



Centre for Environmental Rights

Advancing Environmental Rights in South Africa

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Your ref: PAIA 137640
Our ref: CER-2014-DEA-0008
Date: 16 January 2015

URGENT

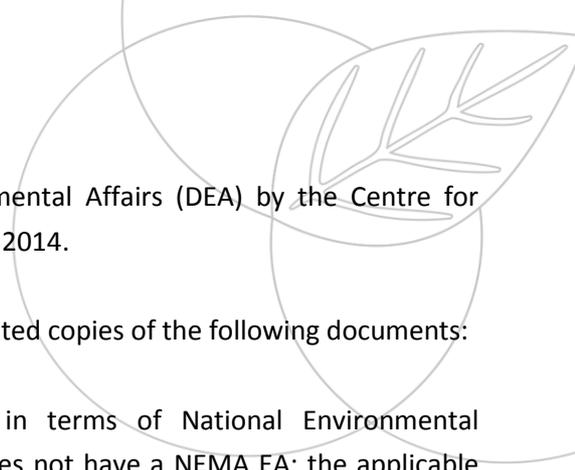
Dear Mr Hassam

WRITTEN REPRESENTATIONS OF THE REQUESTER IN TERMS OF SECTION 76(9) OF THE PROMOTION OF ACCESS TO INFORMATION ACT, 2000 IN RESPECT OF AN INTERNAL APPEAL SUBMITTED BY SAMANCOR CHROME LIMITED

1. Introduction

- 1.1. We address you on behalf of the Greater Middelburg Residents' Association, the requester in the above Promotion of Access to Information Act, 2000 (PAIA) request.
- 1.2. The requester is a community-based environmental justice organisation that undertakes work on a voluntary, non-profit basis. It aims to educate residents of the Greater Middelburg community of their constitutional rights including, among others, their right to a clean and healthy environment. It is also actively involved in campaigns for the protection of such rights.

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- 1.3. The PAIA request was submitted to the Department of Environmental Affairs (DEA) by the Centre for Environmental Rights (CER) on behalf of the requester on 20 August 2014.
 - 1.4. In relation to Samancor Chrome Limited (Samancor), the CER requested copies of the following documents:
 - 1.4.1. the applicable environmental authorisations (EAs) issued in terms of National Environmental Management Act, 1998 (NEMA); alternatively, if Samancor does not have a NEMA EA: the applicable records of decision issued in terms of the Environment Conservation Act, 1989 (ECA);
 - 1.4.2. the applicable waste management licences (WMLs) in terms of the National Environmental Management: Waste Act, 2008; alternatively, if Samancor does not have a WML: the applicable waste permits in terms of the ECA;
 - 1.4.3. all monitoring reports submitted for the last three years in terms of the relevant WMLs or ECA permits;
 - 1.4.4. the last three internal legal compliance audit reports in terms of the Waste Act or ECA ; and
 - 1.4.5. the last three external legal compliance audit reports in terms of the Waste Act or ECA.
 - 1.5. However, the CER has only received copies of the following documents for Samancor:
 - 1.5.1. EA for the proposed construction of a 45MW energy recovery plan and its associated infrastructure at the Samancor Ferrometals Plant in Witbank, dated 27 March 2014;
 - 1.5.2. EA for the construction of a 45MW energy recovery plant and associated infrastructure at the Samancor Chrome, Middelburg Ferrochrome Plant in Middelburg, dated 28 October 2013; and
 - 1.5.3. EA for the development of a furnace and energy recovery plant at the Samancor Tubatse Chrome Plant in Steelpoort, dated 15 October 2012;
 - 1.6. On 15 December 2014, CER was notified that an internal appeal had been submitted by Samancor against DEA's decision to grant the CER access to some of Samancor's records (the Appeal). On 18 December 2014, we received a copy of the Appeal; however, we were not provided with DEA's decision, nor with an indication of which records (or portions of records) had been refused, the reasons for refusal and the relevant PAIA provisions. We were also not advised of our right to lodge an internal appeal in relation to the refusals of any documents. In this regard, our client asserts its right to receive this information in order to determine whether or not to appeal the refusal of any record (or portion thereof).
 - 1.7. On 26 November 2014, we were provided with a letter indicating that the DEA would be serving a section 49(4) notice on Samancor; that it had 30 days to respond; and that the CER would be advised once such response had been received. On 13 January 2015, in response to us advising the DEA that we had not received

the decision on the PAIA request, we were provided with the DEA's correspondence to Samancor, in which was indicated, as follows:

2. I have carefully considered your objections to the release of "the last three external legal compliance audit reports in terms of the Waste Act or ECA" in respect of the Samancor Chrome Holdings (Pty) Ltd's Middelburg Ferrochrome Project. However I am of the view that the requested information of the above mentioned PAIA should be released in accordance with severance in terms of section 28 of PAIA.
3. Kindly find attached hereto the information that will be released, I have severed information where I saw fit. Kindly be advised that environmental authorisations and permits are information that is already in the public domain.

1.8. In the Appeal, Samancor indicated that the following records should be not be disclosed to the requester –

1.8.1. "Appendix 3" of the 2012 report (being the minutes dated June 2011); and

1.8.2. "Appendix O" of the 2014 report which refers to the confidential External Audit for the slag site for the 2012 period.

1.9. According to Samancor:

9. With reference to section 36(1)(b) of PAIA, the disclosure of the abovementioned information (referred to in paragraphs 8.1 and 8.2 above), is "*likely to cause*" financial or commercial harm to Samancor, as such information amounts to "*financial, commercial, scientific or technical information, other than trade secrets*". The relevant portions of the documents referred to above may not be disclosed if the disclosure is "*likely*" to cause harm to Samancor, even if actual harm may not occur. (See in this regard **De Lange and another v Eskom Holdings Limited and others [2012] 1 All SA 543 (GSJ)** at par 84; **SA Metal & Machinery Co Proprietary Limited v Transnet Limited [2003] 1 All SA 335 (W)** at par 12; and **BHP Billiton PLC Incorporated and another v De Lange and others [2013] 2 All SA 523 (SCA)** at par 26).

Conclusion

10. In light of the above Samancor hereby objects to the disclosure of the information itemised in paragraphs 8.1 and 8.2 above, which contains financial, commercial and technical information (other than trade secrets) the disclosure of which is likely to cause harm to the commercial and/or financial interests of Samancor.

1.10. The CER is not in possession of any further information in relation to these documents, but it is assumed that both relate to the request for external legal compliance audit reports.

1.11. In accordance with section 76(9) of PAIA, CER respectfully submits that the requester should be granted access to above records based on the following reasons:

1.11.1. Samancor has not discharged its onus of proof.

1.11.2. It is disputed that the documents referred to in the Appeal fall within the scope and ambit of section 36(1).

1.11.3. Even if it were accepted that some of the documents do in fact fall within the scope and ambit of section 36(1)(b) of PAIA, the request was made in the public's interest and disclosure of the requested documents may reveal evidence of substantial contravention of, or failure to comply with, the law. As such, the "general override provision" contained in section 46 of PAIA finds application.

2. Samancor has not discharged its onus of proof

2.1. PAIA has its genesis in section 32 of the Constitution of the Republic of South Africa, which provides for the right of access to any information that is held by the state.¹ The purposes of PAIA are to foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information and actively to promote a society in which the people of South Africa have effective access to information to enable them to more fully exercise and protect all their rights.²

2.2. In keeping with the purpose of PAIA, 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.³ Further, a party relying on section 36 (1) of PAIA must provide a basis to substantiate its reliance and must adduce evidence that harm 'will and might' happen if it provides access to the requested information. The burden lies with the holder of the information and not with the requester.⁴

2.3. The onus of justification resting on the party refusing disclosure comprises two separate parts:⁵

2.3.1. First, there is a burden of justification. That is, the party must allege sufficient facts which, if proven true, would justify non-disclosure.

2.3.2. Second, there is a true onus of proof. If any of the facts alleged in justification is disputed by the requester, the dispute of fact must be resolved on a balance of probabilities by ordinary evidentiary processes, with the party refusing disclosure bearing an onus.

