

Complaint Ref No: CI 312/22 & CI 323/22



**INFORMATION
REGULATOR
(SOUTH AFRICA)**

*Ensuring protection of your personal information
and effective access to information*

INVESTIGATION REPORT OF THE INFORMATION REGULATOR

Report Number: 01 of 2024

Promotion of Access to Information Act 2 of 2000

“OUTA-NNR”

Information Regulator’s report on the investigation into a complaint, lodged by Adv. Stefanie Fick, in her capacity as Executive Director at the Organisation Undoing Tax Abuse (“OUTA”), for the alleged refusal of access to the records held by the National Nuclear Regulator.

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GLOSSARY

Item	Term	Definition
1.	Constitution	The Constitution of the Republic of South Africa, Act 108 of 1996
2.	DIO	The delegated Deputy Information Officer of the NNR
3.	DoE	Department of Minerals and Energy
4.	IO	Information Officer of the NNR
5.	Koeberg LTO	The Long-Term Operation (life extension) of the Koeberg Nuclear Power Station
6.	NNR	The National Nuclear Regulator
7.	NNRA	The National Nuclear Regulator Act 47 of 1999
8.	Minister	Minister of Minerals and Energy
9.	Official	As defined in section 1 of PAIA
10.	OUTA	Organisation Undoing Tax Abuse
11.	PAIA	Promotion of Access to Information Act 2 of 2000, as amended
12.	POPIA	Protection of Personal Information Act 4 of 2013, as amended
13.	Public Body	The National Nuclear Regulator
14.	Regulator	The Information Regulator of South Africa
15.	Third party	As defined in section 1 of PAIA

1. EXECUTIVE SUMMARY

- 1.1 This is the Investigation Report of the Information Regulator (“the Regulator”) after receipt of complaints made in terms of section 77A of the Promotion of Access to Information Act 2 of 2000 (“PAIA”) and following an investigation conducted in terms of section 77C(1)(a) of PAIA. The report communicates the Regulator’s preliminary findings and preliminary recommendations to the Enforcement Committee, regarding the alleged refusal of access to records held by the National Nuclear Regulator (“NNR”), on the grounds that certain parts of the requested records fall within the purview of sections 37(1)(a) and (b) and section 44(1)(a)(ii) of PAIA.
- 1.2 This Investigation Report relates to the complaints lodged by Ms Stefanie Fick, in her capacity as Executive Director of the Accountability and Public Governance Division - The Organisation Undoing Tax Abuse (“OUTA” / “the complainant”).
- 1.3 The public body is the National Nuclear Regulator of South Africa (“NNR” / “the public body”) that is a public entity which is established and governed in terms of Section 3 of the National Nuclear Regulator Act, (Act No 47 of 1999) to provide for the protection of persons, property, and the environment against nuclear damage through the establishment of safety standards and regulatory practices.
- 1.4 The complainant initially lodged two (2) requests for access to records in the possession of the public body, which requests were dated 22 February 2022 and 14 March 2022 respectively. Access to the said requested records was refused by the public body on 7 March 2022 and 29 March 2022, respectively. As a result, the complainant lodged internal appeals against the refusals, which appeals were dismissed by the public body.
- 1.5 The complainant then lodged two (2) complaints with the Regulator. The complaints were rejected by the Regulator on the basis that complainant used repealed PAIA request forms. The complainant was advised to submit new requests using the correct prescribed forms.
- 1.6 On 13 September 2022, the complainant re-submitted the requests for access to records using the correct prescribed forms. The requests were refused on the same grounds previously relied on by the public body.

- 1.7 Following the refusal of access to the records held by the public body, the complainant lodged internal appeals against the decisions of the DIO. In response to the appeal applications, the IO confirmed the decision of the DIO to refuse access to the records, relying on sections 37(1)(a) and (b) and 44(1)(a)(ii) of PAIA.
- 1.8 Subsequent to the dismissal of the internal appeals, the complainant lodged two (2) complaints with the Regulator (CI 312/22 and CI 323/22) and those complaints were consolidated and dealt with as one complaint for the purposes of this investigation report.
- 1.9 During the investigation of the complaint, the DIO submitted affidavits in terms of section 23, stating that the public body is not in possession all the records requested in respect of a compliant under reference no: CI 323/22, except the following records, which were records requested in respect of CI 312/22:-
- 1.9.1.1 All written statements submitted by all directors (past and present) of the National Nuclear Regulator (NNR) Board upon appointment, to the Minister of Mineral Resources and Energy in which he or she declares whether or not they have any direct or indirect financial interest as stipulated in section 8(9) – (11) of the National Nuclear Regulator Act, 47 of 1999; and
- 1.9.2 All recordings, transcripts, and minutes to all NNR Board and subcommittee meetings during the period April 2021 to January 2022.
- 1.10 In respect of the complaint with Reference No: CI 323/22, the complaint was resolved, in that the complainant abandoned all requested records.
- 1.11 The investigation of the complaint was preceded by an assessment of the prescribed pre-requisites for acceptance of a complaint and all such pre-requisites were met.
- 1.12 Accordingly, the investigation focused on the following issues:
- 1.12.1 Whether the complainant complied with the procedural requirements prescribed in PAIA, relating to a request for access to the records held by the public body;

- 1.12.2 Whether access to the records is refused in terms of any ground for refusal contemplated in Chapter 4 of Part 2 of PAIA;
- 1.12.3 Whether there are any records which do not contain protected information, and that can reasonably be severed from the protected parts of the record; and
- 1.12.4 Whether the disclosure of the records would reveal evidence of, a substantial contravention of, or failure to comply with, the law or an imminent and serious public safety or environmental risk¹, and whether the public interest in the disclosure of the record clearly outweighs the harm contemplated in the grounds of refusal.

1.13 PRELIMINARY FINDINGS AND RECOMMENDATIONS TO THE ENFORCEMENT COMMITTEE

After having conducted an investigation, in terms of section 77C(1)(a) of PAIA, and having regard to all circumstances of the case, the Regulator has made the following preliminary findings and recommendations, in respect of the above-mentioned issues:

1.13.1 Preliminary Findings

Whether the complainant complied with the procedural requirements prescribed in PAIA, relating to the request for access to that record.

- 1.13.1.1 Our preliminary findings are that the complainant has complied with the procedural requirements, as prescribed in PAIA, relating to the request for access to the records held by the public body.

¹ “**Public Safety or Environmental Risk**” means harm or risk to the environment or the public (including individuals in their workplace) associated with—

(a) a product or service which is available to the public;
(b) a substance released into the environment, including, but not limited to, the workplace;
(c) a substance intended for human or animal consumption;
(d) a means of public transport; or
(e) an installation or manufacturing process or substance which is used in that installation or process;

Whether access to the record is refused in terms of any ground for refusal contemplated in Chapter 4 of Part 2 of PAIA

1.13.1.2 Our findings are that access to the records held by the public body were refused on the grounds for refusal, contemplated in Chapter 4 of Part 2 of PAIA, and these are the grounds relied upon:-

1.13.1.2.1 Mandatory protection of certain confidential information, and protection of certain other confidential information, of third party, in terms of section 37(1) (a) and (b) of PAIA; and

1.13.1.2.2 Operations of public bodies, in terms of 44(1)(a)(ii) of PAIA, as the records contain minutes, discussions and / or deliberations for the purpose of taking decisions by the NNR in the exercise of its duties in terms of the NNRA.”

Whether there are any records which do not contain protected information, and that can reasonably be severed from the protected parts of the record

1.13.1.3 Our preliminary findings are that there are certain parts of the financial disclosure forms that can reasonably be severed from any part that contains any such information that is refused in terms of section 37(1)(a) and (b);

1.13.1.4 Therefore, in respect of all recordings, transcripts, and minutes of all NNR board and subcommittee meetings, our preliminary finding is that the DIO has fully discharged its duty to prove its reliance on section 44(1)(a) of PAIA and no part of the records can reasonably be severed from any part of a record of a public body containing information which may or must be refused in terms of any provision of Chapter 4.

1.13.1.5 However, in respect of the financial declaration forms, wherein

part of the records can reasonably be severed from any part that contains such information that must be refused in terms of section 37(1)(a) and (b) of PAIA, the Regulator concludes that the disclosure of such parts of the records will not amount to an unreasonable disclosure of the personal information of the board members and therefore should be disclosed to the complainant, subject to the provisions of section 28 of PAIA.

1.13.1.6 Accordingly, the disclosure of the redacted financial disclosure forms of the NNR's board members will not only enable the complainant to determine whether or not there was compliance with section 8(10) of the NNRA, but also secure accountability and transparency in the public body in so far as the requirement of financial disclosure is concerned.

Whether the disclosure of the records 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 whether the public interest in the disclosure of the record clearly outweighs the harm contemplated in the grounds of refusal.

1.13.1.7 The complainant did not submit any evidence to the Regulator, which proves that, on balance of probabilities, the disclosure of the record would reveal evidence of-

- a) substantial contravention of, or failure to comply with the law; or
- b) an imminent and serious public safety or environmental risk.

1.13.1.8 Accordingly, there is also no evidence that there is public interest in the disclosure of the records, which clearly outweighs the harm contemplated in the grounds of refusal.

1.13.2 Preliminary Recommendations

Having considered the nature of the records requested, those protected by the provisions of sections 37(1)(a) and (b) and 44(1)(b)(ii) of PAIA and the risk of harm from disclosure of the records held by the public body, which clearly outweighs the overall public interest, if any, in the disclosure, the following enforcement action is hereby recommended for consideration by the Enforcement Committee:

1.13.2.1 The decision of the DIO to refuse access to the protected records relating to all recordings, transcripts, and minutes to all NNR board and subcommittee meetings during the period of April 2021 to January 2022, is hereby confirmed; ~~and~~

1.13.2.2 In respect of the financial disclosure statements submitted by all directors of the NNR Board to the Minister of Mineral Resources and Energy, the information officer is directed, in terms of section 77J(1)(a) and (b) of PAIA, to-

1.13.2.2.1 Redact all the information specified in paragraphs 11.1.3.1 and 11.1.3.2 below, except the names, surnames, and signatures of the board members;

1.13.2.2.2 grant access to a redacted version of the written financial disclosure statements submitted by all directors of the NNR Board to the Minister of Mineral Resources and Energy in which he or she declared whether or not they have any direct or indirect financial interest as stipulated in section 8(10) of the NNRA; and

1.13.2.2.3 disclose the said records to the complainant, within thirty (30) days of issuing the Enforcement Notice, upon receipt of payment for an access fee, if any.

REGULATOR'S REPORT ON THE INVESTIGATION INTO A COMPLAINT LODGED BY ADV. STEFANIE FICK, THE EXECUTIVE DIRECTOR AT THE ORGANISATION UNDOING TAX ABUSE ("OUTA"), FOR THE ALLEGED REFUSAL OF ACCESS TO THE RECORDS HELD BY THE NATIONAL NUCLEAR REGULATOR.

2. INTRODUCTION

- 2.1 The rights contained in Chapter 2 of the Bill of Rights in the Constitution affirm the democratic values of human dignity, equality, and freedom. Various provisions of the Bill of Rights are relevant for present purposes, including the right to inherent dignity, the right to equal protection and benefit of the law, the right to privacy, and more importantly, the right of access to any information held by the state. These rights may be limited by laws of general application to the extent that it is reasonable and justifiable to do so 'in an open and democratic society based on human dignity, equality, and freedom, taking into account all relevant factors.
- 2.2 Before South Africa became a constitutional democracy with an enforceable Bill of Rights, the system of Government in South Africa amongst others, resulted in a secretive and unresponsive culture in both public and private bodies which often led to the abuse of power and human rights violations.
- 2.3 The right of access to any information held by a public body is contained in section 32(1)(a) of the Constitution. Section 32(2) of the Constitution in turn provides for the enactment of national legislation that will give effect to this right, by respecting, protecting, promoting, and fulfilling this right.
- 2.4 The Promotion of Access to Information Act 2 of 2000 ("PAIA") is the national legislation that was enacted in accordance with section 32(2) of the Constitution. PAIA was amended by POPIA effectively from 30 June 2021, in terms of which the Regulator is empowered to conduct an investigation, and where there is a violation, take appropriate enforcement action to redress the violation of the right of access to information. One of the objectives of PAIA, in terms of section 9(e)(i) thereof, is, generally, to promote transparency, accountability and effective governance of all public and private bodies.
- 2.5 When exercising its constitutional obligation to protect, promote and ensure fulfilment of the right of access to any information held by the body, the Regulator

shall, in line with the purposive interpretation of the constitutional right of access to information, advance the objectives of PAIA.

