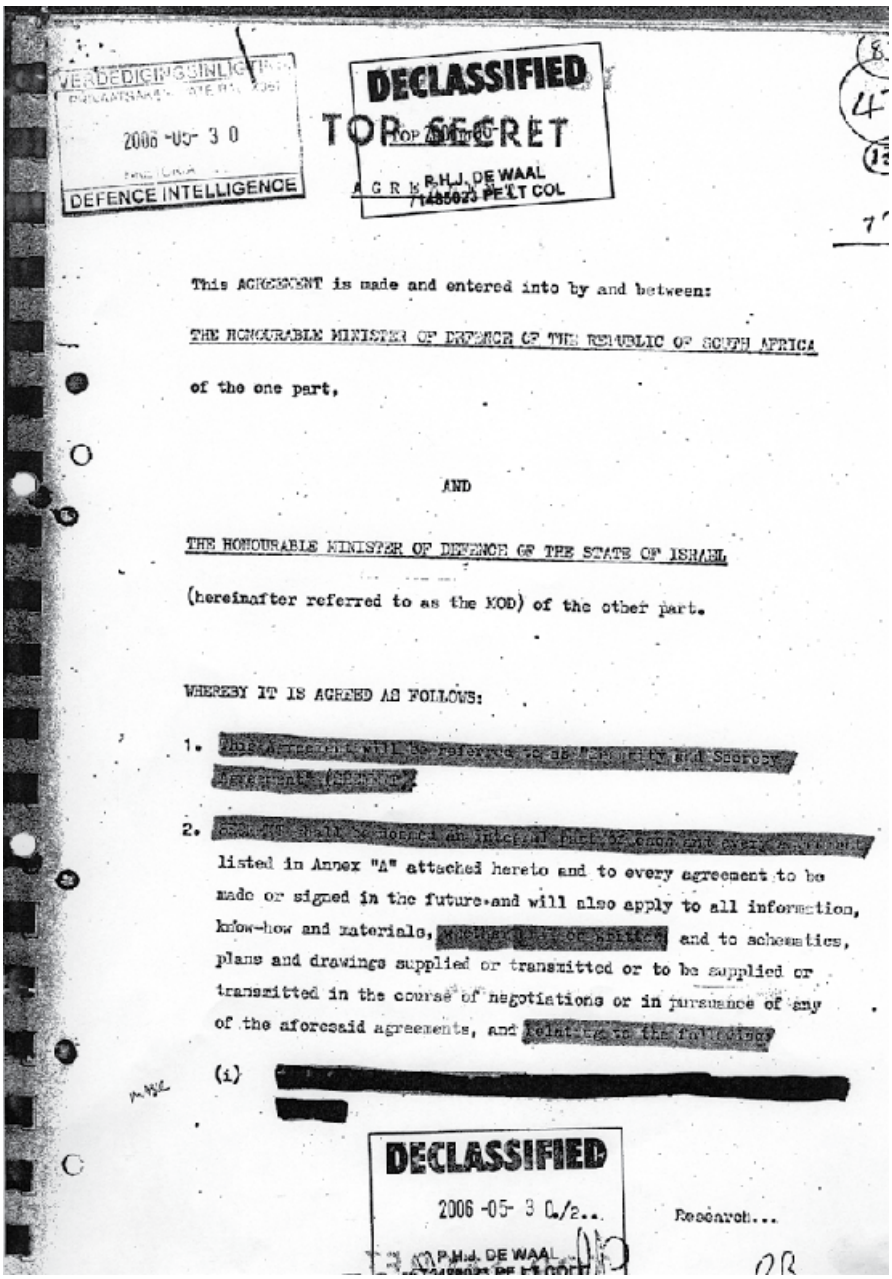
> [W]hat the Commission is enjoined to do by the legislation is to consider each case where a person seeks access to the information obtained by the Commission through its investigating unit and, in the light of the principles of openness and transparency and, having regard to the inherent right of the person seeking the information to a fair trial, decide, after weighing up the interests sought to be reached by this Act and the rights of the individual, make [sic] a value judgment as to whether the information should be made available or not.

The case, while not yet confirmed in a court of higher authority, provides good grounds for challenging DOJ and its blanket application of this and other exemptions to in camera hearings and other records.

The legislation also fails to provide a suitable mechanism for inquiry into an agreement or undertaking to ascertain its legitimacy and ensure that its aims are not to prevent disclosure where the public has a right of access. The requester must therefore challenge the applicability of the agreement to the records in question or argue that the public interest override (considered later) applies without actual knowledge of the records or, in most cases, the content of the agreement. The content of the record should attract confidentiality rather than its classification.

Finally, the exemption fails to provide a mechanism for limiting the duration of confidentiality, except where the information is not subject to a specific agreement and it can be demonstrated that the ongoing provision of information is not required or not in the public interest.[31] The TRC Act is also silent as to the duration of the confidentiality of records. It does provide, however, that the TRC was empowered to authorise that members of the public be given access to documents not produced at a hearing. Pigou notes that the TRC made such a determination regarding in camera hearing records; however, the National Archives and DOJ have viewed the claim as an urban myth without ascertaining its veracity.

Box 6.1: South African–Israeli agreement



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This AGREEMENT is made and entered into by and between:

THE HONOURABLE MINISTER OF DEFENCE OF THE REPUBLIC OF SOUTH AFRICA

of the one part,

AND

THE HONOURABLE MINISTER OF DEFENCE OF THE STATE OF ISRAEL

(hereinafter referred to as the MOD) of the other part.

WHEREBY IT IS AGREED AS FOLLOWS:

1. [redacted]

2. [redacted] listed in Annex "A" attached hereto and to every agreement to be made or signed in the future and will also apply to all information, know-how and materials, [redacted] and to schematics, plans and drawings supplied or transmitted or to be supplied or transmitted in the course of negotiations or in pursuance of any of the aforesaid agreements, and [redacted]

(i) [redacted]

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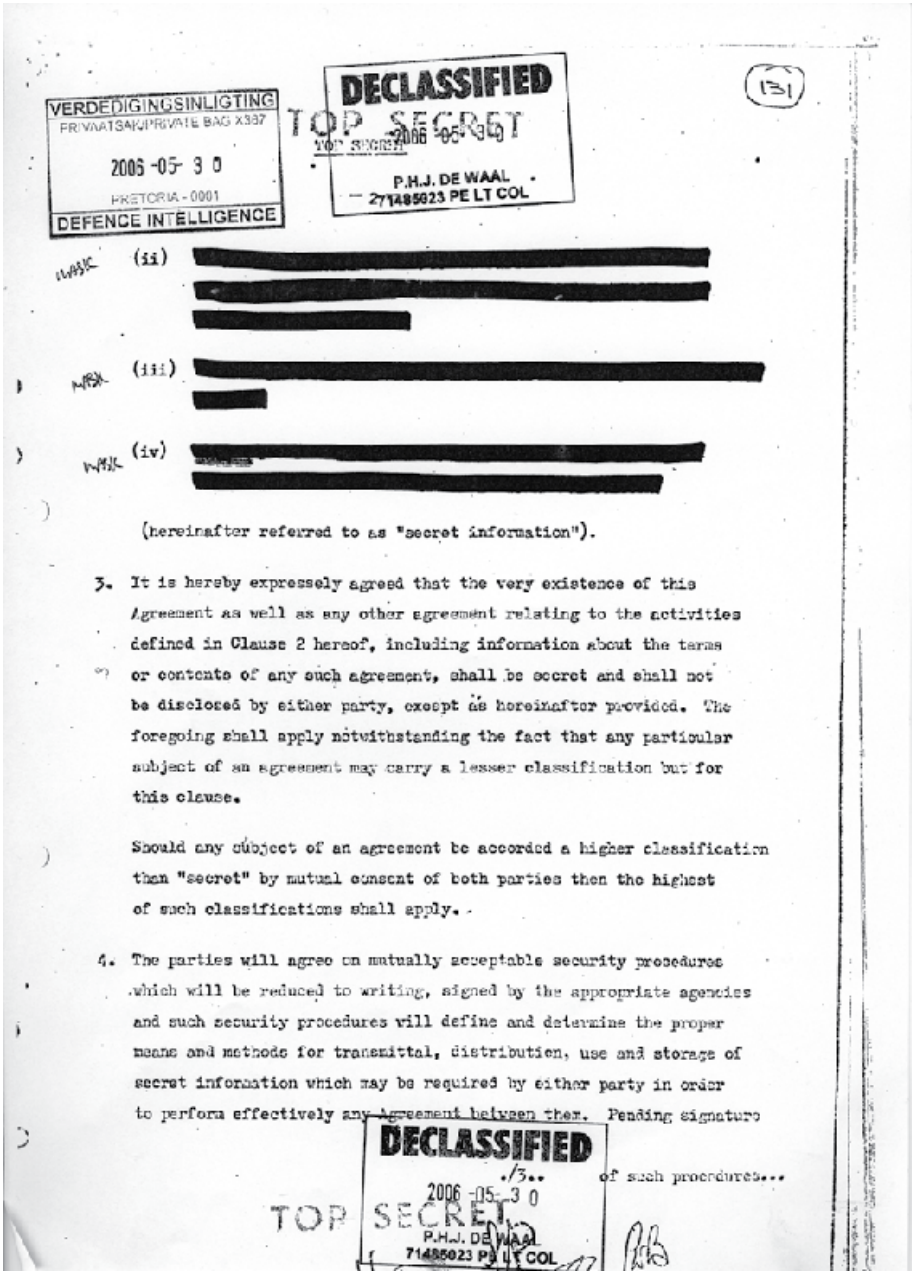

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(ii) [redacted]

(iii) [redacted]

(iv) [redacted]

(hereinafter referred to as "secret information").

3. It is hereby expressely agreed that the very existence of this Agreement as well as any other agreement relating to the activities defined in Clause 2 hereof, including information about the terms or contents of any such agreement, shall be secret and shall not be disclosed by either party, except as hereinafter provided. The foregoing shall apply notwithstanding the fact that any particular subject of an agreement may carry a lesser classification but for this clause.

Should any subject of an agreement be accorded a higher classificatin than "secret" by mutual consent of both parties then the highest of such classifications shall apply.

4. The parties will agree on mutually acceptable security procedures which will be reduced to writing, signed by the appropriate agencies and such security procedures will define and determine the proper means and methods for transmittal, distribution, use and storage of secret information which may be required by either party in order to perform effectively any Agreement between them. Pending signature

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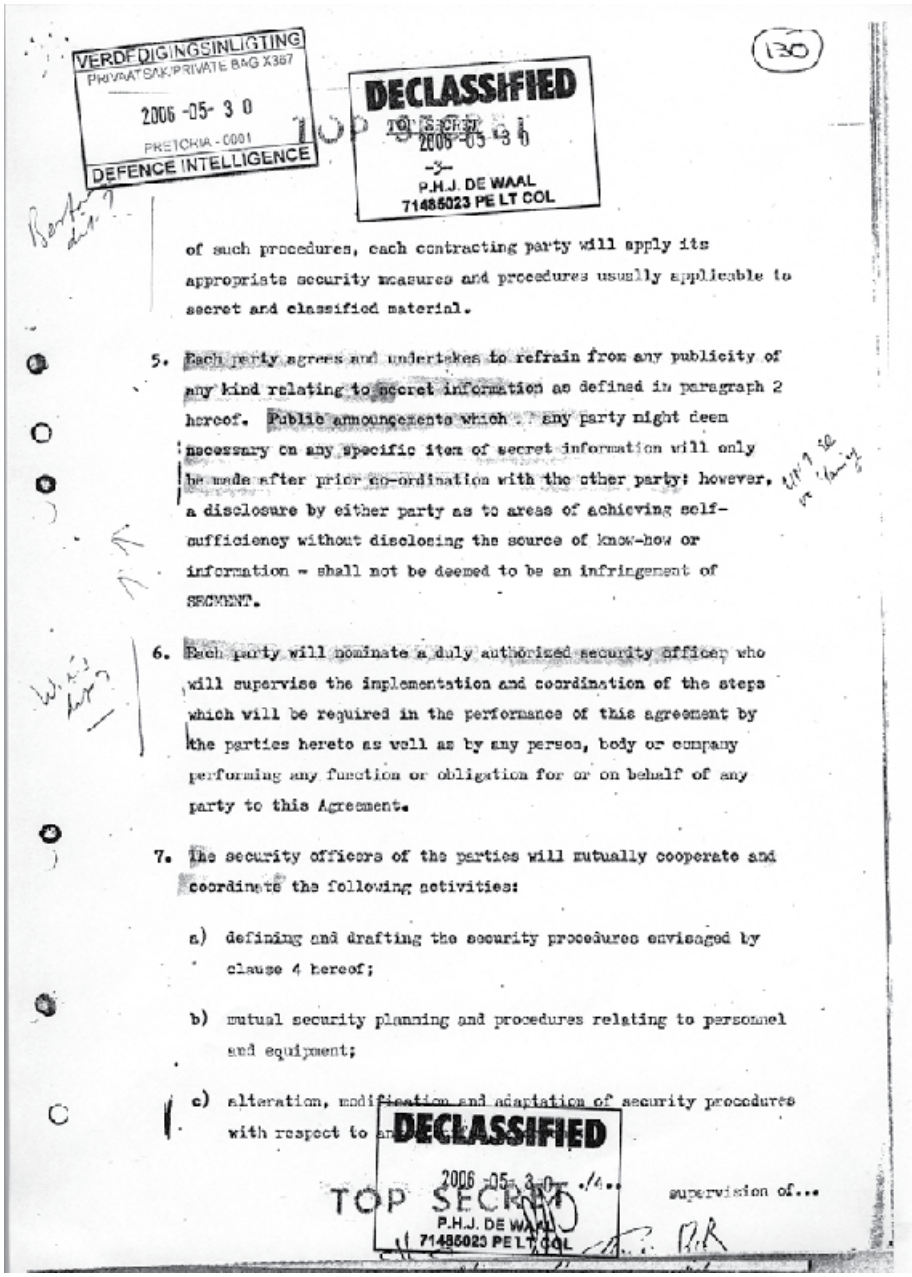

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of such procedures, each contracting party will apply its appropriate security measures and procedures usually applicable to secret and classified material.

5. Each party agrees and undertakes to refrain from any publicity of any kind relating to secret information as defined in paragraph 2 hereof. Public announcements which ... any party might deem necessary on any specific item of secret information will only be made after prior co-ordination with the other party; however, a disclosure by either party as to areas of achieving self-sufficiency without disclosing the source of know-how or information - shall not be deemed to be an infringement of SECRECY.