2.4. In order to discharge the onus resting on it, the party seeking to justify non-disclosure must identify every document which is being withheld and the basis upon which the document is being withheld in terms of

¹ Section 32(1)(a).

² Preamble to PAIA.

³ Section 81(3) of PAIA.

⁴ *BHP Billiton PLC Inc v DE Lange* (189/2012) [2013] ZASCA 11 (15 March 2013) at para 25.

⁵ *President of the RSA v M&G Media Ltd* 2011 (2) SA 1 (SCA) at para 14.

PAIA.⁶ In this case, Samancor must identify the basis upon which the DEA should refuse to disclose the two records set out above.

2.5. Moreover, 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. The party defending non-disclosure cannot merely offer a bald allegation to this effect. This is so as the relevant facts are often peculiar to this party.⁷

2.6. Section 36(1)(b) provides as follows:

“36. Mandatory protection of commercial information of third party. —

(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 the record contains—

...

(b) financial, commercial, scientific or technical information, other than trade secrets, of a third party, the disclosure of which would be likely to cause harm to the commercial or financial interests of that third party.”

2.7. The court has explained the degree of proof that is required as follows:

“It follows that the difference between (b) and (c)⁸ of s 36 (1) is to be measured not by degrees of probability. Both involve a result that is probable, objectively considered. The difference, in my view, is to be measured rather by degree of expectation. In (b), that which is likely is something which is indeed expected. This necessarily includes, at least that which would reasonably be expected. By contrast, (c) speaks of that which “could reasonably be expected.” The results specified in (c) are therefore consequences (i) that could be expected as probable (ii) if reasonable grounds exist for that expectation.”⁹

2.8. In the Appeal, Samancor has not justified its reasons for objecting to the disclosure of the two records (see paragraphs 1.8.1 and 1.8.2 above). As set out above, Samancor merely stated that –

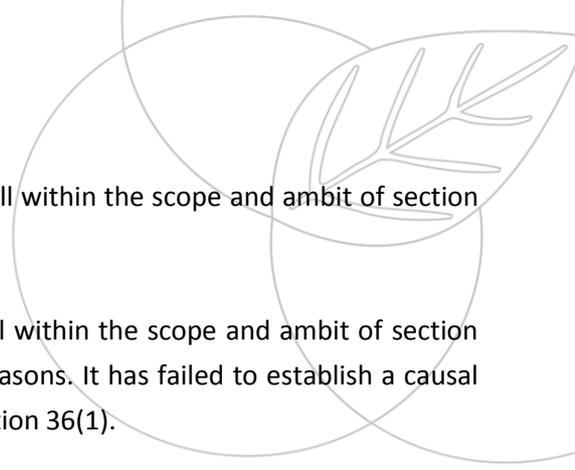
“...the disclosure of the abovementioned information ... is “likely to cause” financial or commercial harm to Samancor, as such information amounts to “financial, commercial, scientific or technical information, other than trade secrets”. The relevant portions of the documents referred to above may not be disclosed if the disclosure is “likely” to cause harm to Samancor, even if actual harm may not occur.”

⁶ *CCII Systems (Pty) Ltd v Fakie NNO (Open Democracy Advice Centre, as Amicus Curiae)* 2003 (2) SA 325 (T).

⁷ *President of the RSA v M&G Media Ltd* 2011 (2) SA 1 (SCA) at paras 18-19.

⁸ Section 36(1)(c) deals with “(c) information supplied in confidence by a third party the disclosure of which could reasonably be expected— (i) to put that third party at a disadvantage in contractual or other negotiations; or (ii) to prejudice that third party in commercial competition”.

⁹ *Transnet Ltd & another v SA Metal Machinery Co (Pty) Ltd* 2006 (6) SA 285 (SCA) para 42.



2.9. Samancor did not discharge its onus of proving that such records fall within the scope and ambit of section 36(1) of PAIA.

2.9.1. Samancor has not offered reasons as to why these records fall within the scope and ambit of section 36(1) or put forward any evidence that would support such reasons. It has failed to establish a causal link between the information requested and its reliance on section 36(1).