2.6 In pursuit of the above-mentioned objectives, the Regulator's primary mandate, under PAIA, is to regulate the promotion of access to information in a manner that promotes the provision of reasonable access to information or records of public and private bodies *swiftly, inexpensively, and effortlessly*. Whilst the Regulator shall remain *independent* and *impartial* when conducting its investigation, it is required to perform its functions and exercise its powers without *fear, favour, or prejudice*.

3. THE COMPLAINANT

3.1 The complainant is the Organisation Undoing Tax Abuse ("OUTA"), a registered non-profit civil action organisation that focuses on exposing government corruption and the abuse of taxes and public funds.

3.2 The complainant is represented by Adv Stefanie Fick, who is the Executive Director: Accountability and Public Governance Division of OUTA.

4. THE PUBLIC BODY

4.1 The public body is the National Nuclear Regulator ("NNR"), a Schedule 3A entity established in terms of Section 3 of the National Nuclear Regulator Act 47 of 1999).

4.2 The fundamental objective of the NNR is to provide for the protection of persons, property, and the environment against nuclear damage through the establishment of safety standards and regulatory practices suited for South Africa.

4.3 The NNR provides oversight and assurance that activities related to peaceful use of nuclear energy in South Africa are carried out in a safe manner and in accordance with international principles and best practices.

5. THE REQUEST FOR ACCESS TO RECORDS

5.1 On 13 September 2022, the complainant submitted a request for access to the following records held by the NNR-

- 5.1.1 All written statements submitted by all directors (past and present) of the NNR's Board upon appointment, to the Minister of Mineral Resources and Energy in which he or she declares whether or not they have any direct or indirect financial interest as stipulated in section 8(9) – (11) of the National Nuclear Regulator Act, 47 of 1999; and
- 5.1.2 All recordings, transcripts, and minutes to all NNR Board and subcommittee meetings during the period April 2021 to January 2022.
- 5.2 On 13 September 2022, the complainant further submitted another requested for access to the following records held NNR-
- 5.2.1 A copy of all NNR Board resolutions made during January 2022 and February 2022, including any resolutions taken by means of round robin;
- 5.2.2 A copy of all decisions taken by the NNR Board during January 2022 and February 2022;
- 5.2.3 A copy of all meeting minutes of NNR Board meetings held during January 2022 and February 2022;
- 5.2.4 All recordings and/or transcripts of all NNR Board meetings attended by Mr Peter Becker during the period of April 2021 and January 2022 and
- 5.2.5 A copy of all reports, memoranda and/or legal opinions submitted by the NNR to the Minister of Mineral Resources and Energy, in support of the former's recommendation and/or request that the Minister suspend Mr Peter Becker from the NNR Board and records and information pertaining to the cause for their prosecution.
- 5.3 On 26 September 2022, the NNR refused access to the records referred to in paragraph 5.1, on the basis of the following grounds of refusal-
- 5.3.1 Access to the records, referred to in paragraph 5.1.1 above, are refused in terms of section 37(1) (a) and (b) of PAIA, on the basis that the record contains personal information of board members;

5.3.2 Access to the records, referred to in paragraph 5.1.2 above, are refused in terms of section 44(1)(a)(ii) of PAIA, as the records contain minutes, discussions and / or deliberations for the purpose of taking decisions by the NNR in the exercise of its duties in terms of the National Nuclear Regulator Act, 47 of 1999; and

5.3.3 That it is not possible to sever the records as contemplated in section 28 of PAIA.

5.4 Aggrieved by the aforesaid discussion of the NNR, and on 7 November 2022, the complainant lodged two (2) internal appeals against the decisions of the DIO.

5.5 As recorded above, the complainant submitted two (2) requests for access to various records of the public body on 13 September 2022.

5.6 Although the internal appeal process, prescribed in section 74 of PAIA, is not mandatory to the NNR, as the NNR is not a public body referred to in paragraph (a) of the definition of “public body” in section 1, the IO confirmed the decision of the DIO to refuse access to the records in term of sections 37(1)(a) and (b) and 44(1)(a)(ii) of PAIA.

6. THE COMPLAINT

6.1 Aggrieved by the decision of the IO, an in accordance with section 77A(2)(a) of PAIA, the complainant lodged two (2) complaints with the Regulator, on 31 January 2023 and 13 February 2023 respectively.

6.2 The complaint in respect of the records listed in paragraph 6.1 above was allocated reference number- CI 312/22 and the complaint in respect of the records listed in paragraph 6.2 above was allocated reference number CI 323/22. The above-mentioned complaints were consolidated into one complaint.

6.3 In its complaint form, part F thereof, the complainant submitted that-

6.3.1 its request for access to the records held by the NNR was refused or partially refused;

6.3.2 It has appealed against the decision of the NNR, and the appeal was unsuccessful; and

6.3.3 its request for access for access to the records held by the NNR was without any valid or adequate reasons for the refusal.

6.4 In terms of its expected outcome, under Part G of the Complaint Form, the complainant submitted that it believes that the records requested fall within the public interest and as such, mandatory disclosure thereof ought to follow. The Regulator is also referred to in the complainant's grounds for appeal.

7. INVESTIGATIVE POWERS OF THE INFORMATION REGULATOR

7.1 The following provisions are applicable to the investigative powers of the Regulator:

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

7.1.2 Section 3(a) of PAIA provides that the said Act applies to a record of a public body **regardless of when the record came into existence**.

7.1.3 Section 9(e)(i) of PAIA, provide that the objects of PAIA is generally to promote **transparency, accountability, and effective governance** of all public and private bodies.

7.1.4 Section 11(1) of PAIA provides that a requester must be given access to any record of a public body if-

7.1.4.1 that person complies with the procedural requirements of PAIA, relating to a request for access to that record; and

7.1.4.2 access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of Part 2 of PAIA.

7.1.5 Section 18(1) of PAIA provides that “a request for access must be made in the **prescribed form** to the information officer of the public body concerned at his or her address or fax number or electronic mail address.”

7.1.6 Section 28(1) of PAIA provides that-

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

(a) does not contain; and

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

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

7.1.7 Section 46(a)(i) and (b) of PAIA, provides that the information officer of the public body must grant a request for access to a record of the body contemplated on any of the grounds of refusal, if-

7.1.7.1 the disclosure of the record would reveal evidence of –

7.1.7.1.1 a substantial contravention of or failure to comply with the law;

7.1.7.1.2 or an imminent and serious public safety; or environmental risk; and

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

7.1.8 Section 77A(2)(a) of PAIA provides that a requester that has been unsuccessful in an internal appeal to the relevant authority of the public body, may lodge a complaint with the Regulator within 180 days of the decision complained against.

7.1.9 In terms of section 77C(1)(a) of PAIA, the Regulator is empowered to investigate the complaint in the prescribed manner. The prescribed manner for conducting an investigation is contained in section 77G, read with section 80, of PAIA, section 81 of POPIA and the Regulations relating to the PAIA.

7.1.10 Section 77G of PAIA deals with the investigation proceedings of the Regulator and section 77G(1) thereof provides that the Regulator has powers similar to those of the High Court in terms of section 80 of PAIA when investigating a complaint, to examine any record of a public or private body to which PAIA applies, and no such record may be withheld from the Regulator on any grounds.

7.1.11 Section 77G(2) of PAIA provides that section 81 of POPIA applies to the investigation of the complaints lodged in accordance with section 77A of PAIA.

7.1.12 Section 81(a) of POPIA, provides that *“for the purposes of the investigation of a complaint, the Regulator may summon and enforce the appearance of persons before the Regulator and compel them to give oral or written evidence on oath and to produce any records and things that the Regulator considers necessary to investigate the complaint, in the same manner and to the same extent as the High Court”*.

7.1.13 The Regulator is also empowered, in terms of section 81(c) of POPIA, *“to receive and accept any evidence and other information, whether on oath, by affidavit or otherwise, that the Regulator sees fit, whether or not it is or would be admissible in a court of law”*.

7.1.14 Lastly, section 77J(1) of PAIA provides that *“the Regulator, after having considered the recommendation of the Enforcement Committee, may serve the information officer of a public body or the head of a private body with an Enforcement Notice -*

7.1.14.1 *confirming, amending, or setting aside the decision which is the subject of the complaint; or*

7.1.14.2 *requiring the said officer or head to take such action or to refrain from taking such action as the Regulator has specified in the notice.”*

7.2 The Regulator is the statutory body empowered to investigate the decision or a failure to take decisions by the information officer of the public body. Therefore, if a

decision and the grounds for refusal thereof were given to the complainant, no additional grounds of refusal maybe advanced during an investigation of a complaint by the Regulator, although the information officer may provide an explanation to substantiate its decision and the grounds of refusal relied upon.

8. JURISDICTION OF THE INFORMATION REGULATOR TO INVESTIGATE THE COMPLAINT

8.1 The following prescribed prerequisites have been complied with by the complainant:

8.1.1 the prescribed PAIA request forms, Form 2, was duly submitted to the information officer, in accordance with section 18(1) of PAIA;

8.1.2 the DIO of the body, duly delegated, refused to grant access to records on the grounds that certain parts of the requested records fall within the purview of sections 37(1)(a) and (b) and 44(1)(a)(ii) of PAIA;

8.1.3 the complainant exhausted the internal appeal process, using the prescribed Form 4, although such process was not mandatory to the NNR;

8.1.4 the complainant did not apply to court for appropriate relief regarding the matter under investigation;

8.1.5 the complaint was lodged with the Regulator on the prescribed form, Form 5 of Annexure A to the PAIA Regulations; and

8.1.6 the complaint was lodged with the Regulator within the prescribed period of 180 days.

8.2 Accordingly, the Regulator has the appropriate jurisdiction to investigate the complaint against the decision of the information officer of the public body, to refuse access to the records held by the public body.

9. THE INVESTIGATION

9.1 Methodology

9.1.1 In terms of section 77C(1)(a) of PAIA, the Regulator is empowered to investigate the complaint in the prescribed manner. The prescribed manner for conducting an investigation is contained in section 77G, read with section 80 of PAIA, section 81 of POPIA; and in the Regulations.

9.1.2 If it appears from a complaint, or any written response made in relation to a complaint, that Regulator may, in terms of section 77E of PAIA, read with Regulation 12, and without investigating the complaint, use its best endeavours to secure such a settlement.

9.1.3 In terms of section 81(c) of POPIA, the Regulator is empowered “to receive and accept any evidence and other information, whether on oath, by affidavit or otherwise, that the Regulator sees fit, whether or not it is or would be admissible in a court of law”.

9.1.4 Based on the information provided by the complainant and subsequent responses thereto by the public body, the Regulator decided to conduct an investigation.

9.2 Approach to the investigation

9.2.1 Upon receipt of a complaint, the complaint was pre-investigated, in terms of section 77E of PAIA, wherein the information officer of the public body was requested to respond to the complaints and produce to the Regulator any information, substantiated reasons or grounds for refusal, item, or document, on which his decision to refuse access was based, as provided for in PAIA Regulation 11(2)(c).