6. Each party will nominate a duly authorized security officer who will supervise the implementation and coordination of the steps which will be required in the performance of this agreement by the parties hereto as well as by any person, body or company performing any function or obligation for or on behalf of any party to this Agreement.

7. The security officers of the parties will mutually cooperate and coordinate the following activities:

a) defining and drafting the security procedures envisaged by clause 4 hereof;

b) mutual security planning and procedures relating to personnel and equipment;

c) alteration, modification and adaptation of security procedures with respect to ...

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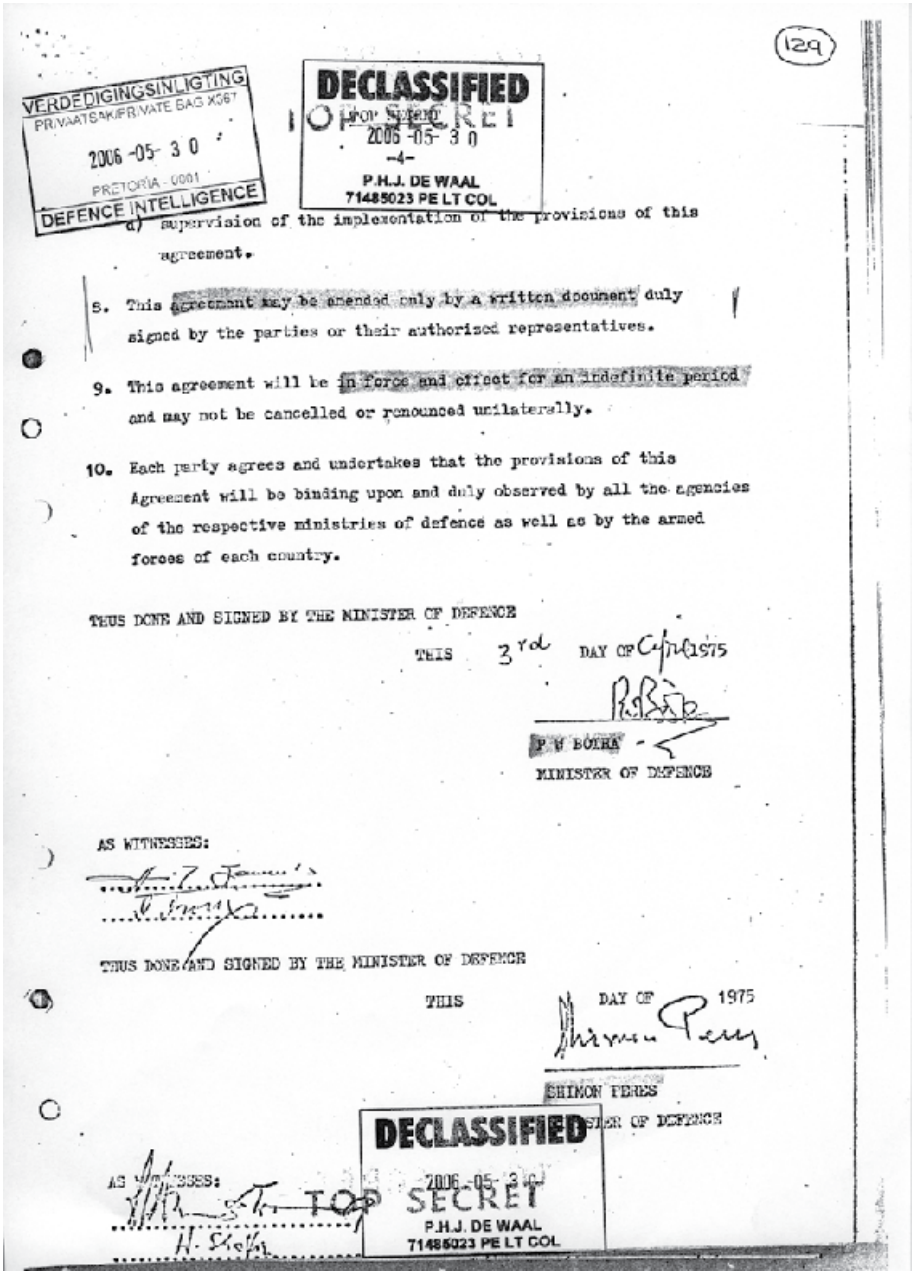

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d) supervision of the implementation of the provisions of this agreement.

8. This agreement may be amended only by a written document duly signed by the parties or their authorized representatives.

9. This agreement will be in force and effect for an indefinite period and may not be cancelled or renounced unilaterally.

10. Each party agrees and undertakes that the provisions of this Agreement will be binding upon and duly observed by all the agencies of the respective ministries of defence as well as by the armed forces of each country.

THUS DONE AND SIGNED BY THE MINISTER OF DEFENCE

THIS 3rd DAY OF April 1975

P W BOTHA
MINISTER OF DEFENCE

AS WITNESSES:

THUS DONE AND SIGNED BY THE MINISTER OF DEFENCE

THIS DAY OF 1975

SHIMON PERES
MINISTER OF DEFENCE

AS WITNESSES:

iii. Ongoing prosecutions

PAIA provides detailed discretionary grounds of refusal where the information being sought relates to ongoing investigation or prosecutions. In short, it protects police dockets in bail, law enforcement and legal proceedings.[32] DOJ frequently utilises subsection (1)(b)(ii) of the exemption, a discretionary ground that protects information that may affect a particular prosecution, and subsection (1)(b)(iii), a mandatory ground protecting information subject to a criminal investigation (it is the only body to have done so upon a request by SAHA), to protect information subject to ongoing investigations and prosecutions by the National Prosecuting Authority (NPA) into apartheid era violations.

There are three key factors rebutting the application of the exemption. Firstly, while the exemption does not except information already in the public domain like the privacy and confidentiality exemptions, it does require the demonstration of prejudice. Where the allegations and the identity of the person who made them, or the identity of a suspect, have been previously revealed to the public, prejudice cannot arise. Accordingly, where amnesty applications, investigation material, testimonies and any other evidence have been revealed to the public through public hearings, televised broadcasts, provision by the TRC, or in any other form, the exemption should not apply. Secondly, even in the case of in camera hearings, disclosure of information may not necessarily prejudice investigations or prosecutions. It is not guaranteed that allegations of the perpetration of offences will be investigated, or that information not aired at public hearings is not presently known to the public through other forums. Further, it is unlikely to be the case that all information contained in a record is of use in any given investigation or prosecution. Thirdly, the extent to which the NPA is in fact intending to investigate and prosecute the perpetrators of apartheid human rights violations is not clear.

At a conference held by the Institute for Justice and Reconciliation in March 2006, Dr J.P. Pretorius, an advocate in the DOJ Priority Crimes Litigation Unit, stated that the NPA did not have any investigators dedicated to apartheid era offences and that it was likely that not more than half a dozen cases will be prosecuted.[33] Since the finalisation of the TRC's activities, the NPA has only prosecuted three cases of those recommended for investigation or prosecution. The likelihood that the NPA will investigate and prosecute, for example, all of the incidents that Eugene de Kock raised in his amnesty application is therefore minimal.[34] In 2005 the national director of public prosecutions released a prosecuting policy for offences emanating from conflicts prior to May 1994 that allows perpetrators to apply for amnesty under certain conditions.[35] The primary criterion is the full disclosure of all facts and circumstances related to the offence. The policy, however, does not require the disclosure to be made to the public.

Setting aside questions concerning the constitutionality of the policy,[36] the lack of transparency and the imposition of a second executive-based amnesty process, it is clear that the intended outcome of the policy is fewer investigations and prosecutions. The need

to ensure the provision of information from witnesses will be reduced and the incentive for perpetrators to come forward increased. The prejudice, therefore, of the disclosure of information provided to the TRC may be lessened. This also has implications for the application of the confidentiality exemption discussed earlier. Fourthly, and in any event, the exemption requires that the information should have 'bearing on an actual and specific prosecution which is "about to commence" or which is pending'.[37] Despite requests for further details, DOJ has rarely been able to confirm that a prosecution is pending or about to commence. Further, the department has not sufficiently demonstrated that the information actually relates to a specific investigation.

Box 6.2: The Department of Justice

DOJ has recently attempted to rework its use of the exemption relating to ongoing prosecutions and preventing the contravention of an offence. In its refusal of access to Eugene de Kock's amnesty application, it stated that:

> The disclosure could reasonably be expected to facilitate a contravention of the law to the extent that the reputations and dignity of the individual names may be impaired thereby as contemplated in section 39(i)(b)(iii)(dd) of PAIA.

SAHA, in its internal appeal to the minister, rejected the ground of refusal, as it utilised an exemption aiming to protect current civil and criminal proceedings in order to prevent what it perceived would be a breach of privacy. An understanding of statutory interpretation informs us that, if we look to the heading the exemption in question, entitled 'Mandatory protection of police dockets in bail proceedings, and protection of law enforcement and legal proceedings', the provision is intended to be limited to current or proposed civil and criminal proceedings to which the records relate. It is not intended to prevent breach of the law through the act of its disclosure. There must be utilisation of the material contained within the record that will impact upon other proceedings. Furthermore, PAIA considered the possibility of breach of privacy in section 34, which the department had already relied upon, and does not intend to afford two opportunities for recipients of requests to raise the same issue.

iv. South Africa's defence, security and international relations

The Act provides a discretionary exemption preventing disclosure of information if it could reasonably be expected to cause prejudice to the defence, security or international relations of the country, or if the information has been supplied in confidence subject to an arrangement or international agreement or otherwise.[38] The exemption has been applied in two ways: to protect current activities of the state and to protect apartheid era collaborators. Pigou discusses the use of the exemption by the National Archives to protect

records documenting its dealings with the TRC archives and its recommendations, where the National Archives refused access to classified records on the basis that they were being transferred 'in an operation that [had] implications for State security, the security of staff and the security of assets'. The minister of arts and culture stated on appeal that:

> [You were] informed that a security threat had been identified (by the National Intelligence Agency) directed at the records of the TRC. In order to prevent a breach of security while the TRC records were being relocated the interdepartmental committee, responsible for the arrangements regarding the TRC records, decided that all the TRC related records of the departments serving on the committee would be regarded as confidential until the exercise was completed …. The government is currently engaged in an exercise of policy-formulation regarding the recommendations of the TRC; it is also a matter of public record that legal challenges regarding the finalization of the report of the TRC are presently being considered by the courts. I therefore see no reason to query the opinions of the NIA and to overrule the decisions of the DG and the National Archives, which are based on the advice they received from the NIA and other departments of government.[39]

SAHA appealed to the High Court. The issue in question was whether the threat to the security of the country was sufficient to warrant refusal. With regard to the records relating to transfer of the TRC archives, the National Intelligence Agency, upon an identical request, granted access to its own correspondence, despite purportedly recommending that all documents be confidential until the transfer took place. In regard to the National Archives' efforts to follow up on TRC recommendations, it was not apparent how disclosing related records, which could cover discussions with other public bodies regarding the development of measures to make apartheid era records accessible, could prejudice national security. The application of this and a number of exemptions over the course of the dispute ultimately appeared to be a tactic to avoid disclosure during a period in which relations with the National Archives were particularly fraught.[40]

The exemption was also relied upon to refuse access to five and mask three of the military intelligence record listings that were withheld from the TRC. DOD argued that the records had only been downgraded to 'secret'.[41] When SAHA appealed, arguing that DOD had not specifically demonstrated how, if at all, the exemption relating to the defence of the Republic applied and that it was inconceivable that the department could not mask exempt information in the listings, DOD argued that the group 6 list contained information relating to 'military tactics or strategy or military exercises or operations undertaken in preparation of hostilities or in connection with the detection, prevention, suppression or curtailment of subversive or hostile activities'.[42] Following SAHA's appeal to the High Court in June 2002, DOD conceded that the list could be released with redactions.

Efforts during this period to access the files referred to in the listings also had mixed results. Access to 22 files relating to anti-conscription activities during the apartheid era was refused on the basis that disclosure would cause prejudice to the defence and security

of the Republic,[43] but when SAHA appealed, they were released (with excisions).[44] Again, in 2003 DOD refused access to files contained in group 5 on the basis that they would reveal the location and identities of sources that could endanger their physical safety,[45] military tactics that are still being used[46] and more generally intelligence-related information used for the defence of the Republic.[47] In this case, DOD also determined to transfer the entire set of group 4 records to Zimbabwe (discussed later). At the time of writing, the matter was on appeal in the High Court.[48]

In four of six DOD cases that have been appealed (excluding the matter currently before the High Court), SAHA was granted access, albeit in some instances with information redacted. This should lead us to question whether DOD has appropriately applied the exemption in all cases, as it appears to be a default application without consideration of severance. What these cases also reveal is that, like the reliance upon its agreement with Israel, DOD continues to rely on informants secured and relationships established and negotiated by the apartheid government. While these relationships may be legitimate and in the best interests of the Republic, failing the commission of a breach of the law (which may arguably be the case if the agreement or relationship contravenes international sanctions) or a threat to the safety of persons or to the environment, PAIA does not provide a mechanism to interrogate whether this is so.

v. Commercial information and economic interests of the state

These detailed exemptions aim to protect the economic interests and financial welfare of the Republic and the commercial activities of the state.[49] In the instance of information related to commercial activities, it may not be refused if it is already publicly available, the body that owns the information consents, or its disclosure would reveal a serious public safety or environmental risk. In March 2004 SAHA submitted two requests to Eskom for its Service Delivery Framework Agreement with the Department of Minerals and Energy, the Department of Public Enterprises and the South African National Civic Organisation, and a research document titled Soweto Socio-economic Research prepared by EON Consulting.[50] Both requests were refused on the broad basis that disclosure of the records would damage the economic interests of the state.[51]

SAHA was forced to appeal on each of the limbs of the provision. SAHA contended, among other things, that harm was unlikely and could not reasonably be expected, given that some of the subject matter was publicly available, and that, since Eskom has a monopoly on the supply of electricity, it has no competitors that could use the information to the organisation's disadvantage. Of greater importance, however, was the fact that the agreement had been cited many times as authority for actions regarding the provision of electricity, including those with respect to debt write-offs and the installation of pre-paid electricity meters. The documents therefore relate to decisions that are administrative decisions under the Promotion of Administrative Justice Act No. 3 of 2000, which requires

affected parties to be afforded an opportunity to comment prior to decisions being taken; failure to disclose may be in breach of these requirements. As a consequence, SAHA alleged that the public interest override compels disclosure in that the agreement and research are likely to reveal limitations on constitutional rights such as health, housing and education where it deals with disconnections to schools, homes and medical centres; the installation of pre-paid meters; and the collection of debt. Eskom subsequently released both documents without masking.