2.9.2. Samancor has also not indicated the basis upon which it asserts the right to protect the information. Rather, it has merely stated that the disclosure thereof “*is likely to cause harm to the commercial and/or financial interests of Samancor.*” It is not clear on what basis it is alleged that such information contains financial, commercial and technical information.

2.10. The blunt invocation of section 36(1) of PAIA does not discharge the burden of justification and is clearly impermissible.

2.11. Samancor has failed to provide adequate reasons for its objection. It has merely alleged that the aforementioned ground of refusal applies, without indicating why this is so.

3. It is disputed that the documents referred to in the Appeal fall within the scope and ambit of section 36(1)

3.1. Samancor relies on section 36(1)(b) of PAIA in its Appeal. It is denied that these grounds are applicable in the circumstances. Disclosure of the records is not likely to cause harm to the commercial or financial interest of third parties.

3.2. The records in question are compliance reports which Samancor is required to compile in compliance with the conditions of its applicable WMLs or ECA permits. Such records do not meet the test set out in section 36(1)(b), which broadly refers to information that must be of a sort that:

3.2.1. is confidential, and

3.2.2. incapable of public disclosure without being likely to cause harm to the commercial or financial interest of a third party.

3.3. The test of being “likely to cause harm” to commercial and financial interests in section 36(1)(b) is a stringent test. It 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.¹⁰ The evidentiary enquiry relates to probable harm and not to a risk of possible harm.

3.4. The harm contemplated by these provisions of PAIA must be harm to the legitimate interests of the third party. By way of illustration, the disclosure of the fact that an industrial ferrochrome production facility is

¹⁰ *Transnet Ltd v SA Metal Machinery Co (Pty) Ltd* 2006 (6) SA 285 (SCA) at paras 38-39.

unlawfully polluting the environment may cause it reputational damage that would probably result in harm to its financial or commercial interests, but this cannot be interpreted in terms of PAIA to justify non-disclosure in order to avoid that sort of harm.¹¹

3.5. The Courts have taken a fairly robust attitude to claims of justification under this ground of refusal. Indeed, there are no judgments of which we are aware in which a right to refuse disclosure was upheld on this basis.¹²

3.6. As indicated above, compliance reports are conditions of applicable WMLs or ECA permits. The public is entitled to know whether or not activities with a significant detrimental impact on the environment, including human health – which require a WML / ECA permit – are being lawfully conducted and whether or not remediation and rehabilitation efforts have been put in place. This lack of information on the pollution levels at and around Samancor’s plant seriously hampers the requester’s ability to monitor and evaluate the immediate and on-going impacts of the pollution at Samancor and to assess the remedial measures undertaken by Samancor. We refer to the recent judgement, in the Supreme Court of Appeal, of *the Company Secretary of ArcelorMittal South Africa v Vaal Environmental Justice Alliance* (case no. 69/2014 of 26 November 2014), in which the court confirmed that organisations advocating for environmental justice are entitled to monitor the operations of private companies and its effect on the environment and that “there is no room for secrecy” for corporations operating in South Africa. As stated above, the requester is an environmental justice organisation and should therefore be granted access to the requested records to exercise its environmental right on behalf of the communities it represents.

3.7. In the circumstances, Samancor has not discharged its onus of proving that the information requested falls within the scope and ambit of section 36(1). It is disputed that the requested information falls within the scope of any of the other grounds for refusal in Chapter 4 of PAIA.

4. Even if it were accepted that some of the documents did fall within the scope and ambit of sections 36(1)(b) of PAIA, the request was made in the public’s interest and disclosure of the requested documents may reveal evidence of substantial contravention of, or failure to comply with, the law. As such, the “general override provision” contained in section 46 of PAIA finds application.