9.2.2 On 17 February 2023, the Information Officer of the public body responded to the aforesaid notification, with the following assertions:

9.2.2.1 *“On 07 March 2022, the DIO refused access to the record after consideration of the request and the nature of the record sought.*

9.2.2.2 *On 29 March 2022, OUTA submitted an internal appeal to the NNR against the DIO's decision.*

9.2.2.3 *On 19 April 2023, the information officer (IO) considered and made a decision of the internal appeal confirming the DIO's decision.*

9.2.2.4 *On 13 September 2022, OUTA attempted to resuscitate the matter by lodging new PAIA request forms requesting the same information despite the NNR having substantively made its decision on the matter as outlined above.*

9.2.2.5 *On 26 September 2022, the NNR declined to reconsider the request on the basis that it was already disposed of substantively.*

9.2.2.6 *It is the NNR's position that PAIA properly and purposively construed, does not impose any obligation to the NNR to deal with one request endlessly. This matter has been disposed of on 19 April 2022 and as such, there is no legal basis to re-open it."*

9.2.3 On 03 March 2023, a Pre-Investigation Report was issued to the information officer of the public body and the complainant, in terms of section 77E of PAIA, wherein the Regulator accepted the complaint and decided to conduct further investigation of the complaint.

9.2.4 In an endeavour to resolve the complaints through settlement process between the parties, in accordance with section 77F of PAIA, read with PAIA Regulation 12, the Regulator attempted to facilitate a settlement of the complaint. However, no settlement agreement was reached by the parties.

9.2.5 During the course of the investigation, the following actions, in respect of requested records, were undertaken by the parties, which resulted in only two (2) records being the subject of this investigation:

Table 1

Complaint Reference No: CI 312/22			
Item	Requested Record	NNR Action	Complainant's Response
1.	All written statements submitted by all directors (past and present) of the National Nuclear Regulator (NNR) Board upon appointment, to the Minister of Mineral Resources and Energy in which he or she declares whether or not they have any direct or indirect financial interest as stipulated in section 8(9) – (11) of the National Nuclear Regulator Act, 47 of 1999	Access refused. The DIO submitted an affidavit in terms of section 23, stating that the public body does not have records of all the written statements submitted by all past directors as the public body only started receiving financial disclosures of directors from 2021/2022 financial year	Complaint remains.
2.	All recordings, transcripts, and minutes to all NNR Board and subcommittee meetings during the period April 2021 to January 2022.	Access refused.	Complaint remains.

Table 2

Complaint Reference No: CI 323/22			
Item	Requested Record	NNR Action	Complainant's Response
1.	A copy of all NNR Board resolutions made during January 2022 and February		

Complaint Reference No: CI 323/22

Item	Requested Record	NNR Action	Complainant's Response
	2022, including any resolutions taken by means of round robin, relating to the Koeberg LTO	A section 23 affidavit dated 6 June 2023, was submitted by the DIO, confirming that the record sought does not exist as the Board Committees and the	The request for the records was abandoned by the
2.	A copy of all decisions taken by the NNR Board during January 2022 and February 2022, relating to the Koeberg LTO	Board have not considered and/or resolved on any matter relating to the long-term operation of the Koeberg Nuclear Power Station during January 2022 and February	complainant in its letter dated 7 September 2023.
3.	A copy of all meeting minutes of NNR Board meetings held during January 2022 and February 2022, relating to the Koeberg LTO	2022.	
4.	All recordings and/or transcripts of all NNR Board meetings attended by Mr Peter Becker during the period of April 2021 and January 2022	Access denied.	Request for the record was abandoned by the complainant in its letter dated 28 November 2023, as this record is a repeat of item 2 under CI 312/22.

Complaint Reference No: CI 323/22

Item	Requested Record	NNR Action	Complainant's Response
5.	A copy of all reports, memoranda and/or legal opinions submitted by the NNR to the Minister of Mineral Resources and Energy, in support of the former's recommendation and/or request that the Minister suspend Mr Peter Becker from the NNR Board and records and information pertaining to the cause for their prosecution	A section 23 affidavit, dated 20 April 2023 was submitted by the DIO confirming that the record sought does not exist as the NNR never recommended and/ or requested the Minister to suspend Mr Peter Becker from the NNR Board.	The request for the record was abandoned by the complainant in its letter dated 7 September 2023.

9.2.6 Accordingly, the complaint with reference number: CI 323/22 was resolved, as highlighted in table 2 above.

9.2.7 Due to the parties being unable to settle their disputes, the information officer of the public body and the complainant were notified that the Regulator has decided to investigate the matter, in accordance with section 77C of PAIA.

9.2.8 Following the resolution of the complaint under reference number: CI 323/22, the investigation focused on the following records, in respect of a complaint under reference number: CI 312/22:

9.2.8.1 All written statements submitted by all directors (past and present) of the National Nuclear Regulator (NNR) Board upon appointment,

to the Minister of Mineral Resources and Energy in which he or she declares whether or not they have any direct or indirect financial interest as stipulated in section 8(9) – (11) of the National Nuclear Regulator Act, 47 of 1999; and

9.2.8.2 All recordings, transcripts, and minutes to all NNR Board and subcommittee meetings during the period April 2021 to January 2022.

9.2.9 The investigation was conducted in terms of section 77C(1)(a), read with section 11(1) of PAIA. In respect of the financial disclosure forms referred to in paragraph 9.2.7.1 above, the investigation focused on the financial disclosures made by the board members upon their appointment in terms of section 8(10) of the NNRA.

9.2.10 The investigation focused on the relevant legal prescripts that regulate the requirements that should have been met by the public body when processing a request for access to the information under its control or in its possession.

9.2.11 The investigation sought to determine whether the complainant has satisfied the above-mentioned prerequisites for granting access to the records, and if yes, to determine the appropriate enforcement action to ensure the promotion of the right of access to information.

9.3 Issues investigated

9.3.1 Based on the complaint and the grounds for refusal of access to the records requested by the complainant, the investigation focused on the following issues:

9.3.1.1 Whether the complainant complied with the procedural requirements prescribed in PAIA, relating to a request for access to the records held by the public body;

9.3.1.2 Whether access to the records is refused in terms of any ground for refusal contemplated in Chapter 4 of Part 2 of PAIA;

9.3.1.3 Whether there are any records which does not contain protected information, and that can reasonably be severed from the protected parts of the record; and

9.3.1.4 Whether the disclosure of the records 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 whether the public interest in the disclosure of the record clearly outweighs the harm contemplated in the grounds of refusal.

9.4 The key sources of evidence gathered during the investigation.

9.4.1 Documents

9.4.1.1 PAIA request form (Form A) dated 22 February 2022 and Annexure A;

9.4.1.2 NNR's response to the 22 Feb PAIA requested dated 7 March 2022;

9.4.1.3 Form B Internal appeal dated 29 March 2022, and grounds of appeal;

9.4.1.4 NNR response to the 29 March internal appeal dated 19 April 2022;

9.4.1.5 PAIA request form (Form A) dated 14 March 2022 and Annexure A;

9.4.1.6 NNR's response to the 14 March PAIA requested dated 29 March 2022;

9.4.1.7 Form B Internal appeal dated 12 April 2022, and grounds of appeal;

9.4.1.8 NNR response to the 12 April internal appeal dated 4 July 2022;

- 9.4.1.9 PAIA request forms (Form 2) dated 13 September 2022;
- 9.4.1.10 NNR's response to the 13 September 2022 PAIA request dated 26 September 2022;
- 9.4.1.11 Form 4 internal appeal dated 31 October 2022;
- 9.4.1.12 Form 4 internal appeal dated 31 October 2023;
- 9.4.1.13 Form 5 dated 30 and 31 January 2013, respectively ;
- 9.4.1.14 IR notification letter to NNR 10 February 2023;
- 9.4.1.15 IR notification letter to NNR 15 February 2023;
- 9.4.1.16 IR acknowledgement letters to the complainant 15 February 2023;
- 9.4.1.17 Response to IR Notification letter dated 14 February 2023;
- 9.4.1.18 Response to IR Notification letter dated 17 February 2023
- 9.4.1.19 Annexure A of the Declaration forms; and
- 9.4.1.20 Report of the safety aspects of the long-term operation mission (SALTO) to the Koeberg nuclear power plant units 1 and 2 South Africa- 22-31 March 2022.

9.5 Correspondence sent and received.

9.5.1 The Regulator sent and received the following correspondence as recorded below:

- 9.5.1.1 Invitation to settlement meeting dated 15 February 2023;
- 9.5.1.2 IR email to the complainant dated 19 April 2023;

- 9.5.1.3 Complainant's response to IR email dated 20 April 2023;
- 9.5.1.4 IR affidavit dated 20 April 2023;
- 9.5.1.5 IR letter to NNR dated 26 April 2023;
- 9.5.1.6 NNR letter to IR dated 5 June 2023;
- 9.5.1.7 NNR affidavit dated 6 June 2023;
- 9.5.1.8 IR letter to NNR dated 7 August 2023;
- 9.5.1.9 NNR letter to IR dated 8 August 2023;
- 9.5.1.10 IR email to NNR dated 23 August 2023;
- 9.5.1.11 IR letter to complainant dated 1 September 2023;
- 9.5.1.12 OUTA letter to IR dated 7 September 2023;
- 9.5.1.13 IR letter to NNR dated 29 September 2023;
- 9.5.1.14 NNR affidavit dated 4 October 2023;
- 9.5.1.15 NNR letter to IR dated 13 October 2023;
- 9.5.1.16 IR letter to OUTA dated 15 November 2023;
- 9.5.1.17 OUTA letter to IR dated 21 November 2023;
- 9.5.1.18 IR letter to NNR dated 21 November 2023;
- 9.5.1.19 IR letter to NNR date 23 November 2023;
- 9.5.1.20 IR letter to OUTA date 23 November 2023;
- 9.5.1.21 OUTA letter to IR dated 28 November 2023;

9.5.1.22 NNR letter to IR dated 29 November 2023;

9.5.1.23 Letter to NNR dated 11 December 2023; and

9.5.1.24 Letter to NNR dated 12 December 2023.

9.6 Websites consulted / electronic sources

9.6.1 <https://outa.co.za/vision-mission/>;

9.6.2 <https://nnr.co.za/about/introduction/>;

9.6.3 <https://mg.co.za/article/2014-09-04-another-judicial-peak-to-determine-khampepe-release/>;

9.6.4 SA National Nuclear Regulator neglects radioactive mine dumps threatening the health of thousands (dailymaverick.co.za)

9.7 Relevant legislation and other prescripts.

9.7.1 Constitution of the Republic of South Africa Act, 108 of 1996;

9.7.2 Promotion of Access to Information Act, 2 of 2000 as amended;

9.7.3 Protection of Personal Information Act, 4 of 2013 as amended;

9.7.4 National Nuclear Act 47 of 1999;

9.7.5 PAIA Regulations;

9.8 Relevant case law.

9.8.1 Smuts N.O. and Others v Member of the Executive Council: Eastern Cape Department of Economic Development Environmental Affairs and Tourism and Others (1199/2021) [2022] ZAECMKHC 42 (26 July 2022).

9.8.2 President of the Republic of South Africa and Others v M & G Media Ltd

(CCT 03/11) [2011] ZACC 32; 2012 (2) BCLR 181 (CC); 2012 (2) SA 50 (CC) (29 November 2011).

9.8.3 *Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others* [2023] ZACC 13.

9.8.4 *Bernstein and Others v Bester and Others* 1996(2) SA 751 (CC).

9.8.5 *The South African History Archive Trust v The South African Reserve Bank and Another* (Case no 17/19) [2020] ZASCA 56 (29 May 2020).

9.8.6 *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623. (A) at 634G-635D.

9.8.7 *De Lange & another v Eskom Holdings Ltd and others* [2012] (1) SA 280 GSJ).

9.8.8 *Cakwebe v Regional Commissioner: DCS* (EL 423/2019) [2021] ZAECELLC.

9.8.9 *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA).

10. ANALYSIS OF THE ISSUES UNDER INVESTIGATION, IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND RELEVANT PRESCRIPTS

10.1 Has the complainant complied with the procedural requirements of PAIA relating to the request for access to the record?