In a later request for access to a report entitled Economic Project Evaluation July 2001: A Macroeconomic Impact Study on the Production of Pebble-bed Modular Reactor and Fuel Plant, the company Pebble Bed Modular Reactor (Pty) Ltd (PMBR Ltd) refused the request on the basis that it formed a material part of its business case and the report's release would cause harm to its commercial and financial interests and put it at a disadvantage in contractual and other negotiations, and may prejudice it in commercial competition.[52] Unlike Eskom, PBMR Ltd is competing in the international arena for the sale of nuclear technology and therefore had a legitimate interest in protecting its ability to compete. Nevertheless, the title of the report indicated that it dealt with matters other than internal financial implications.[53] It appeared to contain information regarding the impact of the establishment of the pebble bed modular reactor and fuel plant on the economy and the ability of the company to deliver electricity supply, and therefore must have considered financial impacts greater than the pricing or cost concerns of PBMR Ltd or the ability of the company to compete.[54] Given the limited information available about the report, it is not possible to say with any certainty that this exemption should not have applied. This is particularly so given that the term 'commercial and financial' has a broad scope.[55] SAHA also appealed to the reason of the decision maker in arguing that, in releasing the report, he/she would contribute to a more rational and informed public debate. PBMR Ltd, however, was not convinced and sought further justification. SAHA did not have the resources to litigate.

The utilisation of the exemption has, in these two cases, appeared to attempt to camouflage the decision making of parastatals regarding the provision of an essential utility. Earthlife Africa in its case against Eskom has faced similar opposition in relation to minutes of meetings of the Eskom board. In the judgment of the High Court, Acting Justice Fevrier held that the 'expert' testimony of the managing director of the Resources and Strategy Division of Eskom provided sufficient evidence that all the minutes contained trade secrets and information that was confidential, and that Earthlife, despite having no detailed knowledge of the information contained in the records, failed to provide sufficient expert knowledge to rebut.[56] The decision was fundamentally flawed in many respects, particularly in that the onus was placed on Earthlife to disprove the application of exemptions. Nevertheless, the protection afforded the commercial enterprises of publicly owned companies exercising public functions is concerning, particularly given recent

developments regarding the failure to meet demand for electricity and the health and environmental concerns regarding nuclear energy proposals.

Challenging cases such as these against profit-making enterprises with resources to litigate is particularly difficult for the people who are most affected. The Fevrier decision has now been overturned by agreement in the Supreme Court, and the parties must send the question of whether the documents contain trade secrets or other commercially sensitive information to two independent experts to report to the court. This is a promising development that has implications not only for considerations relating to trade and commercial secrets, but also for matters in which bodies apply exemptions in a blanket fashion to all records.

vi. Research information of third parties

Section 43 of PAIA protects information about research being or to be carried out by or on behalf of third parties where disclosure would be likely to expose the third party, a person working on behalf of a third party or the subject matter of the research to disadvantage. It also protects research carried out by the public body itself.

In 2004 SAHA submitted six requests to South African Breweries Ltd (SAB) for access to information regarding, among other things, the prevalence of HIV/AIDS among its workforce, access to health services and benefits by the workforce, and HIV/AIDS policies.[57] Although the requests were directed to a private body, the case nevertheless provides a useful example. SAB outsourced the provision of health and counselling services to a third party in order to maintain the confidentiality of workers and ensure that information regarding their HIV/AIDS status was not communicated to co-workers or supervisors. The company argued that to disclose the level of detail requested would prejudice its ability to maintain credibility with its employees in regard to confidentiality, and that disclosing research information or the results thereof would expose numerous parties to disadvantage and prejudice, including SAB, the third party, and employees and their families.

There is certainly legitimacy in this argument: the issue is one that is particularly sensitive and should be treated with great care. However, refusal on the basis of the need to protect research information of the third party is questionable. SAHA was requesting information regarding the prevalence of HIV/AIDS in the company, the number of workers undertaking testing and counselling, the numbers of workers who have left the company or died while in its employ, and the levels of income of workers with HIV/AIDS. While this information is likely to be collected on an ongoing basis, it is not information about research being or to be carried out by or on behalf of a third party, but information collected in the ordinary course of the implementation of SAB policy regarding HIV/AIDS. Further, the information was unlikely to have any commercial value. Currie and Klaaren state that ‘disclosure of research that is commercially valuable but which is not ultimately

intended for publication arguably does not result in any serious disadvantage to the types of interests protected by the ground'.[58]

Upon reading SAB's three-page response, a sense of concealment is not apparent: SAB was clearly attempting to demonstrate that it had a considered policy that was being implemented and was keen to ensure that worker confidentiality was not breached and thereby workers would not be reluctant to access health services offered. Nevertheless, a reluctance to probe and compare prevalence of HIV/AIDS within the company, the use of health and counselling services, and access to antiretrovirals was apparent, given that the information requested could have been released with masking.

The exemption was similarly used to refuse access to records of the Home Affairs Intervention Team, a body established within government to make proposals and establish mechanisms to rectify the numerous failures of the Department of Home Affairs (DHA) to fulfil its mandate.[59] Both these cases are an attempt to apply the term 'research' to a broad range of activities that the exemption should not contemplate. Upon a plain language interpretation, what the exemption aims to protect is research information that has an intellectual property or monetary value. The 'research' information of the Intervention Team in particular could not have such a value, given that its operations are intended to facilitate the restructuring of a department so that it fulfils its ordinary functions — information that is of no value in terms of its intellectual ingenuity or its sale. It is also interesting that DHA characterised the Intervention Team as a third party, particularly given that the other public bodies with representatives on the team had transferred identical requests to DHA, not to the head of the team itself. In any event, another public body, which the Intervention Team must be, does not fall within the definition of a third party for the purposes of the override.[60]

vii. Operations of public bodies

Section 44 of PAIA aims to protect the operations of public bodies by providing them with the discretion to refuse a request if the records contain, for example, opinions, advice, discussions or deliberations, or a report or recommendation relating to the formulation of policy or the taking of a decision. It also prevents (upon a mandatory ground) disclosure that could be reasonably expected to prejudice the effectiveness of a testing, examining or auditing procedure or of evaluative material.

In 2007 DHA refused access to records regarding its Turnaround Task Team documenting discussion and recommendations for processing asylum seeker applications. The request was refused on the basis that the records would disclose the operations of public bodies (although no further detail was provided). The Turnaround Task Team was set up to deal with the backlog of asylum seeker applications (some asylum seekers, who had applied as far back as 1997, were still waiting for a decision). The Turnaround Task Team determined, among other things, to set up a refugee reception office at Crown Mines, and

purchased additional computers and employed staff for that purpose. The backlog project, as it became known, commenced in 2005.

Given these facts, decisions must have been finalised regarding efforts to 'turn around' the backlog. Pre-decision documents are protected to permit the frank and honest debate necessary to formulate government policy. However, where a decision has been determined, the decision itself must lose its protection, as 'it does not have a deliberative character'.[61] Currie and Klaaren state that 'a pre-decision document that is adopted or incorporated by a final decision or in a finalised policy should therefore lose any protection it may have had and no longer qualifies for this ground of refusal'.[62] Some of the documents contain finalised decisions or opinions, advice, discussions and deliberations that became finalised decisions and therefore cannot be refused. The failure of DHA to provide any detail regarding what records are captured by the request or how the exemption applies to these records made rebuttal lengthy and at times vague.[63]

Public interest override

The definition of public interest tends toward a broad interpretation of matters that are of relevance to the public in that they impact upon their communal interests. The construction of public interest in PAIA, however, is narrow and restrictive: in order to override any exemption, it requires that disclosure would reveal evidence of a substantial contravention of or failure to comply with the law, or an imminent and serious public safety or environmental risk, *and* that the public interest in disclosure outweighs the harm contemplated. As noted earlier, the majority of requests made by SAHA relate to relatively controversial issues. In many cases, the records aim in the first instance to reveal evidence of contraventions of the law; arguments concerning the applicability of the public interest override are easy to construct. The public interest override is a key issue in the majority of requests, not because of difficulty in arguing its application, but because public bodies rarely apply it.

DOJ provides a key example. Almost all of SAHA's requests to the department seek records that make allegations about or reveal the commission of human rights violations. DOJ, in most of these cases, refuses access on the basis of section 34 of PAIA, the protection of privacy. In doing so it states: 'The requested documents contain personal information that implicates various third parties in alleged unlawful activities. Its disclosure could be defamatory to the individuals implicated and could also infringe their dignity which is protected under the Constitution'.[64]

DOJ, however, has never explicitly considered the application of the public interest override, which would apply in the case of the above paragraph in that the record contains information of public interest (i.e. it relates to human rights violations in the apartheid era) and may disclose a contravention of the law. In a meeting with the deputy information officer (DIO) in 2006, SAHA argued that her reasoning would compel disclosure

rather than prevent it. When questioned whether she applied the override, she stated that it is the first step she takes. Despite subsequently acknowledging that this in fact should be the final step after giving consideration to the exemptions, the DIO then refused access to Eugene de Kock's application on the same basis without mention of the override.

The issue has also arisen in the military intelligence listings case.[65] When DOD released the group 22 listing, it had been heavily masked on the basis that it cited names of projects and countries, and that disclosure of these names would reveal countries visited by Armscor and thereby their involvement in arms deals when international sanctions were in place against South Africa. DOD stated that, prior to the start of these projects, the parties involved signed international agreements that are still in place. They therefore reasoned that section 37, which prevents disclosure of information subject to confidentiality agreements, prevented access. DOD also masked the names of private firms that dealt with South Africa during this time on the basis that their disclosure might be expected to put such firms at a disadvantage or negatively prejudice future contractual agreements. DOD failed to consider that the engagement by these states and firms was in contravention of international law while international sanctions were in place, and that therefore the first limb of the public interest override was satisfied. In effect, the department was avoiding jeopardising relations developed by the apartheid government. SAHA appealed and, in a rare reconsideration on the grounds of the public interest override, DOD granted access. SAHA requested confirmation that no firms' names had been redacted, as none were revealed in the 'unmasked document', but did not get a further response from the minister.[66]

The contention that the failure to implement the override is experienced across the board can be evidenced by the statistics released by the SAHRC in its yearly reports to Parliament.[67] Across the period 2002–06, 1,997 out of 64,208 reported requests were granted on the basis of the public interest override. The statistics are somewhat skewed, however, by the inclusion of requests reported by SAPS, which constitute 55,027 of the total: excluding SAPS, the figures show that the override was applied positively in 79 of 9,181 requests; in other words, in less than 1 per cent of cases.[68] While reporting to the SAHRC is fairly minimal, given that bodies that actually report to the SAHRC are more likely to collect accurate statistics, they can provide some measure to show that where the override is applied, it leads to access in only a few cases.

Aside from its limited explicit application, the override raises the following issues. Firstly, the limitation in the first limb excludes records that may reveal the implementation of a practice, for example, that is contrary to government policy and may significantly impact upon access to essential services by the community. Secondly, while the second limb includes the term 'public interest' as a requirement, it fails to actually define it or to provide any means to measure whether it outweighs the harm contemplated by the exemption. And thirdly, the provision imposes the burden of demonstrating that the

document would reveal evidence of a contravention of the law or a safety or environmental risk on the requester. It is not feasible to argue that records may provide evidence of a contravention of the law when, in some cases, it is not known which records relate to the request. SAHA has argued that, in accordance with constitutional interpretation,[69] the provision should be read broadly and understood to require requesters to demonstrate that the document may provide any evidence in supporting a contention of illegality or breach of a legal duty. Without judicial precedent, these arguments are simply ignored.

The limited application of the override is an issue that is only remedied through appeals; however, its limited scope could be resolved through amendment to return it to its original formulation in the Open Democracy Bill, where it was a simple public interest test that applied to a broader range of interests; that is, to matters of public interest that do not necessarily relate to contraventions of the law, but are of substantial interest to requesters who aim to ensure that the rights of citizens are being sufficiently represented and upheld.

Box 6.3: Severance

While public bodies have been reluctant to utilise severance, particularly during the first few years following the enactment of PAIA, the key issue, however, seems to be one of consistency. Pollecut notes that DOD mistakenly granted access to a file; SAHA returned the document and its subsequent appeal was refused.[70] Having had the benefit of viewing the file prior to returning it, it was apparent to SAHA that the names that it revealed could have been easily redacted; however, it did not have the resources at that time to litigate.

Some years later, in 2005, DOD released huge volumes of records rather than allowing inspection, because it determined a need to mask the files. The masking undertaken, however, was excessive; the department masked names such as the name of a minister of defence, and the name of an advocate in litigation had been masked, but not the name of the attorney. In a discussion with the Documentation Centre in 2005, DOD acknowledged the problem and laid the blame on the minister for failing to designate sufficient funds to employ and train permanent staff. The National Archives has also adopted an inconsistent approach. In 2003 it masked around 90 per cent of the security legislation directorate files of Michael and Shulamith Muller (making the document worthless in terms of revealing anything substantive about the persons or the monitoring of them),[71] but refused access to security police lists on the basis that the file numbers would disclose information that was subject to the privacy exemption (and what is presumed to be the identity of informers).[72]

There are, however, cases in which large-scale masking is essential. In 2002 SAHA assisted researchers for the Swiss National Science Foundation to obtain access to information regarding Swiss–South African military relations from a number of bod-

ies, including Armscor. After considerable difficulty in eliciting a response — it first ignored the request and then attempted to transfer it, during which time it determined to treat every written inquiry regarding its progress as requests pursuant to PAIA in themselves, then dismissed them as frivolous and vexatious — Armscor released the records, heavily masking the names of third parties. It was apparent to SAHA, however, that Armscor had considered the application of the third-party notification process and determined not to apply it, as it would require Armscor to contact all third parties involved since 1969. In this instance, masking, while subject to challenge on the basis of the public interest override, was accepted due to the practical and legal challenges involved in contacting a large number of third parties.

