CENTRE FOR ENVIRONMENTAL RIGHTS **APPELLANT**

and

THE DEPUTY INFORMATION OFFICER,

DEPARTMENT OF ENVIRONMENTAL AFFAIRS,

FORESTRY AND FISHERIES **RESPONDENT**

ANNEXURE "A" - INTERNAL APPEAL PURSUANT TO THE PROMOTION OF ACCESS TO INFORMATION ACT 2 OF 2000

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INTRODUCTION

1. This is an appeal to the Minister of Environment, Forestry and Fisheries in terms of section 74 of the Promotion of Access to Information Act, 2000 (**PAIA**) in respect of greenhouse gas (**GHG**) emission data for a number of significant GHG emitters in South Africa.

2. South Africa is the world's 13th largest emitter of GHGs.[1] Its GHG emissions are principally due to a heavy reliance on coal. South Africa is also extremely vulnerable to the impacts of climate change, which will impact particularly on the poor and vulnerable sectors of our society.[2]

3. South Africa has stated in its Nationally Determined Contribution (**NDC**) under the Paris Agreement that: *"[t]he adverse effects of climate change have been a stark reality for South Africa for many years … In keeping with South Africa's commitment to progress its contribution to the global effort to mitigate climate change in line with the principle of common but differentiated responsibilities and respective capabilities, South Africa's mitigation component of its INDC moves from a "deviation from business-as-usual" form of commitment and takes the form of a peak, plateau and decline GHG emissions trajectory range. South Africa's emissions by 2025 and 2030 will be in a range between 398 and 614 Mt CO2–eq, as defined in national policy*."[3]

4. South Africa's NDC acknowledges that a 2 degree Celsius (°C) temperature increase globally equates to a 3 to 4 °C increase for South Africa. At present South Africa's commitments in its NDC are not sufficient to reach even the 2°C Paris Agreement target.[4]

5. Meanwhile the United Nations Intergovernmental Panel on Climate Change, in a 2018 Special Report, confirmed that already the plant has warmed by 1 °C. The impacts of temperature increases of 1.5 °C will be dire. The impacts of a 2°C increase, catastrophic. Presently, the world is on track for a global temperature rise of over 3°C, with devastating impacts across the globe (note – as per the confirmation in the NDC referred to above - that this will be even higher for South Africa).[5] The UN's

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[1] 2019 Global Carbon Budget available at https://www.globalcarbonproject.org/carbonbudget/.
[2] P8, National Climate Change Response White Paper.
[3] Page 6 of *South Africa's Intended Nationally Determined Contribution (INDC)* (1 November 2016) available at https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/South%20Africa%20First/South%20Africa.pdf
[4] See https://climateactiontracker.org/countries/south-africa/, with South Africa's commitments rated as "highly insufficient".
[5] See UN, 2019 Emissions Gap Report 2019: 1.5ºC goal at brink of impossible, at https://www.unenvironment.org/interactive/emissions-gap-report/2019/index.php.

latest gap report confirms that the 1.5 °C goal is "*on the brink of impossible*". The need to address climate change has never been more urgent.

6. Already, temperature extremes have increased significantly in frequency annually across the country, and rainfall has shown high inter-annual variability.[6] In the last five years, South Africa has experienced record temperature highs, droughts and fires.[7] This has been impacting on food prices and exacerbating the already high poverty levels in South Africa.[8] These costs are predicted to escalate, as climate-related disasters, such as droughts and fires, get larger in extent and magnitude,[9] with thousands of jobs being lost.[10]

7. If climate change is not curbed, significant socio-implications are expected, particularly for vulnerable groups and communities in South Africa. These implications will largely be felt through: significant warming (as high as 5–8°C, over the South African interior by the end of this century);[11] impacts on water resources, such as changes in water availability; and a higher frequency of natural disasters (flooding and drought), with cross-sectoral effects on human settlements, health, disaster risk management and food security.[12] Two of South Africa's major water management areas, the Olifants and the Limpopo, will be heavily impacted by climate change, with deterioration of water quality and loss of water availability, flagged as high risks for the Olifants,[13] Limpopo and Crocodile Rivers.[14]