10.1.1 In terms of section 32(1)(a) of the Constitution, *“Everyone has the right of access to any information held by the state”*. In this regard, the state refers to the *NNR*.

10.1.2 Section 11(1)(a) of PAIA provides that *“a requester must be given access to a record of a public body if that requester complies with all the procedural requirements in this Act relating to a request for access to that record”*. The prescribed procedures are contained in section 18, 75, 77A and 77B of PAIA, read with Regulation 7 and 9 and 10.

Request for access to information

10.1.3 Section 18(1) of PAIA provides that “a request for access must be made in the prescribed form to the IO of the public body concerned at his or her address or fax number or electronic mail address”. **Form 2** of Annexure A to the PAIA Regulations is the prescribed form in PAIA Regulation 7(1).

Internal Appeal

10.1.4 Section 74(1)(a) of PAIA provides that a requester may lodge an internal appeal against a decision of the IO of a public body² to refuse a request for access to the records. Section 75(1) of PAIA provides that a requester must, within 60 days of receipt of a decision from the IO, lodge an internal appeal with the IO of the public body, in the prescribed form. **Form 4** of Annexure A to the PAIA Regulations is the prescribed form in Regulation 9. In terms of section 75(4) of PAIA, the IO of the public body concerned must, within 10 working days after receipt of an internal appeal, submit such appeal to the relevant authority, together with his or her reason for the decision concerned.

Complaint to the Regulator

10.1.5 Section 77A(1) of PAIA provides that a requester may only submit a complaint to the Regulator after that requester has exhausted the internal appeal procedure against a decision of the IO of a public body.

10.1.6 Section 77A(2) of PAIA provides that a requester that has been unsuccessful in an internal appeal to the relevant authority of a public body, may within **180 days of the decision**, submit a complaint, alleging that the decision was not in compliance with PAIA, to the Regulator in the prescribed manner and form for appropriate relief. The manner and form for lodging of a complaint with the Regulator is prescribed in section 77B of PAIA³ and Regulation 10, which provides that a complaint contemplated in section 77A of the Act, must be lodged with the Regulator, in writing, and

² Only applicable to the Public Body referred to in paragraph (a) of the definition of “public body” in section 1

³ Section 77B(1) of PAIA- A complaint to the Information Regulator must be made in writing.

on a form that corresponds substantially with Form 5 of Annexure A to the Regulations.

Conclusion

10.1.7 Although the internal appeal, in terms of section 74 of PAIA, is not mandatory to the NNR, as the NNR is not a National or Provincial Department or Municipality, the NNR accepted the appeal process, in terms of which the CEO acted as a Relevant Authority and adjudicated on the internal appeal.

10.1.8 As a result of the above, it is a common cause that the complainant duly filed its PAIA request with the IO and in the prescribed form. It is also common cause that the complainant duly lodged an internal appeal with the IO, and in the prescribed form. It is not in dispute that the complainant duly lodged its complaint with the Regulator, in writing, on the prescribed form, and within the prescribed period of 180 days. Lastly, the complainant submitted that there is no matter relating to the records in question, pending before the court.

10.1.9 Accordingly, the complainant has duly complied with all the prescribed procedural requirements in PAIA, relating to a request for access to the records held by the NNR.

10.2 Whether access to those records is refused in terms of any ground for refusal contemplated in Chapter 4 of Part 2 of PAIA-

10.2.1 The right of access to any information held by the State is contained in section 32(1)(a) of the Constitution. Section 32(2) of the Constitution in turn provides for the enactment of national legislation that will give effect to this right, by respecting, protecting, promoting, and fulfilling the right of access to information.

10.2.2 The Promotion of Access to Information Act 2 of 2000 ("PAIA"), is the national legislation which was enacted in accordance with section 32(2) of the Constitution.

10.2.3 PAIA seeks to strike a balance with other competing rights, such as the right to privacy⁴, in so far as the protection of personal information is concerned.

10.2.4 Section 11(2) of PAIA provides that a request contemplated in section 11(1) excludes a request for access to a record containing personal information about the requester, which is regulated in section 23 of the Protection of Personal Information Act 4 of 2013 (“POPIA”).

10.2.5 The above-mentioned constitutional rights may be limited by laws of general application, to the extent that it is reasonable and justifiable to do so ‘in an open and democratic society based on human dignity, equality, and freedom, taking into account all relevant factors, including-

10.2.5.1 the nature of the right;

10.2.5.2 the importance of the purpose of the limitation;

10.2.5.3 the nature and extent of the limitation;

10.2.5.4 the relation between the limitation and its purpose; and

10.2.5.5 less restrictive means to achieve the purpose.

10.2.6 PAIA is not merely a legislation giving effect to the constitutional right of access to information, but it is a law of general application that limits the right of access to information under certain grounds for refusal of access to the records (“Exemptions”) held by the public body. This is in accordance with section 32(2) of the Constitution, which provides that “*National legislation must be enacted to give effect to this right and may provide for reasonable measures to alleviate the administrative and financial burden on the state*”.

10.2.7 The grounds of refusal of access to information, as contemplated in Chapter 4 of part 2 of PAIA, are the laws of general application referred to

⁴ Section 14 of the Constitution

in section 36(1) of PAIA. These grounds of refusal are, (except for the ground for refusal contained in section 35 of PAIA, which has been declared invalid and unconstitutional⁵) subject to section 36 of the Constitution, reasonable and justifiable grounds for limiting the Constitutional right of access to any information.

10.2.8 When exercising its statutory obligation to protect, promote and ensure fulfilment of the right of access to any information held by the body, the Regulator shall, in line with the purposive interpretation of the constitutional right of access to information, advance the objectives of PAIA⁶.

10.2.9 In **Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others**, the Constitutional Court held that⁷–

“PAIA provides statutory right of access to records held by the state and private bodies. In the latter instance, this right is exercisable to the extent that a requested record is required for the exercise or protection of rights. Both private and public bodies are under a duty to provide access to requested records, or part thereof, unless refusal of the request is permitted by one or more grounds of PAIA. The grounds of refusal limit the constitutional right of access to information in order to protect fundamental rights and important aspects of the public interest.”

10.2.10 The grounds of refusal of access to information, as contemplated in Chapter 4 of part 2 of PAIA, are the laws of general application referred to in section 36(1) of the Constitution. These grounds of refusal are, (except for the ground for refusal contained in section 35 of PAIA, which has been declared invalid and unconstitutional⁸) subject to section 36 of the Constitution, reasonable and justifiable grounds for limiting the Constitutional right of access to any information.

10.2.11 For the purpose of this investigation, the following grounds of refusal are relevant, as they were raised by the information officer-

⁵ Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others [2023] ZACC 13

⁶ Section 9 of PAIA

⁷ Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others [2023] ZACC 13, paragraph 53

⁸ Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others [2023] ZACC 13

10.2.11.1 Mandatory protection of certain confidential information, protection of certain confidential information, of third party, as prescribed in section 37(1)(a) and (b) of PAIA; and

10.2.11.2 Operations of public bodies, as prescribed in section 44(1)(a)(ii) of PAIA.

10.2.12 Mandatory protection of certain confidential information, protection of certain confidential information, of third party

10.2.12.1 Section 37(1) of PAIA provides that,

“Subject to subsection (2), the information officer of a public body-

(a) must refuse a request for access to a record of the body if the disclosure of the record would constitute an action for breach of a duty of confidence owed to a third party in terms of an agreement; or

(b) may refuse a request for access to a record of the body if the record consists of information that was supplied in confidence by a third party-

(i) the disclosure of which could reasonably be expected to prejudice the future supply of similar information, or information from the same source; and

(ii) if it is in the public interest that similar information, or information from the same source, should continue to be supplied.”

10.2.12.2 Section 37(2) of PAIA provides that a record contemplated in section 37(1) of PAIA may not be refused if that record consists of information-

- a) already publicly available; or
- b) about the third party who has consented to the disclosure of the records to the requester concerned.

10.2.12.3 The protection of certain confidential information of a third party was raised as a ground of refusal in relation to the complainant's request for access to the records relating to

“All written statements submitted by all directors (past and present) of the National Nuclear Regulator (NNR) Board upon appointment, to the Minister of Mineral Resources and Energy in which he or she declares whether or not they have any direct or indirect financial interest as stipulated in section 8(9) – (11) of the National Nuclear Regulator Act, 47 of 1999”.

10.2.12.4 Personal information is widely defined in POPIA, and includes but not limited to names, identity numbers, address information, contact numbers, e-mail addresses, employment history, education, and financial information.

10.2.12.5 Section 8(10) of the NNRA requires any person, appointed as a director of the board of the NNR, to submit his/her declaration of interest to the Minister and the board. The NNR has standardised a declaration of interest form and the following personal information of a director of the board must be completed-

- a) full name and surname;
- b) identity number;
- c) residential address;
- d) cell phone number;
- e) personal email address; and

- f) name of the employer and employer's address and contact details.

10.2.12.6 In so far as the financial disclosure information in concerned, the board members are required to disclose the following information:-

- a) name of the company in which a board member has shared and number of those Shares;
- b) name of the company in which a board member is a director and the remuneration amount;
- c) description of property ownership, size of the property and the value thereof;
- d) in terms of Vehicles, the board members are required to disclose the make, model, year, colour, registration, estimated value and whether the cars are financed or paid-off; and
- e) source of income and monthly or annual income.

10.2.12.7 The DIO refused to grant access to aforesaid records and stated that parts of the records requested by the complainant contain personal information and therefore prohibited to disclose in terms of section 37(1) of PAIA. The DIO further indicated that it is necessary to protect the personal information of third parties, as the release of such information could constitute an action for breach of duty of confidence owed to the third parties in terms of section 37(1)(a) of PAIA.

10.2.12.8 Although the third party process, in terms of section 47 of PAIA, was not followed by the DIO when considering the request, the IO has, in accordance with section 76 of PAIA, notified the board of directors that he was considering an internal appeal application against the refusal of a request for access to a

record and invited the third parties to make representations to the IO as to why the request for access to their personal information should not be granted. All the directors refused to grant consent to the disclosure of the requested records.

10.2.12.9 Having considered the board members' representations, the IO confirmed the decision of the DIO and thus dismissed the complainant's internal appeal application.

10.2.12.10 In its response to the IO's dismissal of the appeal application, the complainant made the following submissions:

"4. We take cognisance of the fact that the information reflected in paragraph 2.1 of the NNR's refusal may contain personal information about NNR board members, however, section 8(9) – (11) of the National Nuclear Regulator Act, 1999 ("NNRA") does not expressly state that the statements / correspondence submitted by board members in pursuit of declaring an interest be done in a confidential or private manner. In this regard, we contend that the records requested as per paragraph 2.1 is neither implicitly nor explicitly of a private or confidential nature. This is exacerbated by the fact that NNR board members hold a public office.

5. The NNR has also failed to qualify exactly what personal information would be revealed should the records as per paragraph 2.1 be disclosed. Furthermore, the NNR failed to establish the prejudice that would ensue upon such disclosure. It is therefore impossible for OUTA to address the full extent of the NNR's refusal, save for a rebuttal of the NNR's generic reliance on section 37(1)(a) and (b) of PAIA.

6. To the extent that any declaration made by board members constitute personal information, we contend that the identity of such individuals is already public knowledge".

10.2.12.11 The complainant further submitted as follows:

“a board member is not a third party as defined in Section 1 of PAIA.

6. *Section 1 of PAIA states that:*

*“**third party**’, in relation to a request for access to-*

(a) a record of a public body, means any person (including, but not limited to, the government of a foreign state, an international organisation or an organ of that government or organisation) other than-

- (i) the requester concerned; and*
- (ii) a public body; ...”*

7. *In terms of section 1 of the NNRA, public body inter alia exercises a power or performing a public function (sic) in terms of legislation. In terms of Section 8 of the NNRA, the regulator is governed by a Board of Directors. The board must ensure that the objectives of the regulator are carried out and that it exercises control over the performance of the Regulators functions. The board is therefor(sic), in my view, “a public body”.*

8. *I also refer you to the following comment made by the Chief State Law Advisor ad paragraph 2.6 of a letter dated 27 January 2011 and discussed in parliament:*

“As pointed out by the writers, “generally third party information is information the disclosure of which would affect a person other than the body from which it is requested. That person is a third party since they were not involved directly in the request for information, either as the applicant or the person who must respond to the request.”