Enforcement mechanisms

PAIA provides cumulative appeal mechanisms against refusals of access; the application of fees; the failure to respond (i.e. deemed refusal); decisions to extend time periods; and, in the case of affected third parties, the granting of access.[73] Upon any of these events, a requester is entitled to lodge a written internal appeal to the minister of the department or to the head of the public body (provided that the body is not a type (b) public body; that is, a private body exercising a public function). Requesters also have the option of complaining to the public protector or the SAHRC. If unsuccessful, the requester's only recourse is to lodge an application in the High Court for relief.[74]

In her chapter discussing the Nuclear Weapons History Project, Gould notes that when SAHA requested a report by Dr N. von Williegh from the International Atomic Energy Agency (IAEA), the Nuclear Energy Corporation of South Africa (NECSA) irritably responded that it was waiting for clearance from IAEA to release it, and that the Department of Minerals and Energy had instructed that the minister must approve all responses. Despite numerous requests to respond and complaints to the SAHRC and the public protector, no response was received. Due to the classification of NECSA as a type (b) public body, SAHA did not have the right to submit an internal appeal. Its only option was to apply to court to challenge the legitimacy of IAEA's intervention, the minister's need to approve release and the ultimate failure to respond. Given the numerous refusals that were received pursuant to the project and the cost burden of litigation, SAHA was not in a position to take the matter further. The barriers to and limitations of pursuing access through the prescribed appeal mechanisms highlighted by this case have had a significant impact on the right, largely for the following reasons:

- Independent regulators have failed to respond to complaints and have not taken the proactive steps necessary to assist requesters with legitimate disputes.
- The lack of independent regulatory intervention following the internal appeal process allows decision makers to refuse access or fail to respond with

the knowledge that only a select few requesters will proceed to litigation due to prohibitive costs, lack of resources and the failure of independent regulators.
- Where requests do proceed to court, bodies often settle prior to a precedent-setting decision.

Failure of regulatory authorities

The public protector and the SAHRC have legislative obligations in relation to the regulation of PAIA. The public protector is responsible for investigating and mediating complaints of maladministration against public bodies only.[75] The SAHRC is responsible for, among other things, monitoring and education, receipt of manuals and annual statistical reports from public and private bodies, and assisting requesters to exercise their right of access.[76] Section 8 of the Human Rights Commission Act No. 54 of 1994 gives the SAHRC the power to endeavour to resolve by mediation, conciliation or negotiation any dispute or to rectify any act or omission in relation to a fundamental right; any recommendation made as a result is not binding on the public or private body. The intervention by these bodies is intended to provide requesters with a more cost-effective means of resolving disputes.

In June 2003 SAHA was commissioned by the SAHRC to conduct research regarding the role of the commission as a champion of the right of access to information. The research found that persons interviewed for the purposes of the research opined that the activities undertaken to promote the objects of PAIA had not resulted in anything approaching a decisive and cultural shift in the public (or private) sector towards open and transparent governance. This lack of impact must be partly the result of a failure by the SAHRC to take a proactive role in complaints investigation and mediation. The SAHRC failed, until 2007, to follow up on any SAHA complaints in any meaningful way.[77] Despite failing to investigate or finalise complaints, the SAHRC did not include the complaints in its annual report and stated that it had no complaints still under investigation.

The public protector is mandated to have a greater enforcement role, in that he is responsible for investigating and mediating complaints of maladministration; however, his intervention has been similarly weak.[78] Despite provision in PAIA for the public protector to report to the SAHRC, SAHA found in its reserch regarding the role of the SAHRC in championing PAIA that there was no ongoing contact between the commission and the public protector regarding PAIA cases,[79] and neither reported referring any cases to each other nor receiving such referrals. In 2005 SAHA was advised by the SAHRC that, upon receipt of the complaint about NECSA, it would contact the public protector to determine what steps it would take: if the public protector was not intending to intervene, it would assist in the matter. SAHA was not informed about the precise arrangements; however, neither body took any steps to facilitate negotiation or mediation of the dispute, despite SAHA raising the lack of response two years on.[80]

There are two justifications put forward by the SAHRC for its limited intervention. Firstly, it states that it is severely under-resourced. The PAIA unit established by the SAHRC in June 2002 was severely underfunded from its establishment. The extent of this under-resourcing is demonstrated by the SAHRC in its 2002/03 annual report, in which it states that implementing its obligations to produce a guide to PAIA in the various languages and forms would cost a total of ZAR 2 million, leaving ZAR 0.3 million to conduct education and training, monitor implementation, and provide assistance to requesters. The commission consequently recommended amending the regulations to provide for a 'limited but effective' distribution of the guide.[81] The situation did not improve in the 2003/04 reporting period, when the guide was granted only 1.5 per cent of the SAHRC's total budget, a mere ZAR 2.3 million.

Secondly, the commission argues that the weak enforcement power in PAIA has severely impeded its ability to act. The enforcement power contained in PAIA is weak in that it is a power to recommend to a public or private body that the body make such changes in the manner in which it administers the Act as the SAHRC considers advisable,[82] and it couches the commission's roles with caveats in terms of its available resources.[83] It also imposes little obligation upon public and private bodies to engage with the commission regarding complaints, in that it states, 'if appropriate, and if financial and other resources are available, an official of a public body must afford the Commission reasonable assistance for the effective performance of its functions in terms of this Act'.[84]

I make two points to rebut these justifications. Firstly, the PAIA unit is not entirely disconnected from the other units within the commission. The Legal Department, responsible for dealing with complaints and the conduct of mediation, negotiation and litigation, is tasked with intervening in cases and assisting complainants to resolve disputes. The failure of the SAHRC to take an active role in disputes and litigation regarding PAIA cannot therefore be solely one of under-resourcing of the PAIA unit, but must be ascribed to its limited priority in terms of its wide range of legislative obligations. Secondly, the SAHRC has failed to acknowledge its general powers under section 8 of the Human Rights Commission Act; in its 2006/07 report it stated that 'due to [its] lack of powers in [PAIA] to mediate, this is provided only if the two parties agree to such mediation'. The permissive wording in PAIA has allowed the commission to take a very soft approach to promotion and enforcement, with the result that it fails to be a catalyst for the resolution of disputes and access to records.[85]

The work of the SAHRC in promotion and education has increased in recent years (see Box 6.4), raising the potential to elevate the profile of PAIA and DIOs, and achieve greater consensus on not only what is required to implement PAIA, but on the interpretation of provisions. The limited role of the SAHRC in enforcement to date, however, has the effect of lessening this potential; without consequences, some public officers and bodies do not have the impetus to implement or appropriately apply PAIA.

Box 6.4: Deputy Information Officers' Forum

Over the last two years the SAHRC has attempted to raise the profile of the right of access to information held by government bodies by establishing the Deputy Information Officers' Forum. Through yearly meetings and an electronic discussion forum, the project aims to address issues in the implementation of PAIA and the lack of awareness of PAIA obligations by:

- sharing information;
- raising awareness;
- advising DIOs of developments and best practice; and
- building capacity within bodies.

It remains to be seen what impact the forum will have on the implementation of PAIA within bodies and on facilitating access to information.

In addition to the forum, the SAHRC co-hosts the Golden Key Awards, which aim to recognise the exemplary work of particular public and private bodies, DIOs, NGOs, individuals and journalists in using or complying with PAIA. SAHA was awarded the Golden Key Award for the best use of PAIA in 2006.

Deterrent effect of appeal mechanisms

The majority of requests submitted by SAHA are refused or ignored in the first instance. In the absence of facilitative relationships, such as that established with SAPS, where refusals may be negotiated or reconsidered, the only available remedial recourse is through an internal appeal, the intervention of the SAHRC or the public protector, and litigation.[86] The minister or head of a body often refuses the request again on appeal; he/she does so knowing that the majority of requesters are not in the position to litigate due to prohibitive court costs and that independent regulators are unlikely to take steps to intervene. Although SAHA may often rely on pro bono legal assistance, the risk of the imposition of a costs order, as occurred against Biowatch in seeking access to information regarding decision making in granting permits for the production of genetically modified crops,[87] makes litigation an option in only a limited number of cases. This allows bodies not committed to access to disregard their obligations unless court proceedings are instituted.

DOJ provides an example of how the available appeal mechanisms deter bodies from making sound decisions in the first instance. Given that SAHA ordinarily has more than one request with the department at any one time, it is impossible to litigate upon every refusal; the department can therefore wait for litigation before considering the merits of requests.[88] Such conduct is exacerbated when requesters are conducting projects requiring the submission of numerous requests to a number of bodies. When more than one body

ignores requests, options for appeal become limited. For example, in the nuclear energy project, SAHA submitted requests to the Department of Minerals and Energy (eight), the NECSA (27) and the National Nuclear Regulator (seven). These bodies simply ignored the requests on first instance and on internal appeal (where submitted), knowing that it would be impossible to litigate in all of these cases. Such cases become particularly difficult when they are deemed refused, as without a response it may be impossible to determine whether the records sought exist or whether legitimate grounds may be relied upon to refuse access. The requester is then left in the position of determining which requests and which bodies may provide the most useful information and the greatest chance of success.

Lack of precedents

SAHA has resorted to litigation in around ten cases, resulting in seven sets of proceedings. In all finalised cases,[89] settlement occurred prior to hearing.[90] While the primary objective of litigation has been to secure access, a key goal has been to secure a judicial precedent that will provide guidance on the interpretation of PAIA. This is particularly so in the cases against DOJ, which repeatedly refuses access to TRC records unless SAHA litigates.[91] The utilisation of litigation, while based on sound strategy and while securing access, has been very costly[92] and has not led to long-term solutions in the form of guiding and binding precedents.[93] This is largely because litigation is being used as a method of negotiation and a means to force bodies to consider the merits of requests, rather than as a means of obtaining clarity on interpretive issues.

Proposals for reform

The lack of an intermediary process between internal appeals and litigation has led to the pursuit of cases by requesters that public and private bodies do not intend to vigorously defend and the non-pursuit of information that should be in the public domain. An independent arbiter with the power to make binding orders following the refusal of access at first instance or on appeal would require bodies to consider the merits of requests prior to litigation or institute applications to appeal decisions, leading to greater engagement in the early stages of the request. Requesters would also benefit from a cheap, accessible and binding appeal mechanism.

The Open Democracy Bill, the precursor to PAIA, provided a comprehensive approach to the regulation of access to information, the protection of privacy, whistle-blowing and meetings of open government, and recommended three levels of monitoring and enforcement: an open democracy commission tasked with promotion, education, the provision of assistance and monitoring; information courts tasked with adjudicating disputes, staffed by High Court judges, but operating under rules designed to ensure that they were accessible, cheap, informal and expeditious; and the High Court, to which decisions of the

information courts could be appealed. These recommendations were rejected by cabinet.[94]

When it became apparent within the few years following PAIA's enactment that the appeal mechanisms were ineffective,[95] calls were made by a number of organisations, including SAHA, ODAC and the SAHRC, for DOJ to investigate the establishment of an independent arbiter of access to information disputes.[96] The department did not respond. Cabinet had, however, referred the issue of data protection and privacy to the South African Law Reform Commission (SALRC), which, following extensive consultation, drafted the Protection of Information Bill. The Bill, and the discussion paper accompanying it, proposed an information and privacy commission tasked with obligations relating to PAIA and the protection of privacy, including promotion, education, monitoring, investigation, mediation and the issuing of binding determinations. It also proposed that the commission litigate in its own name or on behalf of individuals or classes of individuals for breaches of the Acts.

In its submission to the SALRC regarding the discussion paper, SAHA welcomed its proposal (albeit with a number of concerns regarding the reporting requirements and the lack of power to award compensation and impose fines), but objected to the granting of the additional powers to the SAHRC. Nevertheless, cabinet had, during this time, established a commission headed by Kader Asmal to investigate Chapter 9 (of the Constitution) and other institutions, in particular whether such institutions required reform and whether they could be amalgamated or streamlined. It reported in September 2007, heavily criticising a number of institutions for failing to take a proactive approach to fulfilling their mandates and recommending that all institutions be collapsed into one human rights commission to be based at the current SAHRC. The commission did, however, make specific note of the SAHRC's failures in regard to PAIA and recommended that two dedicated information commissioners be appointed and ring-fenced funds be injected by Parliament.[97] While the recommendation aims to achieve greater accountability in the administration of PAIA, it is without doubt preferable that a dedicated and independent privacy and information commission, which reports directly to Parliament rather than DOJ, be established that will not be subject to any political manoeuvring or affected by any priority decisions. It remains to be seen how the two recommendations, that of the Asmal Commission and the SALRC, will be reconciled by Parliament.

The multiple faces of information governance

PAIA does not act in isolation, but in conjunction with what may be hundreds of other enactments. A number of bodies, in particular bodies dealing with the security of the Republic and intelligence gathering, and statutory bodies, have obligations regarding the classification and dissemination of records pursuant to their own legislation. This legislation has an impact on both the procedures followed in responding to PAIA requests and the application of PAIA provisions and exemptions, creating confusion in some quarters

regarding inconsistencies among Acts.

PAIA applies to the exclusion of other legislation that prohibits or restricts disclosure if that other legislation is materially inconsistent with an object or specific provision of it; where other enactments provide a greater right of access, resort to PAIA is not necessary. Legislation that restricts the right of access can be, according to Harris and Merrett, broken down into four main categories:

i. Acts that control official information,
ii. Acts that restrict information from all sources on specific topics,
iii. Acts that regulate administrative and legal functions, and
iv. Other acts extending government power.[98]

I would add that these categories are not confined to legislation that necessarily restricts access, but can be extended to legislation that provides for a greater right of access. For example, the National Archives and Records Service Act No. 43 of 1996 provides a greater right of access under category (i) and the National Conventional Arms Control Act No. 41 of 2002 and the Inquests Act No. 58 of 1959 under category (iii).

The minister of justice was obligated by section 86 of PAIA to schedule regulations that would list enactments that provided a greater right of access, but the current minister has not done so. Given the lack of a comprehensive audit of intersecting legislation, and given that there are likely to be a large number of enactments that limit or extend the right of access, it is not within the scope of this chapter to list and discuss them all. What I aim to do, however, is to provide examples of cases where legislation has had an impact on the exercise of PAIA. These examples fall into two categories:

i. Acts that control information across all public structures or in relation to specific public structures; and
ii. Acts that relate to specific information held by specific sectors or structures.

Acts controlling access across all public spheres

National Archives and Records Service Act No. 43 of 1996

The National Archives and Records Service Act (NARSA) requires public bodies to transfer records older than 20 years to the National Archives for public access (with exceptions). This means that any records held by National Archives that are older than 20 years should not be subject to PAIA and should be freely accessible, including cabinet records. Records less than 20 years old should be requested pursuant to PAIA, unless they are cabinet records, in which instance access may only be given by special permission

of the national archivist. Prior to the enactment of NARSA and the constitutional right to freedom of information, access to records in the National Archives was only allowed where they were 30 years old, unless the minister of education withdrew the right of access on public policy grounds. The lack of definition of 'public policy' allowed arbitrary restrictions to be enforced, such as the restriction on access to records less than 50 years old of the governor general, the state president, the Public Service Commission, the commissioner of police, Inland Revenue and DHA, and on post-1910 records of the Executive Council, the prime minister, the Department of Foreign Affairs and the Department of Information.[99]

Harris and Merrett note that, even though 2,372 requests out of 2,381 were granted in the period 1980–90, the room for secrecy illustrates that 'the grounds on which public policy restrictions can be applied [should] be established in law'.[100] The enactment of NARSA shortened the access time period; however, it still allows the national archivist to exempt any government body from the a provision of the Act (upon authorisation of the National Archives Advisory Board, which comprises six persons appointed by the minister of arts and culture and which may be dissolved by the minister on 'any reasonable grounds'), or defer access.[101] While this is a great deal better than the pre-NARSA enactment, the room for secrecy remains; this is concerning, given that the national archivist has been less than active in ensuring that apartheid records are transferred to the National Archives or in facilitating access to such records.

