



**MINISTRY
ENVIRONMENTAL AFFAIRS
REPUBLIC OF SOUTH AFRICA**

Ref: LSA140685

APPEAL DECISION

APPEAL IN TERMS OF THE PROMOTION OF ACCESS TO INFORMATION ACT, 2000 (ACT NO. 2 OF 2000) AGAINST THE DECISION TO DISCLOSE INFORMATION RELATING TO SAMANCOR CHROME HOLDINGS (PTY) LTD'S MIDDLEBURG FERROCHROME AND COLUMBUS STAINLESS (PTY) LTD PROJECTS

1. INTRODUCTION

- 1.1 On 20 August 2014, the Centre for Environmental Rights (the requester) submitted an application for access to information in terms of section 18(1) of the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000) (PAIA) on behalf of the Greater Middelburg Residence Association, in respect of access to information relating to Samancor Chrome Holdings (Pty) Ltd's Middleburg Ferrochrome and Columbus Stainless (Pty) Ltd projects (the appellant).
- 1.2 On 1 October 2014, the appellant was notified in terms of section 47 (1) of PAIA of the said request for access to information. On 21 October 2014, the appellant transmitted a letter incorporating its grounds of objection against the disclosure of the last three external legal compliance audit reports. On 25 November 2014, the Deputy Information Officer of the Department (Deputy Director General: Chemicals and Waste Management) informed the

appellant that after careful consideration of its objection, the requested information should nevertheless be released in accordance with severance in terms of section 28 of PAIA.

- 1.3 The decision was subsequently appealed against by the appellant, who specifically requested that appendix 3 of the 2012 external legal compliance audit report and appendix O of the 2014 external legal compliance audit report not be disclosed to the requester as it contains financial, commercial and technical information and thus the disclosure of such is likely to cause harm to its commercial and/or financial interests. On 16 January 2015, the requester submitted its written representations in terms of section 76(9) of PAIA in respect of the appeal.

2. BACKGROUND

- 2.1 The main grounds of appeal put forward by the appellant are the following:

- 2.1.1 In reaching its decision to disclose certain records, the Department has misdirected itself by not properly considering the nature of the records, the reasons provided by the appellant for the non-disclosure thereof and the commercial and/or financial interests of the appellant.

- 2.1.2 With reference to section 36(1)(b) of PAIA, the disclosure of appendix 3 of the 2012 external legal compliance audit report and appendix O of the 2014 external legal compliance audit report is "likely to cause" the appellant financial or commercial harm as such information amounts to "financial, commercial and technical information, other than trade secrets". The relevant portions of the documents referred to above, the appellant submits, may not be disclosed if the disclosure is likely to cause harm to Samancor, even if actual harm may not occur.

3. DECISION

- 3.1 In reaching my decision, I have taken the following into consideration:

- 3.1.1 The request for access to information made by the requester;

- 3.1.2. The written objection lodged by the appellant, dated 21 October 2014,
 - 3.1.3 The decision by the Deputy Information Officer of 25 November 2014;
 - 3.1.4. The grounds of appeal submitted by the appellant, dated 12 December 2014;
 - 3.1.5. The written representations submitted by the requester dated 16 January 2015, and
 - 3.1.6 The relevant provisions of PAIA.
- 3.2 Having considered the above mentioned information, and in terms of Section 77 of PAIA, I have decided to dismiss the appeal by the appellant and to confirm the decision by the Deputy Information Officer of 25 November 2014.
- 3.3 As a result of the foregoing, appendix 3 of the 2012 external legal compliance audit report and appendix O of the 2014 external legal compliance audit are herewith made available to the requester.
- 3.3 The reasons for my decision are as follows:
- 3.3.1 In reaching its decision to disclose certain records, the Department has misdirected itself by not properly considering the nature of the records, the reasons provided by the appellant for the non-disclosure thereof and the commercial and/or financial interests of the appellant.**

In response to this ground of appeal, the requester contends that the appellant has failed to provide adequate reasoning in support of its contentions. In support of its contentions in this regard, the requester submits that a party seeking to justify refusal of access to a record bears the onus of proving that the information requested falls within a ground of refusal under PAIA. Moreover, the requester contends, the party defending non-disclosure must adduce evidence of all the facts upon which it is alleged that the requested record falls within a category of justifiable non-disclosure.

In evaluating this ground of appeal, I concur with the requester in that the appellant has failed to identify the basis upon which I should refuse to disclose the two records set out

above. I furthermore agree that it is not sufficient for the appellant to offer a bald allegation to this fact, and this ground of appeal is accordingly dismissed.

3.3.2 With reference to section 36(1)(b) of PAIA, the disclosure of appendix 3 of the 2012 external legal compliance audit report and appendix O of the 2014 external legal compliance audit report is “likely to cause” the appellant financial or commercial harm as such information amounts to “financial, commercial and technical information, other than trade secrets”.

In response to this ground of appeal, the requester disputes that the documents referred to by the appellant fall within the scope of section 36(1) of PAIA. Disclosure of the records, the requester submits, is not likely to cause harm to the commercial or financial interests of third parties. The requester contends furthermore, that the appellant has not discharged its onus of proving that the information requested falls within the scope and ambit of section 36(1) of PAIA.

The requester contends furthermore that the test of being “likely to cause harm” to commercial and financial interests in section 36(1) (b) is a stringent test which requires the party asserting a right to resist disclosure to produce evidence showing that it is probable that there will be harm to the commercial or financial interests of the third party, and furthermore that the evidentiary enquiry relates to probable harm and not to a risk of possible harm.

The requester further contends that compliance reports are conditions of the applicable waste permits are in the public interest and that the public is entitled to know whether or not activities with a significant detrimental impact on the environment, including human health, are being lawfully conducted and whether or not remediation and rehabilitation efforts have been put in place.

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In evaluating this ground of appeal, I once again agree with the requester in that the appellant has failed to offer any reasons as to why these records fall within the ambit of section 36(1) of PAIA, nor have they put forward any evidence that would support such reasons. The appellant has therefore failed to establish a causal link between the information requested and its reliance on section 36(1) of PAIA.

I am therefore satisfied that the disclosure of the requested information, including that of appendix 3 of the 2012 external legal compliance audit report and appendix O of the 2014 external legal compliance audit report, is not "likely to cause" the appellant financial or commercial harm as such information amounts to "financial, commercial and technical information, other than trade secrets", and this ground of appeal is accordingly dismissed.



MRS B. E. E. MOLEWA, MP

MINISTER ENVIRONMENTAL AFFAIRS

DATE: 2015/03/10