9. *But even if you do not agree with the argument in paragraphs 6 to 8 supra, I submit that section 34(2)(f) applies which state*

that:

“A record may not be refused in terms of subsection (1) insofar as it consists of information-

(a)...

(f) about an individual who is or was an official of a public body and which relates to the position or functions of the individual, including, but not limited to-

- 1. the fact that the individual is or was an official of that public body;*
- 2. the title, work address, work phone number and other similar particulars of the individual;*
- 3. the classification, salary scale, remuneration and responsibilities of the position held or services performed by the individual; and*
- 4. the name of the individual on a record prepared by the individual in the course of employment.”*

Duty of confidentiality

10.2.12.12 The financial declarations made by the board members are made subject to the provisions of Annexure A to the Financial Disclosure Form and clauses 20 and 21 of Annexure A thereof, state that-

“20. The information submitted by all members shall be treated with the strictest of confidentiality”.

21. Only the following persons shall have official access to the contents of this document:-

- a) The Minister to whom the form is submitted;*
- b) The Director-General: Department of Energy; and*

c) *The DoE staff personnel designated by the Minister for the purposes of record- keeping of the original document.”*

10.2.12.13 Annexure A to the Financial Disclosure Form constitute an “agreement” referred to section 37(1)(a) of PAIA. The above provisions of clauses 20 and 21 of Annexure A, prove that the financial declarations submitted by the board members pursuant to section 8(10) of the NNRA, are submitted in confidence and that there is a duty of confidence owed to the board members in terms of an agreement, annexure A, as contemplated in section 37(1)(a) of PAIA.

10.2.12.14 Consequently, the disclosure of the financial declarations of the board members will constitute an action for breach of duty of confidence owed to the board members as contemplated in clauses 20 and 21 of Annexure A to the Declaration Form.

10.2.12.15 The complainant’s assertion that sections 8(9) to (11) of the NNR Act do not expressly state that the statements / correspondence submitted by board members in pursuit of declaring an interest are done in a confidential or private manner, is refuted by the provisions in clause s 20 and 21 of Annexure A to the financial disclosure Form, because it renders the records confidential when completed and submitted in terms of sections 8(10) of the NNR Act.

10.2.12.16 In light of the confidentiality clauses contemplated in clauses 20 and 21 of Annexure A to the financial disclosure Form, the Regulator concludes that there exists a duty of confidentiality between the board and the minister, and that the disclosure of the requested records by the public body would constitute an action for breach of that duty of confidence owed to the board members in terms of the agreement.

10.2.12.17 Accordingly, the public body has correctly relied on the provisions of section 37(1)(a) of PAIA, as a ground of refusal

of access to the requested records.

Prejudice to future supply of similar information (section 37(1)(b))

10.2.12.18 In substantiating the public body's reliance on section 37(1)(b), the DIO made the following submission:

"The NNR still maintains that the financial disclosures contain personal information of directors who have refused their personal information to be disclosed and disclosing such information to a third party may jeopardise the future disclosure of such information and that will result in the NNR not being able to manage potential conflict of interest."

10.2.12.19 Save for the above assertion made by the DIO, there were no facts put up in support to why the records requested fall within the ambit of section 37(1)(b), and therefore should be protected from disclosure based on the said section.

10.2.12.20 Notwithstanding the foresaid, the Regulator is of the view that there is a duty of confidentiality due to the board members in terms of Annexure A, and that a breach of that duty by the custodian of the records could affect the board member's confidence in the protection of their disclosures as contemplated in clauses 20 and 21 of Annexure A, thereby jeopardising any future disclosures or honest disclosures by the board members.

10.2.12.21 Without full disclosures, it will be difficult for the public body to prevent any potential conflict of interest, which happens to be the whole purpose of section 8(9) to (11) and Annexure A. Therefore, it is our view that it is in the public interest that similar information from board members, should continue to be supplied in confidence.

10.2.12.22 It is the Regulator's conclusion that that the disclosure of the requested records could reasonably be expected to prejudice

the future supply of financial disclosures from current and future board members and that it is in the public interest that financial disclosures be submitted in confidence by board members.

Is a board member a third party, as referred to section 37(1)(a) and (b) of PAIA?

10.2.12.23 The Regulator disagrees with the complainant's assertion that a board member is not a third party as defined in Section 1 of PAIA for the reasons set out below.

10.2.12.24 In terms of PAIA, *"a third party, in relation to a request for access to-*

(a) a record of a public body, means any person (including, but not limited to, the government of a foreign state, an international organisation or an organ of that government or organisation) other than-

(i) the requester concerned; and

(ii) a public body;...

but, for the purposes of sections 34 and 63, the reference to 'person' in paragraphs (a) and (b) must be construed as a reference to 'natural person'".

10.2.12.25 The records requested were submitted by the individual members of the board, which are natural persons and contain the personal information of these natural persons. Accordingly, the members of the board meet the definition of a third party, as defined in section 1 of PAIA.

10.2.12.26 The complainant made reference to a comment made by the Chief State Law Advisor ad paragraph 2.6 of a letter dated 27 January 2011 and discussed in parliament, which provides that generally third-party information is information the disclosure of which would affect a person other than the body from which it is requested. That person is a third party since

they were not involved directly in the request for information, either as the applicant or the person who must respond to the request.

10.2.12.27 It is common cause that the disclosure of the financial declarations will affect the board members of the NNR who were not involved directly in the request for information, either as the applicant or the person who must respond to the request. Therefore, this extract further confirms the public body's submission that the board members are third parties in the matter and refutes the complainant's argument that they are not third parties as defined in section 1 of PAIA.

10.2.12.28 Section 34(1) of PAIA provides for the mandatory protection of personal information of natural persons⁹. Although the public body did not rely on this section 34 as its ground of refusal, section 34 is applicable in so far as the disclosure of the requested information would involve the unreasonable disclosure of personal information about a third party. We have already concluded that the disclosure of the record in question would constitute an action for breach of a duty of confidence owed to a third party in terms of an agreement and therefore, the disclosure of the requested information would involve an unreasonable disclosure of personal information about board members, in breach of the agreement.

10.2.12.29 Below is the analysis of section 34(1) of PAIA, in determining whether the exception to the Mandatory protection of privacy of third party who is natural person are applicable-

⁹ Section 34(1) "Subject to subsection (2), the information officer of a public body must refuse a request for access to a record of the body if its disclosure would involve the unreasonable disclosure of personal information about a third party, including a deceased individual."

<p align="center">PAIA provision</p> <p align="center"><i>A record may not be refused in terms of subsection 34(1) of PAIA, insofar as it consists of information-</i></p>	<p align="center">Current status</p>
<p>1. about an individual who has consented to the disclosure of the records, in terms of section 48 of PAIA</p>	<p>No consent was granted by any of the board Members</p>
<p>2. that was given to the public body by the individual to whom it relates, and the individual was informed by or on behalf of the public body, before it is given, that the information belongs to a class of information that would or might be made available to the public</p>	<p>The agreement between the public body and the board members is that the documents may only be disclosed to the following persons-</p> <ul style="list-style-type: none"> a) The Minister to whom the form is submitted; b) The Director-General: Department of Energy; and c) The DoE staff personnel designated by the Minister for the purposes of record- keeping of the original document.”
<p>3. already publicly available</p>	<p>Records not publicly available</p>
<p>4. about an individual who is or was an official of a public body and which relates to the position or functions of the individual</p>	<p>The information requested does not relate to the position or functions of the individual at the NNR. Board members are not employees of the NNR.</p>

10.2.12.30 The Regulator agrees with the public body's submission that its board members are not individuals who are or where officials of the public body, as contemplated in section 34(2)(f)¹⁰ of PAIA. They are appointed by the Minister in accordance with section 8(7) of the NNR Act and are not staff members of the public body as contemplated in section 16 of the NNR Act. Accordingly, the board members are not officials, contemplated in section 34(2)(f) of PAIA. Therefore, the board members' personal information is not exempt from protection in terms of section 34(2)(f) of PAIA.

10.2.12.31 PAIA seeks to strike a balance with other competing rights including the right to privacy and dignity. PAIA, under the grounds for refusal, recognises everyone's right to privacy and promotes the protection of personal information by public and private bodies. In ***Bernstein and Others v Bester and Others*** 1996(2) SA 751 (CC) Para 75 it was said that the scope of a person's privacy extends only to those aspects in regard to which a legitimate expectation of privacy can be held.

10.2.12.32 However, it is imperative that when interpreting the relevant provisions of PAIA, the spirit, purport, and objects of PAIA must be promoted.

10.2.12.33 In the ***Smuts case***¹¹, the court considered a textual interpretation of the balance of section 34(1) which suggests that an information officer of a public body is given the power to refuse a request for access to a record of that body. To exercise that power, the information officer must determine whether disclosure of the information involves 'unreasonable' disclosure of personal information about a third party. If the disclosure would involve unreasonable disclosure of personal

¹⁰ Section 34(2)(f), provides that a record may not be refused in terms of subsection (1) insofar as it consists of information about an individual who is or was an official of a public body and which relates to the position or functions of the individual.

¹¹ *Smuts N.O. and Others v Member of the Executive Council: Eastern Cape Department of Economic Development Environmental Affairs and Tourism and Others* (1199/2021) [2022] ZAECMKHC 42 (26 July 2022), para 23

information about a third party, the request for access to the record must be refused. The flip side of this inquiry would be the non-refusal of a request that did not involve the 'unreasonable' disclosure of such personal information.

10.2.12.34 The test to determine the unreasonable disclosure was laid down in the **SA History Archive Trust**¹², as follows:

“it should be asserted that the disclosure would be unreasonable; and some facts which cause the records to fall within the ambit of the section should be put up in support.”

10.2.12.35 The IO met the requirements of the test set out in paragraph 10.2.12.32.

10.2.12.36 However, the Court went further to state that if one or more of these requirements apply to a specific request, then section 46 comes into play. If none of them applies, there is no basis to refuse access and the two factors mentioned in paragraph 10.2.12.32 including the “public interest override”, need not be considered¹³.

10.2.12.37 The right to information is a unique provision in the Constitution since it requires both public and private entities to enable access to their information. PAIA was designed to give substance to the right to information and to develop a culture of transparency and accountability in public and private agencies. PAIA, on the other hand, cannot be examined in isolation. PAIA attempts to establish a balance between opposing rights, such as the right to privacy and dignity. POPIA recognizes everyone's right to privacy and regulate the protection of personal information processed by public and private entities.

¹² *The South African History Archive Trust v The South African Reserve Bank and Another (Case no 17/19) [2020] ZASCA 56 (29 May 2020).*

¹³ *Para 29 of Smuts case, supra.*

10.2.13 Operations of public bodies

10.2.13.1 In refusing access to all recordings, transcripts, and minutes to all NNR Board and subcommittee meetings during the period April 2021 to January 2022, the DIO relied on the provisions of section 44(1)(a)(ii) of PAIA and submitted that the records contain minutes, discussions and/or deliberations for the purpose of taking decisions by the NNR in the exercise of its duties in terms of the National Nuclear Regulator Act, 47 of 1999.

10.2.13.2 In response to the public body's refusal of access, the complainant submitted that the public body has failed to take into account the nature of the records so requested, more specifically the direct impact that such records have on the **public interest** and thus considered section 44(1)(a)(ii) in isolation. The complainant further submitted that section 44(1)(a)(ii) of PAIA is not peremptory and the information officer has a discretion.