Pigou notes that in 2001 SAHA submitted a request to the National Archives for access to correspondence documenting its dealings with the TRC and other parties in relation to the archive of the TRC.[102] After a number of internal appeals relating to access to 'classified' records, the national archivist, Dr Graham Dominy, stated:

> Your most recent requests for access are being referred for legal advice as there is a lack of clarity between two pieces of legislation, namely the National Archives Act and the Public Access to Information Act (PAIA) [sic] .... Please note that a submission has been made requesting that the National Archives be considered a public body in terms of PAIA. However, the Minister of Justice has not yet approved it. There may therefore continue to be delays in dealing with PAIA requests until this matter has been finalised.[103]

Upon a later request for the Defence and Aid file of the former Directorate of Security Legislation,[104] in which SAHA challenged the national archivist's request for an affidavit of authorisation from a defunct organisation on the basis that it had 'been given access to a number of [the] files in the past without having to make a request in terms of the PAIA', and that 'PAIA is there to be used as a last resort when the file is not open to the public and if access cannot be secured using another piece of legislation',[105] the national archivist stated:

> I regret any inconvenience you may have been put to. The relationship between the publication of the National Archives Act and the application of the Promotion of Access to Information Act does have grey areas and we are investigating how to resolve the issues on an on-going basis. Generally, but not in every instance, the Archives Act applies to records that are older than twenty years, and which are in the National Archives, and PAIA applies to more recent records and obviously to accessing records in offices of origin. I have instructed that your complaint be investigated and I will let you know the outcome as soon as possible.[106]

Whether or not the reliance on inconsistency at that time was legitimate is questionable: I would chance that it is a misconstrued attempt to avoid disclosure under PAIA. The National Archives is established pursuant to statute, indicating it may be a 'type (b)' public body;[107] however, it sits within and reports to the Department of Arts and Culture, and is in fact considered part of that department and therefore a branch of a public body in the ordinary sense (and in terms of part (a) of the PAIA definition). In any event, the distinction only affects the appeal process and has, to all other intents and purposes, no practical effect. The body is required to consider access in terms of the prescribed exemptions and exclusions and no other external grounds, and is required to respond within the prescribed time periods.

Contributing to the response of the National Archives may have been the neglect on the part of DOJ to schedule Acts that provide for a greater right of access. Nevertheless, section 86 of PAIA states that, until the amendment of the Act, where any other legislation not referred to in the schedule provides for access to a record of a public or private body in a manner that is not materially more onerous than the manner in which access may be obtained in terms of the Act, access may be given in terms of that legislation. Accordingly, given that the National Archives Act provides for a less onerous right of access, its operation should not be precluded by PAIA. The national archivist noted this in his letter; however, he did not go on to specify where he believed the 'grey areas' lay.[108]

Box 6.5: Cabinet records

An issue of particular concern is that of cabinet records, which are governed by the National Archives Act, but cannot be accessed pursuant to PAIA. In 2007 SAPS refused access to documents on the basis that they were cabinet records to which PAIA does not apply. It took some months, and consultation with the National Archives by SAPS, before SAPS agreed that, given that the records were more than 20 years old, they should in fact be in the custody of the National Archives, and if they were, SAHA would be granted access.[109]

In October 2002 SAHA requested access to cabinet records that were less than 20 years old, in particular those relating to the 1990–94 negotiation period. SAHA reasoned with the national archivist that these records were 'public records of great historical value which should be firmly in the public domain'. Although ordinarily

archival legislation allowed for the release of such documents after 20 years, legislation empowered the national archivist to release these documents (as well as State Security Council documents from the 1980s) on a discretionary basis before that time.[110] The request was denied, having been 'duly considered and the relevant bodies … consulted'. It was explained that 'the National Archives is considering a structured approach to the question and it is not in a position to respond to ad hoc requests at this stage'.[111] Over four years later, these records remain closed, and no details of a 'structured approach' to addressing this matter have been publicly divulged.

Protection of Information Act No. 84 of 1982

The Protection of Information Act is an apartheid government enactment that aimed to restrict access to information on public affairs and control the extent to which government employees could disseminate information. The Act was the result of the government's obsession with secrecy:

> Every bureaucrat was graded in terms of a rigorous security clearance procedure, the grading level determining an individual's right of access to information. The procedures meshed with a pervasive system of information grading — commonly referred to as 'classification' — defined by perceived security risks. The Protection of Information Act, and various legislative forerunners, promised severe punitive action against individuals defying the system.[112]

Despite its apartheid origins, the legislation is still in force; that is, the threat of punishment for unauthorised disclosures remains. This means that it is being utilised to both classify and declassify records, and prevent government employees from accessing information for which they do not have the appropriate security clearances and from blowing the whistle on matters of public interest.[113] This has a number of implications for PAIA.

Firstly, Pollecut notes that the declassification of files in the archives is driven by requests. In the absence of an information audit, there has been little, if any, proactive declassification of records. As a result, requests for military and other intelligence records subject to classification under the Protection of Information Act are substantially delayed until declassification is undertaken. Secondly, the Protection of Information Act has been used to prevent access on the basis of classification. Classification was cited as a reason for refusal by the National Archives, in conjunction with the National Intelligence Agency (NIA), following requests for access to TRC records documenting their chain of custody and records related to TRC recommendations discussed by Pigou.[114] These were refused on the basis that they had purportedly been classified as 'confidential' by NIA. It was not clear whether the classification was ad hoc, specifically subject to the classification provisions of the Protection of Information Act, or occurred following submission of the request. Subsequently, the national archivist clarified that he was refusing access in terms of sections 37 and 38 of PAIA.[115] The correct and constitutionally consistent interpreta-

tion of the intersection of PAIA with the Protection of Information Act is that PAIA is paramount, and that information should only remain classified where it can be exempted from disclosure pursuant to PAIA.[116]

Thirdly, the extension of classification to records that do not relate to national security but to 'sensitive' matters of public interest and therefore to records of the entire public sector may be unconstitutional. According to Klaaren, this is largely because the 'military information security policy has been crudely and inappropriately adapted to cover the entire public sector'.[117] This is shown in the case of the National Archives, which used classification to withhold access to its own records, records that are not traditionally defined as relating to national security.

In February 2003 the then minister for intelligence, Lindiwe Sisulu, established the Classification and Declassification Review Committee (CDRC), which was tasked with developing criteria for the protection of information, which included a review of relevant legislation such as the Protection of Information Act and its implementing policy, the Minimum Information Security Standards. Submissions to the committee by SAHA and other organisations and individuals made a number of recommendations regarding the need for an archival audit and proactive declassification, full access to cabinet records, the release of apartheid operatives from secrecy undertakings, and the replacement of the Protection of Information Act with information protection legislation that is consistent with PAIA and presumes disclosure.[118] Several submissions also argued that apartheid era records should be open; the National Security Archive[119] suggested that the German model, where the East German Socialist Unity Party files were opened, should be adopted and that particular regard should be given to records that relate to human rights abuses.

There were concerns early on about the extent to which the CDRC would bring about any substantial change. Harris, Hatang and Liberman state:

> There is cause for scepticism … that this initiative will significantly liberalise secrecy policy. It is led by the NIA, which has consistently taken an obstructionist position. Besides its efforts to obstruct the TRC inquiry into project coast … (i.e. it tried to prevent TRC access as it didn't have the required security clearances), the NIA also illegally took possession of thirty-four boxes of sensitive TRC records, concealed their whereabouts, and then blocked access to them.[120]

Despite the fanfare with which the CDRC was launched, the submission of its report and recommendations received very little public attention, and the momentum of the process appeared to peter out. Indeed, the recommendations were effectively mothballed and only dusted off again during 2006, when the current minister of intelligence, Ronnie Kasrils, decided to revisit the issue by establishing the Intelligence Review Commission.[121] The Protection of Information Act therefore continues to play a role in restricting access to records.

Acts regulating discrete collections

Promotion of National Unity and Reconciliation Act No. 34 of 1996

The Promotion of National Unity and Reconciliation Act (the TRC Act) regulated the confidentiality of information collected by the TRC in the course of its investigations and the conduct of its hearings by the Human Rights Violations, Amnesty and Reparations Committees. In summary, the Act states that records collected during investigations and submitted to the TRC by perpetrators and victims of human rights violations were confidential; however, confidentiality lapsed when a hearing relating to such a violation commenced.[122] Any records of in camera hearings retain confidentiality until the TRC determined otherwise.

I have discussed the application of the PAIA exemption that restricts access to records that are subject to a confidentiality agreement or which were provided in confidence. In these cases, DOJ in effect aimed to rely on the provisions of the TRC Act, in particular section 19(8)(a), which states that applications are confidential. In the Cradock 4 case, while the department made no specific references to subsection (b) of that provision, which states that confidentiality lapsed when an amnesty hearing commenced unless the hearing itself was not public, it stated in its answering affidavit to the High Court that it could not say with any certainty that public hearings were in fact held (although reference to its own website or to the South African Broadcasting Corporation would have provided a simple and quick means of establishing that they in fact were).[123] It then relied upon the provision to apply the PAIA exemption relating to confidential information to refuse access. DOJ similarly relied on the confidential status of in camera hearings (and therefore associated potential breaches of privacy and threats to the life or safety of individuals).

It failed to consider, however, that section 5 of PAIA states that this Act applies to the exclusion of any provision of other legislation that prohibits or restricts the disclosure of a record of a public or private body and is materially inconsistent with an object or a specific provision of the Act. Blanket restriction on access to in camera and public hearings of the TRC constitutes a material inconsistency with the objects of PAIA, which are, among other things, to give effect to the right of access to information by starting from the position that a record should be accessible rather than withheld. As a consequence, each and every record requested must be considered in terms of the application of PAIA, including the exceptions to the confidentiality exemption and the question of whether the information is publicly available,[124] and the applicability of the public interest override.[125]

Inquests Act No. 58 of 1959

The refusal of access to inquest records submitted as evidence in the Cradock 4 hearings also raised the issue of the application of the Inquests Act. DOJ refused access to the

inquest judgment and other materials on the bases that the 'information is personal and is protected … and disclosure could be traumatic to the victims' families and offensive to the public'. The Inquests Act provides that the record of an inquest forms part of the records of the magistrate's court in the district in which it was held, and the Magistrate's Court Act No. 32 of 1994[126] provides that records of that court are available to the public. Accordingly, had the records not been subject to TRC hearings or requested pursuant to PAIA, they would be publicly available. The fact that they were now contained in a collection of materials categorised by their inclusion in another hearing should not have imposed a restriction or a greater burden on access.

National Conventional Arms Control Act No. 41 of 2002

In 2007 SAHA was verbally refused access to the 2003/04 and 2005 annual reports of the National Conventional Arms Control Committee[127] on the basis that the information was confidential. The National Conventional Arms Control Act (NCAC Act), however, states at section 23 that 'the Committee must … present to Parliament and release to the public an annual report on all conventional arms exports concluded during the preceding calendar year'. Subsection 2 goes on to provide that, subject to the specific details that must be contained within the report, information concerning the technical specifications of conventional arms may be omitted from a report in order to protect military and commercial secrets. Furthermore, subsection 3 states that 'no person may disclose any classified document or the content thereof concerning the business of the Committee except with the authorisation of a competent authority or as required in terms of [PAIA]'.

SAHA consequently appealed on the bases that, firstly, the committee had a positive duty to release to the public an annual report that is only limited to the extent of the content included in the report; and, secondly, the provision made it clear that the annual report cannot be a classified document, as the positive duty to release cannot be overcome by the restriction on disclosing classified information. It is unclear whether the committee had thought so far as to rely upon the exemption contained in PAIA relating to confidential information; however, even if it had, PAIA should not have been used to restrict access, because the NCAC Act provides a greater right.

In light of this, and despite the reference to PAIA in subsection 3, it is questionable whether the document should have been requested pursuant to PAIA in the first place. However, the Ceasefire Campaign, which wished to obtain the report, had made a number of unsuccessful attempts to access it without resort to PAIA. The NCAC Act does not provide any means for individuals outside parliamentary structures to compel release, and therefore PAIA provides the only other viable option. Had the minister of justice amended PAIA to provide for legislation providing a greater right of access, SAHA may have faced the same difficulties with the committee; however, the argument for access would have been simpler had it been forced to litigate.[128]

Other issues

I have discussed the limitations of both PAIA and related legislation that have had a substantial impact on the extent to which SAHA has been able to access information. I would now like to turn to external factors: the destruction of records, record-keeping practices and cultures of transparency or secrecy inherent in public bodies.

PRETORIA NEWS
MONDAY SEPTEMBER 3 2007

History archive trust set for war with defence ministry

Organisation seeks court order to obtain military intelligence files

ZELDA VENTER
HIGH COURT REPORTER

The SA History Archive Trust (Saha) is set to battle it out in court with the minister of defence over access to certain information contained in apartheid-era SA Defence Force (SADF) military intelligence files relating to ties between South Africa and various foreign governments.

Saha accused the SANDF of masking the bulk of information and refusing to hand it over to them.

The minister said the files were back in Zimbabwe "where they belong" and that this was done "to prevent embarrassment to South Africa".

Saha, however, is determined to obtain a Pretoria high court order to force the government to hand over the documents.

If they had been sent to Zimbabwe, they should be returned. Saha also wants the court to order that the department declare the names and positions of the officials responsible for sending the documents to Zimbabwe so that it can take legal action against them.

Piers Pigou, Saha's director, said in papers filed before court that the archive was dedicated to recapturing the country's lost and neglected history and recording history in the making.

More than four years ago Dr John Seiler, a former professor of international studies who has since died, applied for access to certain documents from the department in terms of the provisions of the Promotion of Access to Information Act.

The defence department eventually informed Saha that eight of the 22 files requested had been declassified and the rest had to be masked. Pigou said they were told that some of the records were protected and not available for release. The records protected were described as box 260, volume 1-4, American Ambassadors 1966-1977.

Pigou said that two months later the department wrote to them stating that the archive was no longer the custodian of some of the documents pertaining to military information, as these had been "transferred to the country of origin" – Zimbabwe.

He said the department did not give any explanation for not providing the remainder of the documents requested.

Pigou said the grounds for refusing access to the protected records were that the disclosure "could reasonably be expected to endanger the life or physical safety of an individual".