8. Further, if temperature increases are not limited to 1.5 degrees, Southern Africa will be exposed to increased food shortages and poverty.[15] The cooler coastal regions of the country are likely to see

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[6] P128, Long Term Adaptation Scenarios: Climate Trends and Scenarios for South Africa.
[7] The fire season for 2015/16 in the Western Cape Province has broken previous records. P2, Western Cape Climate Change Response Strategy, 2nd Biennial Monitoring and Evaluation Report, 2017/2018.
[8] Based on January 2016's preliminary retail prices, the cost of the staple basket increased by approximately 19% from January 2015 to the corresponding month in 2016, p22, Western Cape Climate Change Response Strategy, 2nd Biennial Monitoring and Evaluation Report, 2017/2018.
[9] P20, Western Cape Climate Change Response Strategy, 2nd Biennial Monitoring and Evaluation Report, 2017/2018.
[10] Drought Policy Brief, Western Cape Agriculture, at http://www.bfap.co.za/wp-content/uploads/2018/08/DroughtPolicyBrief_2018.pdf.
[11] P128, Long Term Adaptation Scenarios: Climate Trends and Scenarios for South Africa.
[12] P129, Long Term Adaptation Scenarios: Climate Trends and Scenarios for South Africa.
[13] P40, Department of Water and Sanitation Climate Risk and Vulnerability Assessment of Water Resources in the Olifants WMA, March 2018.
[14] P43, Department of Water and Sanitation Climate Risk and Vulnerability Assessment of Water Resources in the Limpopo WMA, March 2018.
[15] P9 – 10, IPCC Special Report Summary for Policy Makers, https://www.ipcc.ch/site/assets/uploads/sites/2/2019/05/SR15_SPM_version_report_LR.pdf.

significant in-migration from the interior of the country (as well as from further north on the continent).[16]

9. Information on: the volume of climate change-causing GHGs being emitted; planned emission reductions; and whether those reduction targets are in fact being met are directly relevant to the country's exposure, and contributions, to the impacts of climate change. As shown above these are, and will continue to be, significant negative impacts for the people of South Africa, and their rights enshrined in the Bill of Rights in the Constitution of the Republic of South Africa ("**the Constitution**").[17]

10. Clearly records and information regarding GHG emissions and plans of large emitters to reduce these emissions are of fundamental public interest and of relevance for all the people of South Africa.

11. This appeal is being instituted to dispute and seek the setting aside of the decision of the Respondent to redact and withhold, relevant GHG emission information on the alleged basis of commercial confidentiality.

12. It is the Appellants' primary assertion that: information regarding emitters' GHG emissions and anticipated reductions is not, and cannot be, commercially confidential. In any event, given the high public interest in this information, it cannot be withheld on any basis. This is addressed in further detail under the grounds of appeal below.

THE PARTIES

13. The Appellant is the Centre for Environmental Rights (**CER**), a non-profit company based in Cape Town with registration number 2009/020736/08 established to help communities and civil society organisations in South Africa realise the Constitutional right to a healthy environment by advocating and litigating for environmental justice ("**the Appellant**").

14. The Respondent is the Deputy Information Officer (also the Deputy Director General: Climate Change Air Quality and Sustainable Development), of the Department of Environment, Forestry and Fisheries

[16] P1, Western Cape Climate Change Response Strategy, 2nd Biennial Monitoring and Evaluation Report, 2017/2018.
[17] Act 108 of 1996.

("**the Department**"), the decision-maker in respect of the PAIA request for access to information described below ("**the Respondent**").

THE PAIA REQUEST

15. On 11 February 2019, the Appellant submitted a request in terms of PAIA to Ms. Vanessa Bendeman (Chief Director: Corporate Legal Support and Litigation) and Ms. Phumzile Sabeka (PAIA Administrator) at the Department, with reference number CER-2019-DEA-0001 (GHG) ("**the PAIA request**"). The PAIA request form and cover letter are attached as **Annexure A1**.