10.2.13.3 The complainant further stated that in terms of section 25(3)(a) of PAIA, the information officer must state **adequate reasons** for the refusal but failed to indicate why section 44(1)(a)(ii) of PAIA is applicable and why he refused access.

10.2.13.4 The public body subsequently made further submissions as set out below:

"The record sought contains discussions and/ or deliberations inclusive of minutes for the purpose of taking decision/s by the NNR in the exercise of its duties in terms of the NNR Act. Therefore, the record sought is protected from disclosure in accordance with the provisions of section 44(1) (a)(ii) of PAIA. The board deliberations are made in the shared space that allows board members to freely engage without fear, favour, or prejudice. Disclosure of such information will have the effect of board members being profiled into certain positions

which may affect future deliberation of the board. It is also not possible to sever the record as contemplated in section 28 of PAIA.”

10.2.13.5 Section of 44(1)(a)(ii) of PAIA provides that, the information officer of a public body **may** refuse a request for access to a record of the body if the record contains an account of consultation, discussion or deliberation that has occurred, including, but not limited to minutes of a meeting, for the purpose of assisting to formulate a policy or take a decision in the existence of a power or performance of a duty conferred or imposed by law.

10.2.13.6 Section 44(b)(i) of PAIA provides that the information officer of a public body may refuse a request for access to a record of the body if-

(i) the disclosure of the record could reasonably be expected to frustrate the deliberative process in a public body or between public bodies by inhibiting the candid-

(aa) communication of an opinion, advice, report, or recommendation; or

(bb) conduct of a consultation, discussion, or deliberation; or

(ii) the disclosure of the record could, by premature disclosure of a policy or contemplated policy, reasonably be expected to frustrate the success of that policy.

10.2.13.7 In its submission to Regulator, the public body submitted that-

a) The board deliberations are made in the shared space that allows board members to freely engage without fear, favour, or prejudice; and

- b) Disclosure of such information will have the effect of board members being profiled into certain positions which may affect future deliberation of the board.
- c) It is also not possible to sever the record as contemplated in section 28 of PAIA.

10.2.13.8 Section 44(1)(b) of PAIA provides for the protection of a record from disclosure if such disclosure could reasonably be expected to frustrate the deliberative process in a public body or between public bodies by inhibiting the candid communication of an opinion, advice, report, or recommendation; or conduct of a consultation, discussion, or deliberation.

10.2.13.9 In terms of section 44(1)(a) and (b) of PAIA, the records requested by the complainant are protected from the disclosure, however, this is not a mandatory protection of such records, as the information officer has the discretion to decide whether or not to grant access to such records.

Relevant case law

10.2.13.10 In ***De Lange & another v Eskom Holdings Ltd and others* [2012] (1) SA 280** GSJ) paras 34-35], the court held:

“For public bodies...the requester does not need to explain why it seeks the information, let alone why it requires it for the exercise of its rights. In terms of s11(1) of PAIA a requester of information is entitled to the information requested from a public body as long as it has complied with the procedural requirements set in that Act and as long as none of the grounds of refusal are applicable. Those grounds of refusal are set out in Ch 4 of Part 2 of the Act”.

10.2.13.11 In **Cakwebe v Regional Commissioner: DCS (EL 423/2019) [2021] ZAECELLC 8** (25 March 2021), para [35] the court held:

“Consequently, the importance of access to information held by the State or public or State entity as a means to secure accountability and transparency justifies the approach adopted in s 32(1)(a) of the Bill of Rights and in PAIA, namely that, unless one of the specially enumerated grounds of refusal obtains, citizens are entitled to information held by the State or public entity as a matter of right. This is so regardless of the reasons for which access is sought and regardless of what the organ of State believes those reasons to be.”

10.2.13.12 The scheme of PAIA is such that information must be disclosed unless it is exempt from disclosure under one or more narrowly construed exemptions or grounds of refusal.

10.2.13.13 In the matter of the **President of the Republic of South Africa and Others v M & G Media Ltd**¹⁴, the court held that *“the holder of information bears the onus of establishing that the refusal of access to the record is justified under PAIA. The say so of a deponent that he or she has personal knowledge of the facts that put the record within one or more exemptions is insufficient without an indication, at least from the context, of how that knowledge was acquired”*. The Court further held, in paragraph 31 thereof, that *“the opportunity to acquire knowledge may emerge from the duties of the deponent and the office he or she occupies, as well as the seniority of the deponent within the office and his or her prior experience with similar activities or procedures within the office. The nature of the deponent’s office may therefore provide evidence that the deponent would, in the ordinary course of his or her duties, acquire personal knowledge of the information in question.*

¹⁴ *President of the Republic of South Africa and Others v M & G Media Ltd (CCT 03/11) [2011] ZACC 32; 2012 (2) BCLR 181 (CC); 2012 (2) SA 50 (CC) (29 November 2011), Para 30*

10.2.13.14 In the matter of **Smuts NO and others v MEC, Eastern Cape Department of Economic Development Environmental Affairs and Tourism and others**¹⁵, the Court held, in paragraph 8 thereof, that “*Legislation which gives effect to constitutional rights and provides mechanisms for their promotion and enforcement must be interpreted generously and purposively, and with due attention to context*”. In paragraph 15 thereof, the court laid down the following two fundamental principles for a purposive interpretation of the constitutional right of access to information-

- a) **Firstly**, withholding information is permitted only in instances described in PAIA. These exemptions and grounds of refusal must be narrowly construed because they involve limitation of a constitutional right. While access may be denied where it is clearly justified, doubts should typically be resolved in favour of disclosure, and a discretion exercised accordingly.
- b) **Secondly**, the burden of justifying a limitation of a right falls on the party wishing to do so, and not on the right-holder. This is to be discharged on a balance of probabilities by providing evidence that the record in question falls within the description of the ground for refusal that is claimed.

10.2.13.15 In the matter of **President of the Republic of South Africa and Others v M & G Media Ltd**¹⁶, the court held that-

“The facts upon which the exemption is justified will invariably be within the knowledge of the holder of information. In these circumstances, the requester may have to resort to a bare denial of the facts alleged by the holder of information

¹⁵ *Smuts N.O. and Others v Member of the Executive Council: Eastern Cape Department of Economic Development Environmental Affairs and Tourism and Others (1199/2021) [2022] ZAECMKHC 42 (26 July 2022)*

¹⁶ Paragraph 34

justifying refusal of access. A bare denial will normally not be sufficient to raise a genuine dispute of fact, and the Plascon-Evans rule would require that the application be decided on the factual allegations made by the party refusing access to the record¹⁷.

10.2.13.16 In the matter of **President of the Republic of South Africa and Others v M & G Media Ltd¹⁸**, the court held that the state must, in order to discharge its burden under PAIA, provide evidence that the record in question falls within the description of the statutory exemption it seeks to claim. The proper approach to the question whether the state has discharged its burden to ask whether the state has put forward sufficient evidence for a court to conclude that, on the balance probabilities, the information withheld falls within the exemption claimed.

10.2.13.17 In this instance, the IO has discharged his burden, as sufficient evidence has been brought forward to enable the Regulator to decide whether the information falls within the exemption claimed. Having considered the mandate and function of the public body in the Republic and the statutory obligations of the board members, the Regulator is satisfied that the -

- a) records in which access is sought contains an account of consultation, discussion or deliberation that has occurred, including, but not limited to, minutes of a meeting, for the purpose of assisting to formulate a policy or take a decision in the exercise of a power or performance of a duty conferred or imposed by law; and
- b) disclosure of the record in question is reasonably expected to frustrate the future deliberative process in a

¹⁷ See *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634G-635D.

¹⁸ Paragraph [23]

public body by inhibiting the candid conduct of a consultation, discussion, or deliberation.

10.2.1 Accordingly, information officer has properly exercised his discretion, in accordance with section 37(1) and section 44(1)(a) and (b) of PAIA, and that access to the records held by the public body is protected from disclosure in terms of the grounds for refusal specified in section 44(1) of PAIA.

10.3 Whether there are any records which do not contain protected information, and that can reasonably be severed from the protected parts of the record

10.3.1 **“Personal Information”** has been defined in PAIA, to mean any information relating to an identifiable natural person, including, but not limited to-

10.3.1.1 information relating to the race, gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, sexual orientation, age, physical or mental health, wellbeing, disability, religion, conscience, belief, culture, language and birth of the person;

10.3.1.2 information relating to the education or the medical, financial, criminal or employment history of the person; and

10.3.1.3 any identifying number, symbol, email address, physical address, telephone number, location information, online identifier or other particular assigned to the person.

10.3.2 In order to fulfil the obligation placed on the information officer, to protect personal information of a natural person, section 28 of PAIA provides that any information in a record that is not protected and that can reasonably be severed from the protected parts of the record, must be severed, and disclosed.

10.3.3 Therefore, there is no discretion to withhold information that is not protected. The unprotected material must be disclosed “despite any other

provision” of PAIA, unless it “cannot reasonably be severed” from the protected portions.

10.3.4 The DIO submitted that it is not possible to sever the financial disclosures as contemplated in section 28 of PAIA, on the basis that all the information contained in the records in which access is sought are personal information which is under the mandatory protection of certain confidential information of a third party in terms of section 37 of PAIA.

10.3.5 In Mail & Guardian case, the court held that¹⁹-

“There is no discretion to withhold information that is not protected. The unprotected material must be disclosed despite any other provision of PAIA, unless it cannot reasonably be severed from the protected portions”.

“Ngcobo CJ further stated that “it is a reality that some things must be secret. More importantly, however, secrecy must be subjected to the tightest control. The judicial duty that secrecy should be as limited as possible is one that is vital to the success of our democratic order. We cannot ignore this. We must do our judicial duty, however unpleasant it might be”.

10.3.6 The test to determine the unreasonable disclosure was laid down in the SA History Archive Trust²⁰, as follows:

10.3.6.1 it should be asserted that the disclosure would be unreasonable; and

10.3.6.2 some facts which cause the records to fall within the ambit of the section should be put up in support.

10.3.7 The IO met the first requirement of the test but failed to provide reasons and/or evidence on why it will be unreasonable to disclose the information which contains personal information of third parties.

¹⁹ *President of the Republic of South Africa & Others v M & G Media Limited CCT 03/11[2011] ZACC 32*

²⁰ *The South African History Archive Trust v The South African Reserve Bank and Another (Case no 17/19) [2020] ZASCA 56 (29 May 2020).*

10.3.8 The right of access to information is a unique right in the Constitution as it places an obligation on both public and private bodies to allow access to records held by the bodies. To this end, PAIA was enacted to give effect to the right of access to information and foster a culture of transparency and accountability in public and private bodies. PAIA can however, not be considered in isolation. PAIA seeks to strike a balance with other competing rights including the right to privacy and dignity. POPIA recognises everyone's right to privacy and promotes the protection of personal information processed by public and private bodies.

10.3.9 Having considered the abovementioned test for unreasonable disclosure and interpretation of the constitutional right of access to information, the disclosure of a severed board of directors' declarations of financial interest made to the Minister, does not amount to an unreasonable disclosure of the personal information of the board members. The personal information contained in some parts of the records requested by the complainant does not enjoy a right to privacy (i.e. Names of the board members). Disclosing the information, bearing in mind the broad governance related issues which underpin the request, is consistent with a society based on constitutional values such as accountability, responsiveness, and openness.

10.3.10 It is our view that a disclosure of the records under the above-mentioned circumstances will not amount to an unreasonable disclosure of the certain parts of the requested records and therefore, certain part of the records should be disclosed to the complainant, after following the severability of certain personal information.

10.4 Whether the disclosure of the record would reveal evidence of a substantial contravention of, or failure to comply with, the law and the public interest in the disclosure of the record clearly outweighs the harm contemplated in the grounds of refusal.