It was also stated that the records contained information relating to military tactics in preparation for hostilities.

Saha expressed its concern that the records were transferred, despite the request to hand them over before the transfer. The trust also objected that no copies of the documents had been retained.

Pigou said access to information was central to meaningful participation in the democratic process. He also stated that he had reason to believe the documents were not transferred to Zimbabwe, as authorities there claimed they had not received any documents from South Africa.

But Siviwe Njikela, of the SANDF's legal services, stated that the documents were in Zimbabwe because they belonged to that country.

He said the files were official Rhodesian security force records from 1964 to 1979. They had been obtained unofficially by the SADF's military intelligence division in 1980 and kept in the archives for safekeeping.

"At the time the provenance of the Rhodesian files was not realised ... The issue was discussed and all the relevant aspects, including security, were considered. It was decided to return them to Zimbabwe to prevent embarrassment to South Africa should their provenance become known," he said.

Njikela said no court can order the SANDF to have them returned from Zimbabwe.

It is believed that the application will be heard early next year.

Figure 2. Press clipping, Zelda Venter 'History Archive trust set for war with defence ministry' *Pretoria News*, 3 September 2007.

Destruction of records: Missing, shredded or gathering dust?

The purge of public records by the apartheid state was one mechanism in a systematic endeavour to selectively write history and influence the memory of oppressed and oppressors alike. The routine destruction of sensitive records began well before the onset of the negotiation period from 1990. The destruction of records is routine practice in most governance structures and is accepted as legitimate, as states do not have the resources to retain all records. The TRC, in its final report, noted that 'the selection policies of some countries' national archives secure for archival preservation as little as 1 per cent of all state records', and that the State Archives Service[129] estimates that the policies implemented in South Africa between 1960 and 1994 secured the preservation of approximately 15 per cent of state records'.[130]

Despite the requirement to get authority from the Archives Commission from 1926 and subsequently the Director of Archives from 1979 to dispose of records, the security establishment[131] management culture was characterised by 'almost complete autonomy from the intervention of the State Archives Service'.[132] In 1978 all government departments received guidelines for the destruction of classified records outside the operation of the Archives Act, contrary to the State Archives Service standing order.[133] Harris notes that it was clear that state secrecy 'ensured that this programme was neither transparent nor accountable to the public'.[134] In 1990, with the likelihood of transition to democratic rule growing, the National Intelligence Service (NIS) adopted a more proactive approach to disposal by issuing guidelines that required the destruction of paper-based records unless there were very good reasons for retaining them, and mandated that security-relevant records were to be kept on microfilm or in electronic form where they were secure and could be easily erased. This process, sanctioned by cabinet and supported by legal opinions obtained by the State President's Office, NIS and the director general of education, was broadened into a systematic purging of all state records.[135]

The TRC investigation into the destruction of records found that blame could be apportioned to actors on all sides of the political transition: the State Archives Service, the director of archives, the African National Congress (ANC), NIA (and its predecessor, NIS), incumbent heads of the state, the cabinet, the South African Police and the State Security Council. The TRC also found that:

> By May 1994, a massive deletion of state documentary memory within the security establishment had been achieved …. The motivation for this purging of official memory was clearly to prevent certain categories of record falling into the hands of the incoming government. The apartheid state was determined in this way to sanitise its image and protect its intelligence sources. It was also apparently intent on eliminating evidence of gross human rights violations.[136]

While the TRC investigation demonstrated that a substantial proportion of public records,

particularly those related to more sensitive issues, were destroyed, the limited resources of the TRC and its reliance on the cooperation of departmental officials meant that it was not able to provide a comprehensive account of what remained.[137]

The advent of PAIA provided an opportunity for the findings and recommendations of the TRC to be tested. When SAHA set about requesting records in 2001, it became evident that the well-documented destruction of records was to become an oft-quoted reason for refusal. The greatest evidence of concealment arose in the request for access to the military intelligence lists noted frequently throughout this chapter. This raised grave concerns about the extent of destruction and the secreting of information from the TRC that were likely to serious skew the recording of events and the findings of the commission. Harris states:

> It is not clear what impact this might have had on the Commission's work. Nor is it clear whether this was an isolated incident or part of a broader pattern of obstruction. Nevertheless, it raises serious questions about the degree to which the Commission was permitted access to the records it required in order to fulfil its mandate comprehensively.[138]

This exercise of skewing the recording of history continued well past the transition period. In 2004 DOD informed SAHA and the late Dr John Seiler, the requester whom it was representing, following a request, that it had transferred the entire group 4 collection to its 'country of origin … in keeping with the archival principle that official governmental records remain the property of the originating country and its people'.[139] It was revealing that the department chose to disclose the transfer two days prior to Christmas, a time when the media and holiday goers would pay scant attention. In its answering affidavit to SAHA's application in the High Court seeking an explanation and the return of the documents, DOD alleged that it had discovered the origin of the collection in 2002 and, in a discussion among members of the Command and Management Information Systems Defence Intelligence, Military Legal Services, and Policy and Planning, the military legal representative expressed the opinion that the files should be returned to the Zimbabwean government to 'prevent embarrassment' to South Africa. DOD asserted that it 'consulted with the National Archivist',[140] but because the records were official Rhodesian documents obtained 'unofficially' by South Africa, it considered them to be outside the ambit of PAIA and the National Archives Act; an interesting, but entirely misconceived argument. If records collected through intelligence activities, whether overt or covert, escape the ambit of South African laws, then large collections of intelligence records both of the military and other intelligence-gathering bodies would escape the operation of any South African legislation.[141] The minister also argued that the transfer was in keeping with 'good archival practice', despite the fact that the office of the national archivist of Zimbabwe had not been informed of the transfer and was not aware of where the records were being kept.[142]

The concealing and retention of security police files has also been of fundamental concern. During the TRC investigation into the destruction of documents, the joint investigative team discovered a collection of South African Police records that post-dated 1990 and included:

- 11 back-up tapes of the head office computerised database (the readability of seven of these tapes was confirmed); and
- Security Branch records that fell into three categories:
  - general files, all post-dating 1990;
  - computer data tapes containing data on anti-apartheid organisations, apparently captured in the 1980s; and
  - individual case records.[143]

While access was granted to the lists of provincial records, head office and regional records could not be located.[144] After some time, SAPS advised that the paper records had been found; however, due to a lack of 'intellectual control', it was impossible to retrieve them for public use. SAPS subsequently transferred them to the National Archives for processing.

It became apparent, nevertheless, that select records had disappeared since they had been viewed by the TRC: requests submitted based on the lists of provincial office files released to SAHA in 2002 were refused by the National Archives on the basis that the files in question could not be found.[145] SAHA consequently submitted a request for updated lists of security police files to ascertain what remained,[146] but was refused on the basis that the list contained personal information. During this time, SAHA raised the location of the data tapes again with SAPS, but the latter provided a number of affidavits stating that the records could not be found and staff did not recall having ever seen them. Disturbingly, an affidavit to this effect was provided by Commissioner Roos, who was consulted some three years previously regarding the files, but stated that he 'personally never inspected the files and [was] totally unaware of the existence of the data tapes'.[147] When SAHA requested a meeting with the national archivist regarding the refusal of access to security police lists and the location of the missing security police records and data tapes, he stated that:

> I am informed that the discrepancies you have alluded to relate to the fact that the files we have in the National Archives were sent to us by the National Headquarters of Crime Intelligence. Apparently there are other fragmentary lists from other sources, but the SAPS has assured the National Archives that all files have been transferred.[148]

It is not clear, however, whether the records have actually been indexed since their transfer, nor whether the national archivist in fact knows what he holds, particularly given his

reference to being assured by SAPS that the records were transferred.

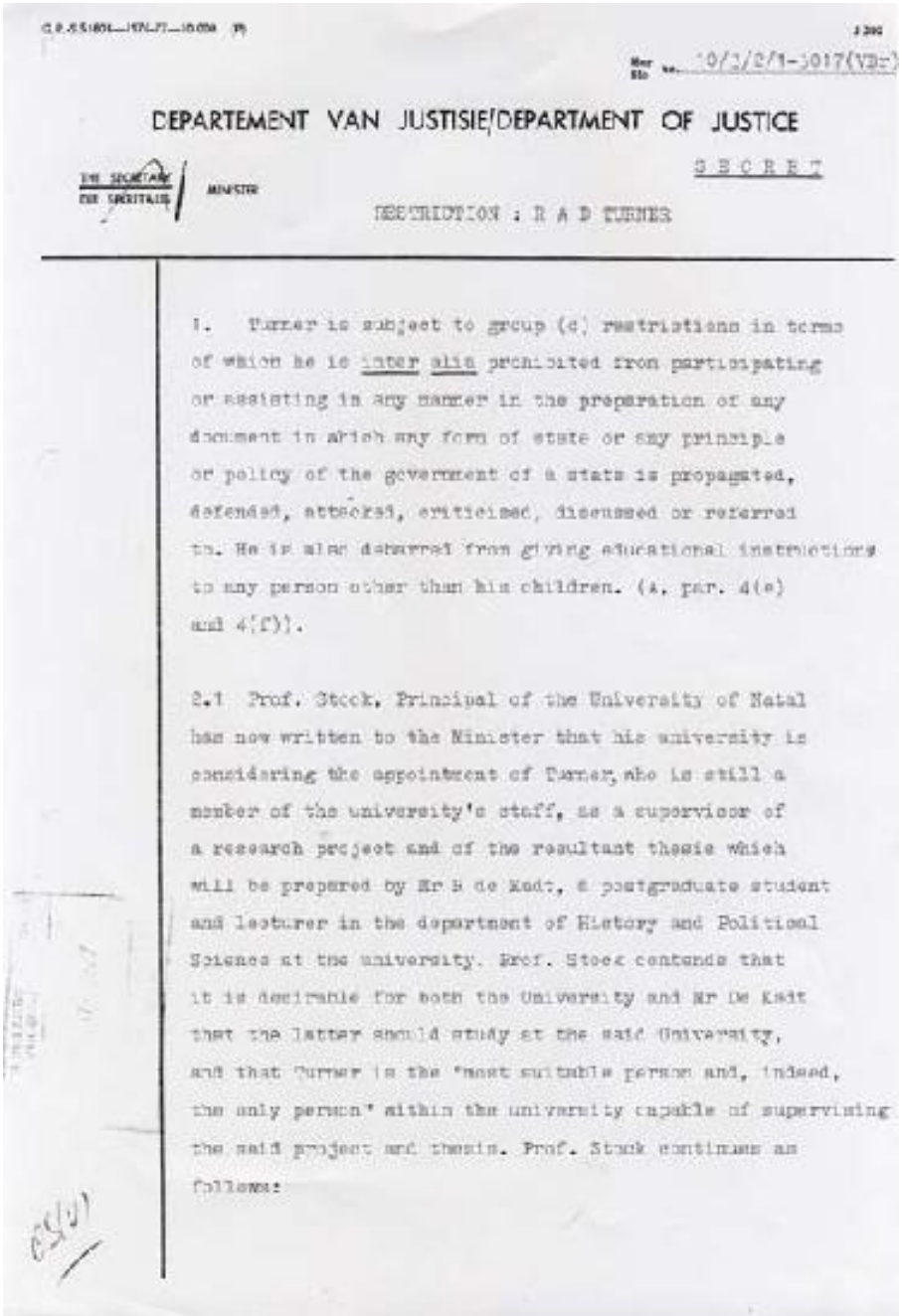
Box 6.6: NIA and Project Bible

NIA is suspected of concealing records following a request for access to records described as Project Bible. These records were referred to in the ANC's Daily News Briefing of 25 November 2003, in which it was stated that former ANC intelligence commander Mo Shaik declared that he had handed over a secret database containing information about 888 suspected apartheid government spies that was compiled as part of the ANC's Project Bible and aimed at combating government infiltration of the then liberation movement.[149] When the request for these records was refused in the first instance and then on appeal, the minister of intelligence, Ronnie Kasrils, stated that he had 'been assured by the NIA that the information you requested is not in the possession of the NIA',[150] and failed to advise whether it was in fact in his possession or whether SAHA should transfer the request.[151]

The policy and practice of the apartheid state, however, leading up to, and in part following, transition to democratic governance in 1994 resulted in the massive disposal of records characterised as sensitive and of particular importance for and interest to the newly liberated citizenry. However, these case studies provide grounds for questioning the status quo; that is, that the majority of pre-1990 records were subject to furnaces or shredders and were lost to contemporary requesters. While the case studies do not necessarily provide answers, they raise the question: were and are records being concealed, or is a lack of resources responsible for administrative inefficiency and restrictions on access? Information officers are only required by PAIA to provide an affidavit stating what steps they took to locate requested records. They are therefore not required to provide an explanation of why records could not be found or whether they have disappeared, and thereby implicate the body in negligent or wilful destruction. This is a particularly problematic limitation on access, as requesters are often completely reliant upon those of whom requests are made to disclose the existence of records.

Records management

It is commonly thought that dictatorships or oppressive governance structures such as the apartheid government are rigorous and fastidious record keepers, but that democracies tend to take a more lackadaisical approach. While we know that extensive collections of records regarding individuals were collated by the apartheid government, it cannot be said with any certainty that it was rigorous in all areas of governance. It is apparent, however, that since transition, records management has been poor. This is apparent even in bodies, such as SAPS, that fervently implement PAIA; in response to a request for access



DEPARTEMENT VAN JUSTISIE/DEPARTMENT OF JUSTICE

SECRET

RESTRICTION : R A D TURNER

1. Turner is subject to group (c) restrictions in terms of which he is inter alia prohibited from participating or assisting in any manner in the preparation of any document in which any form of state or any principle or policy of the government of a state is propagated, defended, attacked, criticised, discussed or referred to. He is also debarred from giving educational instructions to any person other than his children. (A. par. 4(e) and 4(f)).

2.1 Prof. Stock, Principal of the University of Natal has now written to the Minister that his university is considering the appointment of Turner, who is still a member of the university's staff, as a supervisor of a research project and of the resultant thesis which will be prepared by Mr B de Kadt, a postgraduate student and lecturer in the department of History and Political Science at the university. Prof. Stock contends that it is desirable for both the University and Mr de Kadt that the latter should study at the said University, and that Turner is the "most suitable person and, indeed, the only person" within the university capable of supervising the said project and thesis. Prof. Stock continues as follows:

Figure 3. Opening page of 'Secret' document, dated July 1977, from the files of the Directorate of Security Legislation at the Department of Justice regarding request to allow Dr Rick Turner to supervise a student's research project. Turner, a Durban based academic whose political involvement had led to various restrictions and banning orders in the 1970s was assassinated at his home on 8 January 1978.