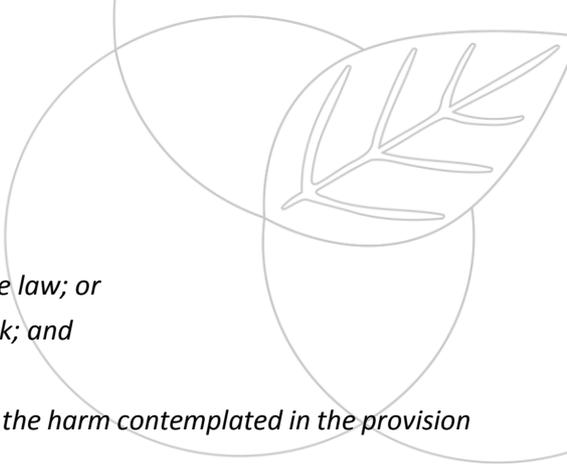
4.1. Section 36(1) is subject to the general override provision contained in section 46 of PAIA.

“46. Mandatory disclosure in public interest

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

¹¹ By way of analogy, see *Media 24 Ltd v SA Taxi Securitisation (Pty) Ltd (AVUSA Media Ltd as Amici Curiae)* 2011 (5) SA 329 (SCA) at para 16; *Caterham Car Sales & Coachworks Ltd v Birkin Cars (Pty) Ltd* 1998 (3) SA 938 (SCA) at para 31.

¹² In *De Lange and Another v Eskom Holdings Ltd and Others* 2012 (1) SA 280 (GSJ) the Court held that the pricing formula in the Eskom Billiton electricity supply agreement for the smelters operated by Billiton was information the disclosure of which was likely to cause harm to Billiton. However, it nevertheless ordered disclosure of the information on the basis of the override clause (which shall be discussed later).

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

4.2. PAIA defines “public safety or environmental risk” in the following terms:

“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.”*

4.3. The general override provision will accordingly operate when the disclosure of the record 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 the public interest in the disclosure outweighs the harm contemplated in section 36.

4.4. It is submitted that, in the present case, there is a harm or risk to the environment or the public associated with substances released into the environment and associated with a ferrochrome production facility. As set out above, activities which require WMLs/ECA permits are those which result in environmental degradation and pollution and may have a significant detrimental effect.

4.5. Disclosure of these records would reveal the extent to which Samancor is operating in accordance with its WML/ECA permit and whether Samancor is in contravention of the waste management legislation and other environmental legislation or its WML/ECA permit by polluting the environment and/or putting the surrounding communities within which they operate at risk. It could thus reveal evidence of any substantial contravention of, or failure to comply with, the law.

4.6. Moreover, and in any event, the public interest override must be construed generously and broadly to bring PAIA within constitutional grounds. In the present case, it would clearly be in the public interest to make such information available, and this public interest would override any alleged basis (including section 36) to refuse access to the records.

4.7. The application was made to further the requester's mandate, which is manifestly in the public's interest. Further, disclosure of the requested documents may reveal evidence of a substantial contravention of, or failure to comply with, the law or an environmental or public safety risk.

5. Statutory compliance

5.1. CER hereby submits its written representations in respect of the Appeal in accordance with section 76(9) of PAIA:

5.1.1. the representations is submitted on or before 19 January 2015 as agreed with DEA (in this regard, we point out that we only received notification of Samancor's Appeal (sent by the DEA on 15 December 2014) when our offices re-opened on 12 January 2015);

5.1.2. CER is delivering the representations to the relevant authority, being the Director: Appeals and Legal Review of DEA, at his electronic mail address; and

5.1.3. the reasons why access to records listed under paragraphs 1.8.1 and 1.8.2 above should be granted are identified.

6. Relief sought

6.1. It is submitted that access to the above records should not be refused by DEA.

6.2. Samancor has failed to provide adequate reasons for its objection to DEA's decision to grant the requester access to such records and has not discharged the onus of proof required of it in terms of section 36(1)(b) of PAIA. In terms of section 11 of PAIA, the requester has the right to the requested information because it has complied with all procedural requirements in PAIA relating to the request for access, and the Appeal should therefore be dismissed.

6.3. CER calls on the responsible authority to dismiss the appeal and grant access to the information requested.

Yours faithfully

CENTRE FOR ENVIRONMENTAL RIGHTS



per:

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Attorney

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