16. The PAIA request submitted on 11 February 2019 sought access to the following records:

    16.1. The database or list of data providers registered in terms of regulation 5 of the National Greenhouse Gas Emission Reporting Regulations, GN 275 of 2017 ("**the GHG Reporting Regulations**");

    16.2. The latest reports submitted in terms of regulation 7(1) of the GHG Reporting Regulations (**"GHG emission data reports"**) for the following entities (**"the companies"**):

        16.2.1. Eskom Holdings SOC Ltd.
        16.2.2. Sasol Ltd.
        16.2.3. ArcelorMittal South Africa Ltd.
        16.2.4. Exxaro Resources Ltd.
        16.2.5. Glencore Plc.
        16.2.6. African Rainbow Minerals Ltd.
        16.2.7. Anglo American Plc.
        16.2.8. Anglo Operations Ltd.
        16.2.9. South 32 Ltd.
        16.2.10. Seriti Resources Holdings (Pty) Ltd.
        16.2.11. Petmin Ltd.
        16.2.12. Mbuyelo Coal (Pty) Ltd.
        16.2.13. Kuyasa Mining (Pty) Ltd.
        16.2.14. Sappi Ltd.
        16.2.15. PPC Ltd.
        16.2.16. Gold Fields Ltd.

16.3. The database of or list of persons that have submitted pollution prevention plans under regulation 4(1) of the National Pollution Prevention Plan Regulations, GN 712 of 2017 ("**PPP Regulations**");

16.4. The pollution prevention plans submitted for the period up to 31 December 2020 in terms of regulation 3(2) of the PPP Regulations, by the companies ("**pollution prevention plans**"); and

16.5. The latest annual progress reports, submitted by the companies, in terms of regulation 5(1) of the PPP Regulations ("**annual progress reports**").

THE RESPONDENT'S DECISION

Partial access granted: redacted GHG emission data reports, pollution prevention plans and progress reports

17. On 5 April 2019, the Respondent sent a letter of outcome (attached as **Annexure A2**), stating that:

17.1. the Department had decided to release the following documents to the Appellant:

17.1.1. the list of data providers registered in terms of regulation 5 of the of the GHG Reporting Regulations;

17.1.2. the latest reports submitted in terms of regulation 7(1) of the GHG Reporting Regulations for some of the listed companies, redacted allegedly, in accordance with the provisions of sections 28 and 36 of PAIA;

17.1.3. a list of persons that have submitted pollution prevention plans under regulation 4(1) of the PPP Regulations; and

17.1.4. the pollution prevention plans submitted for the period up to 31 December 2020 in terms of regulations 3(2) of the PPP Regulations, redacted, allegedly in accordance with the provisions of sections 28 and 36 of PAIA;

17.2. the Department had received the first annual progress reports from certain of the Third Parties listed above but that the Appellant's request for those annual progress reports would be deferred for a period of 90 (ninety) days in terms of section 24 of PAIA;[18]

[18] Annexure 1 at para 9.

17.3. the Department did not receive GHG emission data reports as requested from the following entities:

17.3.1. Petmin Ltd;

17.3.2. Mbuyelo Coal Ltd; and

17.3.3. Kuyasa Mining Ltd; and

17.4. that the Department did not receive pollution prevention plans or annual progress reports, as requested, from the following entities:

17.4.1. Anglo American Plc;

17.4.2. Petmin Ltd;

17.4.3. Mbuyelo Coal Ltd;

17.4.4. Kuyasa Mining Ltd;

17.4.5. Gold Fields Ltd;

17.4.6. Seriti Resources Holdings Pty Ltd;

17.4.7. Glencore;

17.4.8. Exxaro Resources Ltd;

17.4.9. PPC Ltd; and

17.4.10. South32 (Samancor Manganese Pty Ltd).

18. The letter of outcome was accompanied by an affidavit in terms of section 23(1)(b)(ii) of PAIA, dated 5 April 2019, ("**the April affidavit**"), attached as **Annexure A3**, confirming, *inter alia*, that the Department was not in possession of the records listed in paragraphs 17.3 and 17.4 above.

19. In an email sent on 17 May 2019, the Department sent the records to which access had been granted, but with redactions of various portions of the GHG emission reports and pollution prevention plans that had been provided.