Buro vir Staatsveiligheid
Bureau for State Security

PRIVAATSAK X87
PRIVATE BAG PRETORIA EHEIM

GEHEIM

Verw. Ref. B.A.24847 Vol.14 (A6)

DEPARTMENT OF JUSTICE
11-11-1976
DEPARTMENT OF JUSTICE

9 November 1976

A. Die Sekretaris van
Binnelandse Sake
Privaatsak X114
PRETORIA

B. Die Sekretaris van
Justisie
Privaatsak X81
PRETORIA

C. Die Kommissaris van die
Suid-Afrikaanse Polisie
Privaatsak X302
PRETORIA

AANSOEK OM REISGESKRIEWE: Dr. RICHARD A.D. TURNER: LEKTOR TE UNIVERSITEIT NATAL, DURBAN

A. 1. U skrywe Nr.75103/66G van 28.10.76 en my eerderagenoemde dienbrief van 8 Augustus 1974 het betrekking.

2. Dr. TURNER is op 27 Februarie 1973 ingevolge artikels 9(1) en 10(1)(a) van Wet Nr. 44 van 1950 (soos gewysig) vir 'n tydperk van 5 jaar ingeperk. Kragtens die bepalings van art.10(1)(a) word hy onder andere verbied om die landdros-distrik van Durban te verlaat.

3. Hierdie Departement is nie ten gunste daarvan dat 'n SA. paspoort aan hom uitgereik word nie.

B. Afskrif ter inligting

C. U S.1/8242 verwys. Afskrif vir u inligting.

a/SEKRETARIS VAN VEILIGHEIDSINLIGTING

JHB/ab

GEHEIM

Figure 4. Recommendation marked 'Secret' from the Bureau for State Security (aka BOSS) to the Secretaries of States for Foreign Affairs and Justice and the Commissioner of the South Africa Police recommending that Dr Turner's application for a passport be refused, which it duly was.

to records relating to Operation Crackdown, a highly publicised operation targeting organised crime, SAHA was informed that numerous records at all levels of SAPS — that is, area, provincial and national levels — could not be found despite having been created in 2005.[152] Similarly, upon a request for access to records relating to the repatriation of the remains of Saartjie Baartman, the Department of Arts and Culture acknowledged that a number of key documents had been misplaced.[153]

There are two primary pieces of legislation that impose duties on public bodies relating to record keeping.[154] PAIA provides that each public body must produce and submit a manual to the SAHRC that sets out, among other things:

- a description of its functions and structure;
- sufficient detail to facilitate a request for access to a record of the body, including a description of the subjects to which records relate and the categories of records held on each subject; and
- the latest notice regarding the categories of records that are available without the need to invoke PAIA.[155]

Manuals can play a vital role in assisting requesters to understand the functions and structure of a body and the categories of records collected; however, the lack of implementation of this requirement has been problematic (see Box 6.7).

In addition to PAIA, NARSA imposes requirements on public bodies and imparts power to the National Archives as the overseer of records management. The Act allows the National Archives to receive and comment on filing plans submitted by public bodies;[156] these filing plans provide lists of categories of records held by the public bodies and are more detailed than PAIA manuals. The Act also requires most public bodies to transfer records older than 20 years to the National Archives for retention and public access.[157] By agreement between the national archivist and the minister of a public body, records may be withheld from public access or retained by the department despite being created more than 20 years ago.[158]

A more detailed breakdown of records is provided by lists and indexes specific to collections, which may describe individual documents or the subject matter of groups of records. These lists, therefore, go a step further than filing plans in providing guidance on records that are available and may be requested. The use of lists, which ordinarily describe more discrete collections of records, has also saved considerable resources of both requesters and recipients of requests. SAHA has used lists of, for example, security police files (discussed above),[159] Security Legislation Directorate files[160] and Correctional Services files[161] to submit in excess of 360 requests[162] for access to personal files[163] on behalf of individuals or in its own right.[164] Had these lists not been available, requesters would have submitted requests blindly, increasing the number of requests submitted and

the burden on recipients of requests to consider them, irrespective of whether or not a file existed. While ideal, it is inconceivable that every public body has the resources to produce and publish lists of records for each of its collections, or that it should be required to do so. As noted in Box 6.7, the inclusion of a full filing plan within the PAIA manuals would significantly facilitate access to records. I would even submit that PAIA's requirement to provide as much detail as required to facilitate requests for information compels such publication.

The extent to which bodies are able to manage record keeping is, in contemporary times, largely determined by the extent to which bodies manage the flow of electronic information. There nevertheless appears to be resistance to the implementation of electronic record-keeping and dissemination practices within government. SAHA reported in 2001 that 'only a sliver of the state's electronic records resources is under any form of archival control' and 'an effective programme for preserving the long-term electronic memory of the state remains out of reach'.[165] In 2005 SAHA reported that, following its commissioned research on access to digital records, a DIO stated that there is no requirement for government bodies to keep electronic records, nor should they be expected to do so.[166] While roughly half of the departments were in the process of implementing or piloting electronic records management systems, in one case this was driven by the information technology section of the department without input from information and records managers.[167] In 2001 the National Archives released guidelines relating to the management of electronic records, and was apparently working with the State Information Technology Agency to develop government-wide standards for electronic record keeping.[168] A regional conference of archivists held in Dar es Salaam in June 2007[169] repeatedly raised the need for the adoption of electronic records management policies; however, the South African National Archives was not represented and appears to have done little since the release of the guidelines in 2001.

What are the remedies to these limitations? The TRC in its final report recommended that 'a comprehensive analysis by independent researchers be undertaken into both the scope and content of the remaining archival holdings of the intelligence services of all divisions of the security forces'.[170] Once completed, the TRC recommended that these documents be subject to existing archival legislation and transferred to the National Archives. Similar specific recommendations were also made with respect to the archival holdings of the apartheid SADF.[171] While the TRC limited its recommendations to apartheid records, an information audit covering all historical and contemporary records is necessary, given the poor implementation of records management policies since transition.

This would serve three broad purposes. Firstly, it would assist public bodies to categorise records and publish detailed lists of information that may be voluntarily disclosed without resort to PAIA.[172] While bodies are required to publish such lists in their manuals, the limited detail published at present results in the submission of requests that should

require a phone call or email at most. Secondly, it would provide the means to create and provide greater access to finding aids for collections of records held, minimising the resources required to be expended by public bodies in locating records subject to requests. Thirdly, it would also assist public bodies to utilise their own records, in particular historical records, in the formulation of policy. The TRC's recommendation should therefore not be limited to the former security apparatus and the SADF, and should be extended further to apply to all records held by all national, provincial and local governments.

Box 6.7: PAIA manuals

The management of records in the early stage of their life cycle is inextricably linked with and has serious implications for the retention and destruction of records, and therefore goes hand in hand with management of and compliance with an access to information regime. In recognising this, PAIA requires each public body to develop, publish and submit to the SAHRC a manual outlining its operations and categories of records.[173] These manuals can play a vital role in assisting requesters to understand the functions and structure of a body and the categories of records collected. They do have their limitations, however.

PAIA and its regulations fail to provide any direction for compiling the manuals, particularly in relation to the requirement to provide detail on the records held. Despite naming the relevant section 'Index of records', PAIA does not require the body to provide an index of records, but a description of 'subjects' and 'categories'. While it requires a description sufficient to facilitate the submission of a request, the words are imprecise, have been construed broadly and have not always assisted requesters to identify more specifically the types of records sought, their possible location within the body or the activity to which they might relate. The lack of implementation has also been problematic. The publication of manuals has been limited,[174] few are electronically available[175] and they are not regularly updated, despite changes in the allocation of responsibility for PAIA. The manuals have therefore had limited effectiveness in assisting requesters to locate records.

Both Gould and Pollecut note in their chapters in this volume that the use of lists rather than manuals in identifying records played a key role in finding relevant information. Pollecut states that, while in her particular case gaining access to indexes of specific bodies of files transferred the burden of finding pertinent information to the researcher, it also assisted in formulating more specific requests and provided an opportunity to peruse and closely examine records and uncover valuable documentation that may otherwise have been overlooked. Gould queries whether the use of lists by Sasha Suransky (see chapter 4, Box 4.1) compared with SAHA's subject-based approach led to the release of records where SAHA was refused on the basis that nothing could be found.

The importance of the availability of more detailed description is be demonstrated by requests submitted to SAPS and DHA pursuant to a project examining the history of migration policy and practice in South Africa.[176] Just prior to the commencement of the project, SAHA submitted a request for access to the filing plans of all national government departments to enable requesters to identify potential records relevant to the subject forming the request.[177] The filing plans, compiled by each department and submitted to the National Archives for comment,[178] provide a more detailed breakdown of the categories of records held by the bodies than PAIA manuals.

In 2006 SAHA obtained access to the SAPS file plan, which it used to draft a request for the inspection of a number of categories of files.[179] A project researcher was therefore able to examine the files and identify records relevant to the research. Consequently, around 5,500 pages were released. While SAPS expended substantial resources and time in preparing the records, it may have expended considerably more had the requests been drafted by subject and not by file location, while SAHA was also likely to obtain a smaller and less relevant collection of records.

By contrast, DHA did not provide access to a file plan, and a large number of requests were submitted that identified the records by subject.[180] It is apparent from the long delays in dealing with the requests and the numerous phone calls seeking clarification regarding progress that the department has struggled to understand what records are sought and move beyond identifying who is responsible for each of the requests.[181] As a result, some 11 months after the submission of the first batch of requests and following the submission of an internal appeal, DHA was only beginning to deal with the substantive issues related to them.[182] Given the obligation to produce a filing plan and submit it for comment to the national archivist, the inclusion of a full filing plan within the PAIA manual would facilitate access.

Culture and transparency

I have said that dictatorships spawn rigid record-keeping practices, and democracies a lackadaisical approach. But to what end? Rigid practices mean greater control; greater control means an increased ability to determine who knows what and when. The secrecy of the apartheid state was no secret. Clandestine operations and informers permeated both sides of the system — the oppressed and the oppressors. It was for this reason that access to information during this period was reserved solely for those who, through covert conduct, sought intelligence necessary to either suppress or resist. This culture of opaqueness and secrecy, after decades, must have become an inherent feature of the way in which government structures and liberation movements operated. What became of this culture, then, when transition to democratic governance was achieved through legislated equality and voting rights? Did the shift in the form of governance lead to a shift in mindset and a commitment to transparency?

I have stated that it was apparent soon after the enactment of PAIA that implementation was severely hampered. In its 2002/03 report, the SAHRC stated that the failure to implement the Act 'can only be attributed to the lack of commitment to the advancement of this important constitutional right'. In its submission to the Human Rights Commission, SAHA and the Public Service Accountability Monitor wrote:

> Effective and meaningful implementation is hampered by the fact that South Africans have been shaped by generations of an absence of the right to information .... Freedom of Information, as an idea and as a culture, has not yet taken root in the country. South Africans have neither the expectations nor the skills to ensure that PAIA is utilised optimally .... By and large existing officials have simply been given additional responsibilities under the Act. Few have experience and expertise in record keeping.[183]

There are four principal features evidencing this lack of shift. Firstly, bodies have failed to establish infrastructure required to implement PAIA obligations. DHA, for example, does not have a PAIA unit or budget, and in every instance relies on Legal Services to provide opinions on access; the deputy directors or their delegates to locate the records (in conjunction with information management, where necessary) and make a decision on access; and the director general to approve that decision. Following the submission of a number of requests over the period 2004–07, DHA lost requests more than once; was unable to provide details of the delegated official responsible for processing the requests; and was, until late into 2007, unable to provide any substantive responses. Needless to say, SAHA has only had six substantive responses to the 92 requests submitted since 2004.[184]

DOD also suffers from a lack of resources and infrastructure, despite the channelling of requests through its Documentation Centre: with over five million records and few permanent staff, it suffers from an overload of requests and an inability to devote considerable resources to conduct more efficient searches. When SAHA, in response to what it perceived to be an inappropriate response to a request, queried why staff do not phone SAHA to discuss problems with requests, the director claimed that, because DOD was not allocated a budget specifically for PAIA requests, staff were required to deal with them outside their normal work hours, and unless SAHA wanted a phone call at six o'clock in the morning, they would not call. The current waiting period for responses to requests is around two years.

Box 6.8: The NIA and South African Secret Service exemption

In 2003 the minister of justice granted an exemption to NIA and the South African Secret Service from compiling a PAIA manual that would set out their functions and categories of records, in terms of section 14 of the Act.[185] The ramifications were concerning: the exemption allowed these bodies to maintain a level of secrecy that PAIA aimed to surmount and would make it difficult for requesters to understand

the categories of information that may be available. The exemption has contributed to the difficulties in challenging NIA refusals on the ground that records could not be found or do not exist. When SAHA challenged the refusal of access on the basis that records do not exist, NIA officials stated that the records of NIA's predecessors, the Bureau of State Security (BOSS) and NIS were routinely destroyed through the period 1960–90, and proactive destruction from 1990 until the establishment of NIA left it with little more than boxes of microfilm that have no indexes. In a letter to SAHA dated 17 May 2006, NIA stated:

> BOSS/NIS records were subjected to a routine destruction process which began in 1982 in terms of the National Archives Act. That led to the State Archives Service investigating such destruction not only in the former BOSS/NIS but also in the following bodies: SAPS, SADF (particularly military intelligence), Department of Prison Services, and the Security Legislation Directorate of the Department of Justice. As stated in the TRC Report, Vol. 1 Chapter 9, par. 60+61, implementation of the policy gained a momentum in 1992, but reached its most intense levels in 1993. At the same time the mass destruction of records took place, embracing all media and all structures. The result of the destruction was a massive purging of the NIS's corporate memory.

It is difficult to accept that all former intelligence records were destroyed. While it is clear that large amounts of records were destroyed, the magnitude of the boxes of microfilm is not clear, and the fact that these records are not indexed makes it difficult for both requesters and NIA staff to establish what remains. NIA refuses to provide an affidavit setting out the steps it took to locate records, on the basis that it is exempted from producing a PAIA manual setting out its structure and the categories of its records, and that to reveal the steps taken to search for the records would jeopardise the security of its intelligence. It argues that the requests are too broad and vague, and that SAHA should provide it with more specific information to assist it to locate files.

In a meeting in June 2006, NIA argued that the requests are too broad and vague, and requested that SAHA provide it with more specific information to assist it to locate files. However it failed to acknowledge that information in manuals, filing plans and affidavits assists requesters to understand what records it does and does not have and to draft more appropriately future requests. Given its position concerning the provision of affidavits setting out the steps taken to locate records, it is not apparent to what extent the microfilm records are searched upon submission of a request. SAHA submitted a request for access to intelligence files concerning Hêlêne Passtoors, an anti-apartheid activist who was detained in South Africa and released pursuant to negotiation between the South African and Belgian governments. SAHA had already obtained large volumes of Security Legislation Directorate and Correc-

tional Services records from the National Archives, but NIA stated that no records could be found.