10.4.1 **“Public Safety or Environmental Risk”** means harm or risk to the environment or the public (including individuals in their workplace) associated with-

10.4.1.1 a product or service which is available to the public;

10.4.1.2 a substance released into the environment, including, but not limited to, the workplace;

10.4.1.3 a substance intended for human or animal consumption;

10.4.1.4 a means of public transport; or

10.4.1.5 an installation or manufacturing process or substance which is used in that installation or process;

10.4.2 PAIA contains substantive and procedural provisions relating to the prohibition on disclosure and the circumstances under which the “public interest override” will operate. All of this collectively increases the reliability of the system of mandatory or discretionary protection and its counterpart, mandatory disclosure – it also enhances the likelihood of an informed and well-considered decision emerging.

10.4.3 Section 46 of PAIA, requires disclosure of otherwise protected information if such disclosure would reveal evidence of **"a substantial contravention of the law, or failure to comply with, the law"** or **"an imminent and serious public safety or environmental risk"** and "the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question"²¹.

10.4.4 In the matter of **Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others [2023] ZACC 13**²². The majority judgment notes that-

*“A PAIA requester who seeks to successfully invoke the benefit of section 46 ‘has formidable substantive and procedural hurdles to overcome’. An IO must be satisfied that the record sought reveals evidence of a substantial contravention of the law or an imminent or serious public safety or environmental risk. This in itself is a **high threshold to meet and, at***

²¹ Section 46 of PAIA

²² Paragraph 140

least objectively, represents aims that are closely aligned with the public interest”.

10.4.5 In paragraph 143 of the said judgment²³, the majority judgment notes that held that-

*“Section 46 goes on to provide that the IO, before being obliged to release the record, **must also be satisfied that the public interest in disclosure clearly outweighs the harm that the provision in question contemplates.** What is contemplated is not just a balancing between equally weighted considerations of the public interest and the personal information of individuals or the interests of the state. It is an exercise that requires that **the public interest must quantitatively outweigh the harm contemplated.** This bias in favour of the non-disclosure of information generally worthy of protection means that section 46, far from negating the claim to confidentiality, retains it, not absolutely but substantially so. This again is a weighted exercise in balancing rights.”*

10.4.6 Lastly, the Constitutional Court held, in paragraph 144 of the judgment in the matter of **Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others**, that-

*“The effect of the “public-interest override” is to **continue to maintain a high level of confidentiality while providing a carefully crafted, limited, restrained and relatively onerous basis for the lifting of confidentiality in the public interest.**”*

10.4.7 The above-mentioned judgement emphasises the substantive and procedural hurdles which the complainant must overcome under the public interest override. The effect of the “public interest override”, as the Constitutional Court has found, is to continue to maintain a high level of confidentiality while providing a carefully crafted, limited, restrained and relatively onerous basis for the lifting of confidentiality in the public interest.

10.4.8 Having found that the DIO has provided reasonable evidence, on a balance

²³ Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others [2023] ZACC 13

of probabilities, for his refusal of access to the records of the public body in terms of the listed grounds for refusal, as contemplated in Chapter 4 of Part 2 of PAIA, the Regulator must now determine the public interest override, as follows-

10.4.8.1 Whether the disclosure of the record of the public body would reveal evidence of a **contravention of**, or **failure to comply with, the law**;

10.4.8.2 Whether the contravention of, or failure to comply with, the law, if any, **is substantial**; and

10.4.8.3 Whether the public interest in the disclosure of the record **clearly outweighs the harm** contemplated in the grounds of refusal.

10.4.9 As stated above, the complainant submitted the request for access to information held by the public body and the records in question relate to:

10.4.9.1 all written statements of all directors (past and present) of the NNR Board upon appointment, to the Minister of Mineral Resources and Energy in which he or she declares whether or not they have any direct or indirect financial interest as stipulated in section 8(9)-(11) of the NRA, and

10.4.9.2 all recordings, transcripts, and minutes to all NNR board and subcommittee meetings during the period of April 2021 to January 2022.

10.4.10 The Regulator's approach to the matter under investigation took into consideration the submissions made by both the complainant and the public body. However, in this instance, the complainant bears the burden to prove that the disclosure of the record would reveal evidence of a substantial contravention of, or failure to comply with, the law; and the public interest in the disclosure of the record clearly outweighs the harm contemplated in the grounds of refusal.

Determination of whether the disclosure of the record would reveal evidence of a substantial contravention of, or failure to comply with, the law- Section 46(a)(i) of PAIA

10.4.11 In determining whether the disclosure of the record would reveal evidence of a contravention of, or failure to comply with, the law, the Regulator considered the following assertions made by the complainant-

“Section 46 ought to have been considered mero motu by NNR when NNR was of the opinion that they had valid reasons to refuse the request for access to information and OUTA further believes the following ought then to have been considered by the NNR:

- a) *It is common cause that the only civil society representative on the NNR board was removed and that the NNR Board functioned without the mandatory representative (section 46(a)(i) and (a)(ii) read with section 8(4) of the NNRA).*
- b) *the NNR did not provide proper reasons to show that section 46 was considered properly and why section 46 is NOT applicable.*

10.4.12 In support of the above assertions, the complainant made references to:

10.4.12.1 King IV Report²⁴, submitting that the disclosure of financial interest is compulsory in terms of the NNRA and the Companies Act (section 75) and ought to be in the public domain if one considers the reasons for the declarations;

10.4.12.2 The vast number of examples in the public domain that points to conflict of interests and the resultant corruption;

10.4.12.3 Various media articles regarding the dismissal of Mr Peter Becker from the NNR Board²⁵.

²⁴ [King IV Practice Note - Declaration of interests.pdf \(ymaws.com\)](#)

²⁵ <https://www.dailymaverick.co.za/article/2022-05-18-peter-becker-sacked-from-the-national-nuclear-regulator-board-wont-go-down-without-a-fight/>
<https://www.saflii.org/za/cases/ZAWCHC/2023/5.html>

10.4.13 Section 46(a)(i) of PAIA provides that the information officer of a public body must grant a request for access to a record of the body if the disclosure of the record would reveal evidence of a substantial contravention of, or failure to comply with, the law.

10.4.14 The complainant is of the view that the disclosure of the records would reveal evidence of a substantial contravention of, or failure to comply with, the law on the basis that following the removal of the civil society representative from the NNR board, the NNR Board functioned without the mandatory representative, as contemplated in section 8(4)²⁶ of the NNR Act.

10.4.15 Having considered the above submission and view of the complaint, the Regulator must determine whether the disclosure of the records would reveal substantial non-compliance with section 8(4) of the NNR Act.

10.4.16 The Regulator does not agree with the complainant's view that for the NNR board to properly function, all the directors listed in section 8(4) of the NNR Act must be appointed. Section 8(7)(d)²⁷ of the NNRA provides that for the purposes of appointing the directors of the board referred to in subsection (4)(a)(i), (ii), (iii) and (vi), the Minister may, for a director appointed in terms of subsection (4)(a)(i) to (v), appoint a suitably qualified alternate director to act in the place of that director during his or her absence. Section 10 (6)²⁸ of the NNR Act, provides that no decision taken by the board or an act performed under its authority, is invalid merely by reason of a vacancy on the board. Therefore, it is the Regulator's view that that the appointment of an alternate director in the absence of the director referred in section

<https://www.freightnews.co.za/article/high-court-reinstates-outspoken-activist-nuclear-regulator-board>
<https://www.dailymaverick.co.za/article/2023-01-20-qwede-mantashe-axing-of-nuclear-watchdog-activist-peter-becker-was-unconstitutional-rules-court/>

²⁶ Section 8(4) of the NNR Act - The board consists of—

(a) the following directors appointed by the Minister:

(i) One representative of organised labour;

(ii) one representative of organised business;

(iii) one person representing communities, which may be affected by nuclear activities;

(iv) an official from the Department of Minerals and energy;

(v) an official from the Department of Environmental Affairs and Tourism; and

(vi) not more than seven other directors; and

(b) the chief executive officer.

²⁷ Section 8(7)(d) of the NNR Act - the Minister may, for a director appointed in terms of subsection (4)(a)(i) to (v), appoint a suitably qualified alternate director to act in the place of that director during his or her absence.

²⁸ Section 10(6) of the NNR Act- No decision taken by the board or an act performed under its authority, is invalid merely by reason of a vacancy on the board.

8(4)(iii), is not compulsory, which means that the board can still function without such an appointment.

10.4.17 The question is not whether there are serious allegations of contravention of, or failure to comply with the law, but whether the information or evidence provided is sufficient for the Regulator to conclude, on the balance probabilities, as to whether the disclosure of the records would reveal evidence of a “**substantial**” contravention of, or failure to comply with, the law and the public interest and the disclosure of the records “clearly outweighs the harm” contemplated in the grounds of refusal.

10.4.18 Based on the submissions and evidence advanced by the complainant it is the Regulator’s view that there is no evidence that the disclosure of the records would reveal evidence of contravention of, or failure to comply with, the law. Media articles regarding the dismissal of Mr Peter Becker from the NNR Board, is not sufficient for the Regulator to conclude, on the probabilities, that the disclosure of the record would reveal evidence of contravention of, or failure to comply with, the law.

10.4.19 Having concluded that there is no evidence that the disclosure of the record held by the public body would reveal evidence of contravention of, or failure to comply with the law, it follows that there is no evidence that the disclosure of the records would reveal evidence of a substantial contravention of, or failure to comply with, the law.

Determination of whether the disclosure of the record would reveal evidence of an imminent and serious public safety or environmental risk²⁹- Section 46(a)(ii)

10.4.20 In terms of section 46(a)(ii) of PAIA, it is incumbent upon the complainant to prove, on a balance of probabilities, that the disclosure of the records

²⁹ “**Public Safety or Environmental Risk**” means harm or risk to the environment or the public (including individuals in their workplace) associated with—

- (a) a product or service which is available to the public;
- (b) a substance released into the environment, including, but not limited to, the workplace;
- (c) a substance intended for human or animal consumption;
- (d) a means of public transport; or
- (e) an installation or manufacturing process or substance which is used in that installation or process;

would reveal evidence of an **imminent** and **serious** public safety or environmental risk.

10.4.21 To this end, the complainant made the following submission:

“NNR’s mandate is clear and is set out in the NNRA. Considering that the NNR’s sphere of operations is that of the nuclear industry, and more importantly, nuclear safety and every decision made by the NNR has a direct or indirect effect on the public. It is common cause that the Koeberg nuclear power station had some serious safety concerns (section 46(a)(ii)).” In Page 5 of the complainant’s letter dated 28 November 2023, the complainant submitted that Koeberg nuclear power station had some serious safety concerns.

10.4.22 In the Koeberg_SALTO-mission-report³⁰ - (“Report”), the following statement was made-

*“Through the review of available documents, presentations and discussions with counterparts and other members of the plant staff, the IAEA team observed that despite many challenges, **the plant has addressed the most important deviations in ageing management activities and preparation for safe LTO since the Pre-SALTO mission in 2019**, however many activities are still in progress to achieve full compliance with IAEA Safety Standards.”*

10.4.23 The complainant’s submissions that the Koeberg nuclear power station had some serious safety concerns, is based on media articles to which the complainant referred. However, as mentioned above, the question is not whether there is serious safety concerns Koeberg, but whether the information or evidence provided is sufficient for the Regulator to conclude, on the probabilities, as to whether the disclosure of the records would reveal evidence an **imminent** and **serious public safety or environmental risk**.

10.4.24 In this regard, the complainant has not provided the Regulator with

³⁰ Report of the Safety Aspects of the Long-Term Operation Mission (Salto) to the Koeberg Nuclear Power Plant Units 1 And 2, South Africa, 22-31 March 2022

sufficient evidence for the Regulator to accept that the disclosure of the records would reveal evidence of an imminent and serious public safety or environmental risk, as contemplated in section 46(a)(ii) of PAIA. In fact, it is the complainant who referred the Regulator to the Koeberg_SALTO-mission-report, which report concluded that there is imminent and serious public safety or environmental risk at Koeberg.

10.4.25 According to the Koeberg_SALTO-mission-report, in the executive summary, it was mentioned that **“the plant has addressed the most important deviations in ageing management activities and preparation for safe LTO since the Pre-SALTO mission in 2019, and that many activities are still in progress to achieve full compliance with IAEA Safety Standards.”** The report also indicated that ***“walkdowns showed the plant to be in good condition”***.

10.4.26 Therefore, the safety concerns, if any, in relation to the Koeberg LTO have been addressed and there is no evidence submitted to the Regulator, that the disclosure of the records would reveal evidence of an ***imminent*** and ***serious*** public safety or environmental risk.

10.4.27 Accordingly, the complainant has failed to prove that the disclosure of the records 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.

Whether the public interest in the disclosure of the record clearly outweighs the harm contemplated in the grounds of refusal.

10.4.28 Hefer JA in **National Media Ltd v Bogoshi 1998 (4) SA 1196 (SCA) at 1212** (albeit in different context), stated that:

“The ‘public interest’ is ‘material in which the public has an interest,’ as opposed to material which is interesting to the public”.

10.4.29 Although the disclosure of the records in question may be interesting to the public, no evidence has been provided to the Regulator that the public, particularly have an interest to know how personal information of the board

members or recording of the meeting discussion or deliberation of the board members of the NNR.

10.4.30 Therefore, there is no evidence that the public interest in the disclosure of the record **clearly outweighs** the harm contemplated the grounds of refusal, especially when the complainant failed to provide evidence that the disclosure of the record would reveal evidence of-

10.4.30.1 a **substantial** contravention of, of failure to comply with, the law; or

10.4.30.2 an **imminent** and **serious** public safety or environmental risk.

11. PRELIMINARY FINDINGS AND RECOMMENDATIONS TO THE ENFORCEMENT COMMITTEE

After having conducted an investigation, in terms of section 77C(1)(a) of PAIA, and having regard to all circumstances of the case, the Regulator has made the following preliminary findings and recommendations:

11.1 Preliminary Findings

11.1.1 **Whether the complainant complied with the procedural requirements prescribed in PAIA, relating to a request for access to that record.**

11.1.1.1 The investigation of this complaint was preceded by an assessment of the prescribed pre-requisites, as prescribed in the PAIA Regulations, and the complaint met all the prescribed pre-requisites.

- a) the applicable PAIA request form, Form 2, was duly submitted to the DIO, in accordance with section 18(1) of PAIA;
- b) access to records was refused by the DIO, in terms of section 37(1)(a) and (b) and section 44(1)(a)(ii) of PAIA;

- c) the complainant lodged an internal appeal in terms of section 75 of PAIA and the prescribed Form 4 was duly submitted within sixty (60) days from the date of the decision;
- d) the complainant did not apply to court for an appropriate relief regarding access to the records which are the subject matter under investigation;
- e) the complaint was lodged with the Regulator on the prescribed form, Form 5 of Annexure A to the PAIA Regulations; and
- f) the complaint was lodged with the Regulator within the prescribed period of 180 days.

11.1.1.2 Accordingly, the complainant has complied with the procedural requirements, as prescribed in PAIA, relating to the request for access to the records held by the public body.

11.1.2 **Whether access to the record is refused in terms of any ground for refusal contemplated in Chapter 4 of Part 2 of PAIA**

11.1.2.1 Access to the records held by the public body was refused on the basis of the following grounds of refusal-

11.1.2.1.1 Mandatory protection of certain confidential information, and protection of certain other confidential information, of third party, in terms of section 37(1) (a) and (b) of PAIA;

11.1.2.1.2 Operations of public bodies, in terms of 44(1)(a)(ii) of PAIA, as the records in question contain minutes, discussions and / or deliberations for the purpose of taking decisions by the NNR in the exercise of its duties in terms of the NNRA. The DIO made a submission that "*The board*

deliberations are made in the shared space that allows board members to freely engage without fear, favour, or prejudice and that the disclosure of such information will have the effect of board members being profiled into certain positions which may affect future deliberation of the board.”

11.1.2.2 The third fundamental principle for a purposive interpretation of the constitutional right of access to information, laid down in **Smuts NO and others v MEC, Eastern Cape Department of Economic Development Environmental Affairs and Tourism and others**⁷², provides that, *“the burden of justifying a limitation of a right falls on the party wishing to do so, and not on the right-holder”*.

11.1.2.3 Having considered the nature of the records requested and those protected by the provisions of sections 37(1)(a) and (b) and 44(1)(b)(ii) of PAIA and the submissions made by the DIO for relying on the said grounds of PAIA, the Regulator is satisfied that the disclosure of the records requested would:

11.1.2.3.1 constitute an action for breach of a duty of confidence owed to the board members in terms of Annexure A to the financial disclosure Form;

11.1.2.3.2 prejudice the future supply of similar information; and

11.1.2.3.3 reasonably be expected to frustrate the deliberations process in the public body

11.1.2.4 Therefore, the DIO has discharged his burden, as sufficient evidence has been brought forward to enable the Regulator to decide whether the information falls within the exemptions claimed.

11.1.3 Whether there are any records which do not contain protected information, and that can reasonably be severed from the protected parts of the record

11.1.3.1 The Regulator having inspected the written financial disclosure forms submitted by all directors of the NNR Board, it has noticed that the following personal information of board members must be completed-

- a) full name and surname;
- b) identity number;
- c) residential address;
- d) cell phone number;
- e) personal email address; and
- f) name of the employer and employer's address and contact details.

11.1.3.2 In so far as the financial disclosure of information in concerned, the board members are required to disclose the following information, amongst others:-

- a) name of the company in which a board member has shared and number of those Shares;
- b) name of the company in which a board member is a director and the remuneration amount;
- c) description of property ownership, size of the property and the value thereof;
- d) in terms of Vehicles, the board members are required to disclose the make, model, year, colour, registration,

estimated value and whether the cars are financed or paid-off; and

e) source of income and monthly or annual income.

11.1.3.3 The Regulator is of the view that certain portions of the financial disclosure, referred to in paragraphs 11.1.3.1 and 11.1.3.2 above can reasonably be severed from information that contains information that is refused in terms of section 37(1)(a) and (b) of PAIA. Therefore, all the information specified in paragraphs 11.1.3.1 and 11.1.3.2 above, must be severed except the names, surnames, and signatures of the board members.

11.1.3.4 Therefore, it is the Regulator's view that in respect of all recordings, transcripts and minutes of all NNR board and subcommittee meetings during the period of April 2021 to January 2022, the DIO has fully discharged its duty to prove its reliance on section 44(1)(a) of PAIA and no part of the records can reasonably be severed from any part of a record of a public body containing information which may or must be refused in terms of any provision of Chapter 4.

11.1.3.5 However, in respect of the financial declarations forms, wherein certain parts of the records can reasonably be severed from any part that contains any such information that must be refused in terms of section 37(1)(a) and (b) of PAIA, the Regulator concludes that the disclosure of such parts of the records severed will not amount to an unreasonable disclosure of personal information of the board members and therefore should be disclosed to the complainant in accordance with the provisions of section 28.

11.1.3.6 The disclosure of the redacted financial disclosure forms will not only enable the complainant to determine whether or not there was compliance with section 8(10) of the NNRA, but also to secure *accountability* and *transparency* in the public body in

so far as the requirement of financial disclosure is concerned.

11.1.4 **Whether the disclosure of the record would reveal evidence of a substantial contravention of, or failure to comply with, the law and the public interest in the disclosure of the record clearly outweighs the harm contemplated in the grounds of refusal.**

11.1.4.1 In the matter of **Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others [2023] ZACC 13**. The majority judgment notes that-

*“A PAIA requester who seeks to successfully invoke the benefit of section 46 ‘has formidable substantive and procedural hurdles to overcome’. An IO must be satisfied that the record sought reveals evidence of a substantial contravention of the law or an imminent or serious public safety or environmental risk. This in itself is a **high threshold to meet and, at least objectively, represents aims that are closely aligned with the public interest**”.*

11.1.4.2 The question is not whether there is suspicion of contravention of, or failure to comply with the law, or suspicion of public safety or environmental risk, but whether the information or evidence provided is sufficient for the Regulator to conclude, on the probabilities, as to whether the disclosure of the record would reveal evidence of-

- a) a **substantial** contravention of, of failure to comply with, the law; or
- b) an **imminent** and **serious** public safety or environmental risk; and

the public interest in the disclosure of the record “**clearly outweighs the harm**” contemplated in the grounds of refusal.

11.1.4.3 According to the Koeberg_SALTO-mission-report, in the executive summary, it was mentioned that the plant has addressed the most important deviations in ageing management activities. The report also indicated that “walkdowns showed the plant to be in good condition”. Therefore, the safety concerns, if any, in relation to the Koeberg LTO have been addressed.

11.1.4.4 Therefore, there is no evidence that the disclosure of the records would reveal evidence of **substantial** contravention of, or failure to comply with the law or an **imminent** and **serious** public safety or environmental risk.

11.1.4.5 Accordingly, there is also no evidence that there is public interest in the disclosure of the record, which **clearly outweighs** the harm contemplated in the grounds of refusal.

11.2 Preliminary Recommendations

11.2.1 Having considered the nature of the records requested, those protected by the provisions of sections 37(1)(a) and (b) and 44(1)(b)(ii) of PAIA and the risk of harm from disclosure of the records held by the public body, which clearly outweighs the overall public interest, if any, in the disclosure, the following enforcement action is hereby recommended for consideration by the Enforcement Committee:

11.2.1.1 The decision of the DIO to refuse access to the protected records relating to all recordings, transcripts, and minutes to all NNR board and subcommittee meetings during the period of April 2021 to January 2022, is hereby confirmed; and

11.2.1.2 The information officer is directed, in terms of section 77J(1)(a) and (b) of PAIA, to-

11.2.1.2.1 Redact all the information specified in paragraphs 11.1.3.1 and 11.1.3.2 above, except the names, surnames, and signatures of the board members;

11.2.1.2.2 grant access to a redacted version of the written financial disclosure forms submitted by all the board members to the Minister of Mineral Resources and Energy in which he or she declared whether or not they have any direct or indirect financial interest as stipulated in section 8(10) of the NNRA; and

11.2.1.2.3 disclose the said records to the complainant, within thirty (30) days of issuing the Enforcement Notice, upon receipt of payment for an access fee, if any.

12. COMPLIANCE MONITORING WITH THE IMPLEMENTATION OF THE ENFORCEMENT NOTICE

12.1 Upon receipt of an Enforcement Notice, the DIO is required to submit an Implementation Plan to the Regulator, within five (5) days of receipt of the Enforcement Notice. The Implementation Plan should specify how the DIO intends to implement the Enforcement Notice.

12.2 Section 90(1) of PAIA provides that a person who with intent to deny a right of access in terms of this Act—

12.2.1 destroys, damages, or alters a record;

12.2.2 conceals a record; or

12.2.3 falsifies a record or makes a false record,

commits an offence and is liable on conviction to a **fine** or **to imprisonment** for a period not exceeding two years.

12.3 In accordance with section 77K of PAIA, the DIO who refuses or fails to comply with an Enforcement Notice referred to in section 77J of PAIA, is guilty of an offence and liable upon conviction to **fine** or **to imprisonment** for a period not exceeding three (3) years **or to both such a fine and such imprisonment.**

13. REVIEW OF THE DECISION OF THE REGULATOR

An Enforcement Notice issued by the Regulator is a final decision of the Regulator. Section 78(2) and (4) of PAIA provides that a requester or an IO of a public body that is aggrieved by any final decision of the Regulator, may, within 180 days of receipt of the decision concerned, apply to a court for appropriate relief in terms of section 82 of PAIA.



Mr Ntsumbedzeni Nemasisi

EXECUTIVE: PAIA

Date: 28 January 2024

Investigators: *Ms Nompumelelo Ntombela-*
Ms Mathapelo Magagula-

Complaints & Investigations Officer
Senior Complaints & Investigations Officer