Secondly, many bodies have not appointed DIOs who are competent to ensure compliance with PAIA. These officials can in effect pose a brick wall, particularly where their superiors continue to refer complaints and appeals to them. For example, DOJ, which has dedicated infrastructure and staff, demonstrates considerable difficulties in compliance, largely due to the incompetence of the official to whom the director general has delegated his responsibility. Pigou outlines numerous disputes, noting that in all cases taken to the High Court and following the intervention of counsel, DOJ settled and granted access with costs. This is largely because the DIO fails to demonstrate the capacity for reasoned thought upon receipt of requests, and uses a template letter to respond in which the subject header is changed and reasons for refusal are removed if not used in a particular letter. As a result, records that are of a substantially similar character to those released through litigation, such as the amnesty applications of Eugene de Kock, continue to be refused. The director general has ignored requests to meet and the minister's office fails to evidence involvement or intervention at any stage of the request process. SAHA submitted a complaint to the SAHRC regarding these issues, and the minister of justice responded defensively and refused to attend a mediation.

Box 6.9: The Department of Labour

In 2005 SAHA requested access to the filing plans of all national departments to assist it to more appropriately frame requests and build on the use of PAIA manuals. The request, once transferred to all departments by the National Archives, had a mixed reception. Some departments provided access to their filing plan, some unsurprisingly advised that their plans were so outdated as to make them unusable and others simply ignored the request. The response of the Department of Labour, however, stood out.

Upon receipt of the request, the department phoned me to query it and asked why I wanted the information. I responded that I was not obliged to provide a reason for the request, but nevertheless was happy to confirm by email that I aimed to use the plan to assist with future requests. A few days later, I received another phone call from the department querying why I wanted the information. I pointed out that I had already discussed this with someone else within the department and I was not obligated to provide the information. The official of the Department of Labour stated that in fact I was. When I stated that the PAIA form, which is prescribed by regulation, does not contain a section that requires me to state the reason for the request, unlike the form for submission to private bodies, and the Act is silent as to this apparent requirement,

he responded that 'the form is wrong'. When I asked to whom I was speaking, he stated 'the head of Legal Services'.

Thirdly, a number of bodies demonstrate an unwillingness to engage in any facilitative communication or relationship with frequent requesters such as SAHA. SAHA's relationships with public bodies have evolved over time, leading to an understanding of their respective modi operandi. The evolution of these relationships has, in some cases, led to a greater exchange of information concerning the availability of records and the pressures from various quarters within bodies regarding access. SAHA enjoys a good relationship with SAPS, which has led to increased communication regarding requests, greater access to records and, as a result, greater trust than that enjoyed with other bodies. Indeed, as a result, SAHA has not litigated against SAPS. While SAHA has made considerable effort to establish a similar relationship with the National Archives, suspicion of and disregard for SAHA's motives by the national archivist has led to a fluctuating relationship; SAHA consequently questioned the ability of the national archivist to exercise his powers and to execute his PAIA obligations (see Box 6.10).

Box 6.10: National Archives

The relationship between SAHA and the national archivist from 2001 to 2004 provides an interesting case study of souring relations between a small, vocal and relatively well resourced NGO and a senior official who did not take well to being challenged, and apparently believed that SAHA was pursuing a sinister agenda. The events occurring over this period might have been avoided if the relevant state departments and individuals concerned had adopted an open and constructive policy of engagement and a commitment to communicate and seek resolutions to problems. Instead, from SAHA's perspective, the intended spirit of the law was abandoned in favour of resistance and conflict. While I will resist going into too much detail, a few key events are worth noting.

The relationship with the national archivist soured quite early on, when in October 2001 SAHA publicly castigated the National Archives for failing to take decisions on any of the requests submitted by SAHA in May that year.[186] The relationship deteriorated further during 2002 in a public spat and litigation around the missing 34 boxes. The following year, in January 2003, SAHA released a report detailing experience of using PAIA that contained criticism of the National Archives' failure to comply with the Act in terms of timelines and the application of exemptions.[187] As a result, the national archivist submitted a formal complaint to SAHA's board of trustees about its director, alleging that the latter had repeatedly made misleading and negative public statements about the National Archives, and questioning the director's conduct and motives.[188] When the board of trustees concluded that it was satisfied that the director

was 'fulfilling his duties and responsibilities to the highest professional standards',[189] the national archivist accused the director of disrespecting due legal process[190] and of being unprofessional and unethical.[191] Once again, the board of trustees defended its director, and now raised its own concerns about the tenor of the accusations made and the fact that allegations were being raised in other government circles. The board challenged the national archivist to 'state [his] views in public so that we can defend the organization against accusations that are damaging to its reputation'.[192]

After a period of silence, the national archivist published an open piece in *This Day* newspaper in which he accused SAHA of an exaggerated response to the 34 boxes case and stated that the tempo of the internal debate has so far done little to encourage balanced and professional discussion of these issues.[193] SAHA's response in the following edition accused the national archivist of obfuscation and maintained that the organisation was simply exercising its rights in terms of PAIA. While the national archivist had accused SAHA of demanding 'instant access', SAHA pointed out that while the legislation required a response within 30 days, it had been waiting for almost a thousand days. SAHA reiterated its fundamental concern that time-consuming and costly litigation could have been avoided if government departments, including the National Archives, had simply done their job.[194]

During this dispute, the national archivist noted in a recommendation to the minister of arts and culture regarding three PAIA requests made by SAHA[195] that

> many of the delays in responding to [SAHA's] applications have been occasioned by extensive legal research into whether a 'restraint of trade' can be applied in [the director's] case as most of his requests are motivated by an intimate and privileged knowledge of documents in the Archives acquired while in the public service. [196]

The minister of arts and culture at that time was apparently displeased with the national archivist's approach to dealing with these requests. In approving access to records on internal appeal, she noted by hand on the recommendation coming from the director general,

> I really do not appreciate the reason why the CD/NA [i.e. the national archivist) did not get … advice from the very beginning. The PAIA is a serious piece of legislation which requires a legal person to implement …. The CD/NA must not put me in such a position.[197]

The national archivist subsequently determined to espouse a policy of non-engagement with SAHA.

In July 2003 the National Security Archive in the United States, an independent archive housed at the George Washington University, visited South Africa with the intention of meeting with a number of agencies to discuss mutual issues, and sub-

sequently released a report that commented on the difficulties SAHA was facing in accessing information from the National Archives. The national archivist, who did not make himself available to the National Security Archive staff during their visit, was apparently angered that they had reported such comments without his rebuttal: he wrote to the National Security Archive stating that 'I have adopted the policy of no longer responding to the strident and repetitive criticisms of the National Archives by SAHA'.[198]

Although the residue of these disputes remains, efforts to forge a more constructive and collegial approach have been undertaken. This has not, however, resulted in an improved access to TRC records or apartheid era security and intelligence records, or an improved relationship. The national archivist in many cases fails to respond to correspondence. In the case of requests that cannot be delegated to his more than helpful staff, the delay in making decisions is still lengthy. We noted above the response of the national archivist to a request for a meeting in July 2007 regarding access to the security police lists and the missing security police files and data tapes that SAPS alleged were transferred to National Archives in 2003, in which he ignored the request for a meeting and stated that he had been assured by SAPS that he had all the files.

Without political will, or a proactive effort by the national archivist to champion many of the issues around record keeping, the retention of apartheid era records and the transfer to National Archives of records more than 20 years old, in particular cabinet records, a significant shift in the internal cultures of other national bodies cannot be achieved. The national archivist has claimed on numerous occasions that he has no power and that his positioning within the Department of Arts and Culture rather than the Presidency limits perceptions of his authority.[199] While there is some merit in his argument, these oft-repeated excuses are becoming tiresome in the face of numerous complaints, requests to intervene and notifications of concerns about the destruction of significant collections of records. One wonders what in fact he is empowered to do if this is not his domain.

The fourth, and perhaps strongest, indicator of a lack of any shift in culture in public bodies is the utilisation of a long-employed method of deflection by government: silence. The Presidency and the Departments of Minerals and Energy and Trade and Industry have mastered this approach; without making repeated phone calls, it is rare to get any kind of response at all.[200] NECSA and the National Nuclear Regulator (NNR) have also adopted this approach, despite limited attempts to engage through meeting. NECSA was unperturbed by complaints to the public protector and the SAHRC (although this is not surprising, given their lack of action): in its responses it failed to acknowledge its agreement to provide the requested records by the end of 2005, and even went so far as to argue that 'NECSA went beyond the requirements of the Promotion of Access to Information

Act'.[201] What it was in fact doing at that time was, some four years after the enactment of PAIA, organising its records in a manner that allowed it to comply with its legislative obligations. When SAHA submitted an additional batch of requests in 2007, it failed to get any acknowledgement at all. NNR adopted a similar approach in failing to respond until Earthlife Africa blew the whistle on a number of issues. In 2006 SAHA was granted access to a limited amount of information pertaining to four requests; however, later requests were ignored, and at the time of writing 22 are outstanding.

Box 6.11: The South African Police Service

SAPS has established a PAIA unit with committed staff and has gone to great lengths to assist requesters. The national DIO is tasked solely with managing the implementation of and compliance with PAIA, and has a dedicated team of staff to assist her. Both she, and Commissioner Geldenhuys, to whom she reports, express the importance of ensuring that members of the public have access to information. SAHA has therefore been able to establish a communicative and facilitative relationship that has meant that SAHA has not submitted any internal appeals and has not been required to appeal to the courts.[202] This is largely due to the ability to request the reconsideration of refusals and to negotiate access with officials who are tasked solely with managing requests and who take their obligations seriously in the early stage of the process. While the exemplary performance of SAPS has been limited by its failure to ensure the retention of apartheid era records, in particular data tapes and security police records and the records relating to Operation Crackdown, a strong, dedicated team for facilitating the implementation of PAIA has gone a considerable way toward ensuring that valuable materials are accessed.

These four features — infrastructure, competence of officials, relationships and failures to respond — demonstrate that there has not been a substantial shift in the mindset of those with public power from secretiveness to transparency. Understanding the lack of shift from a long history and culture of secrecy therefore assists us to understand why, in some cases, it seems that implementation PAIA remains in the starting blocks. This lack of shift must derive from the top, from the ministers and other heads of bodies, from a failure to prioritise compliance, allocate a dedicated budget and appoint qualified staff. It is a sorry (but true) state of affairs when the president of the country himself makes public statements about the need to prevent activist civil society organisations from accessing information and exercising their right to free speech. Without political champions, the importance of access to information in fighting for transparency and democratic governance will not be demonstrated across all layers of the executive.

Conclusion

In concluding, I will start from the end by saying that the culture of secrecy pervading public bodies is the primary limitation on the right of access to information. It informs resource allocations; the enactment of facilitative regulations; the priority accorded to the implementation of procedures to create, manage and retain records and facilitate access; the desire of bodies to be seen to be transparent rather than defensive; the appointment and training of competent staff; and the adoption of narrow interpretations of restrictive provisions rather than broad and blanket applications. It has, therefore, a trickle-down effect that, without intervention not only from the top down but the bottom up, is and will continue to be the wall between the government and those whom it governs.

The effects of an ingrained culture of secrecy can be seen across two primary areas. While PAIA is lauded as a comprehensive and progressive enactment, it is clear from the case studies considering the application of the definitions, the exemptions and the public interest override that the Act is being used as a method to broaden restrictions on access rather than narrow the extent to which the constitutional right can be limited. This plays out in a number of ways.

It first results in complete silence: a complete failure to actually acknowledge, process or respond to requests. Secondly, it results in a broadening of the interpretation of categories of information to which exemptions apply, and a reduction in the extent to which harm must be demonstrated. This also leads to the limited exercise of discretion in favour of access. Thirdly, it results in the provision of limited information about which records relate to requests and how exemptions apply to them. This blanket application makes the situation particularly difficult for requesters, who are often entirely reliant upon bodies to disclose the existence of records and to determine whether records relevant to their request actually exist and are worth pursuing, whether the exemption/s cited by the body actually apply and whether there are grounds for challenging them. Fourthly, it results in a failure to consider the merits of requests prior to the threat of appeal or litigation.

Another area in which we can see the effects of this ingrained culture is in the application of intersecting legislation, where apartheid enactments influence and restrict access, and enactments providing for greater access rights are ignored. A causal factor influencing the capacity for intersecting enactments to impact upon PAIA in this way is the failure of the minister of justice to issue regulations listing enactments that supersede, and are superseded by, PAIA.

The legislation itself, however, has some fundamental limitations. It fails in some instances to limit the extent to which exemptions may apply, for example, in the instance of the exemptions regarding confidentiality; to permit inquiry into the legitimacy of the intent behind the agreements; or to limit the duration of the agreement or confidentiality. This may have the effect of permitting parties who wish to avoid disclosure of information that may embarrass bodies or expose them to criticism to withhold such information,

even though requesters would otherwise have a right of access to it. It also, as we have seen in the case of the agreement between South Africa and Israel that was entered into in 1975, permits ongoing reliance on agreements without providing requesters with the power to question the extent of these agreements' application or their present applicability. It also limits, to an unnecessary degree, the circumstances in which the public interest override will apply. But, more importantly, it fails to provide adequate enforcement mechanisms that are accessible, efficient and cost effective; that will provide (where necessary) a means for urgent determinations; and that will provide greater leverage through which to compel bodies to apply PAIA appropriately.

The broader implication, the ability to limit the exercise of a range of other civil and political, social, economic and cultural rights, and merely rely upon oft-repeated rhetoric about resource limitations and quotations of statistics, is not yet realised by the broader public, or even a broader collection of civil society organisations working outside of traditional accountability and transparency rights. This is the challenge for access to information: to bring it to a wider audience and activism, and to push for reform on a larger scale, rather than limit it to the activities of the three organisations in South Africa at present who are the primary users of PAIA. The other, equally important implication, the ability to skew the recording of history and its events — and by history here I mean what happened yesterday and further back in time — is what I perceive as the key question for archival discourse. The use of access to information mechanisms has a key role to play in combating the selectivity of archival processes and the hand of the influential in tailoring and tampering with the picture that may be formed by record collections.

So what do we need to fix this right? Legislative amendment. Political champions. The systematic declassification of records. An archival audit. An independent and proactive information commission. The promotion of the act across all levels of governance. There is no one answer. As civil society organisations, litigators, activists and requesters, we can only continue to pursue requests, lobby government and promote the importance of the right of access to information.