20. The Department simultaneously sent: a letter (dated 7 May 2019) stating that two additional entities had not provided the Department with GHG emission data reports: Exxaro Resources Ltd and Gold Fields Ltd (in addition to Petmin, Mbuyelo and Kuyasa Mining); and a further affidavit in terms of section 23(1)(b)(ii) of PAIA, dated 7 May 2019 ("**May affidavit**"), confirming that the Department was not in possession of these additional records for Exxaro and Gold Fields. That letter and affidavit are attached as **Annexures A4 and A5** respectively.

21. Following correspondence and follow-ups by the Appellant in respect of item 4 of the PAIA request (the annual progress reports for the pollution prevention plans), in respect of which a decision was outstanding, the Department wrote to the Appellant on 2 August 2019 (letter attached as **Annexure A6**) indicating that:

    21.1. subsequent to receiving the annual progress reports submitted in terms of the PPP Regulations, and after having had the opportunity to scrutinise the reports, it became apparent that the reports might be considered as records contemplated within the ambit of section 47 of PAIA and that the Department therefore cannot release such reports in terms of section 24(1)(b) of PAIA;

    21.2. the requested annual progress reports might contain information that falls within the ambit of sections 36(1), 37(1), and 43(1) of PAIA and therefore the Department had informed all companies in terms of section 47 of PAIA; and

    21.3. the outcome of the Appellant's PAIA request in relation to the annual progress reports would be communicated to the Appellant in due course.

22. On 2 September 2019, the Appellant wrote a letter to the Department (attached as **Annexure A7**) reminding the Department that a response in terms of the annual progress reports was outstanding and requested that the Department revert as soon as possible with the response.

23. On 9 September 2019, the Department sent a letter of outcome (attached as **Annexure A8**) in respect of item 4 of the PAIA request indicating that:

    23.1. a notice as contemplated in section 47 of PAIA was sent to the third parties (the companies) on 2 August 2019, and the third parties had been afforded a period of 21 days to make representations in terms of section 48 of PAIA to the Department;

    23.2. after careful consideration of the representations received from Anglo Operations Ltd, African Rainbow Minerals Ltd, South32 Ltd, Sappi Ltd and PPC Ltd, the Respondent had exercised her own discretion and decided to release the annual progress reports by those five entities;

    23.3. the Respondent had also considered the representations received from Eskom, Sasol and ArcelorMittal and had exercised her discretion and decided to release the annual progress reports of those three entities in redacted format in accordance with the provisions of sections 28 and 36 of PAIA. The Respondent said that "*the reason for redacting the specific*

portions is due to the fact that these portions would likely cause harm to the financial or commercial interest of the Third Parties, if disclosed" and that "*the Department is of the view that disclosure of such records, sans the redactions, may compromise any competitive advantage that have (sic) been achieved, or might be achieved by the above stated Third Parties in the future*"; and

23.4. The Department did not receive annual progress reports as requested from the following companies:

23.4.1. Anglo American Plc;

23.4.2. Petmin Ltd;

23.4.3. Mbuyelo Coal Pty Ltd;

23.4.4. Kuyasa Mining Pty Ltd;

23.4.5. Gold Fields Ltd;

23.4.6. Seriti Resources Holdings Pty Ltd;

23.4.7. Glencore; and

23.4.8. Exxaro Resources Ltd.

24. The letter was accompanied by an affidavit in terms of section 23(1)(b) of PAIA confirming this ("**the item 4 affidavit**").

25. The Appellant received annual progress reports to which access was granted, on 15 October 2019 from the Department via email, some of these were redacted, as advised by the Department.

Records received: content received and redacted

26. By 17 October 2019, the Appellant had obtained access to the following records from the Department:

26.1. The list of data providers registered in terms of regulation 5 of the of the GHG Reporting Regulations and list of persons that have submitted pollution prevention plans under regulation 4(1) of the PPP Regulations;

26.2. Redacted copies of the GHG emission data reports in respect of Arcelor Mittal South Africa Ltd, PPC South Africa, Eskom Holdings Ltd, Glencore Operations South Africa (Pty) Ltd, Anglo American Plc, African Rainbow Minerals Ltd, Seriti Ltd, SAPPI Southern Africa Ltd, Sasol Ltd, and South32 (Hillside Aluminium) (attached as **Annexure A9**);

26.3. Redacted copies of the pollution prevention plans in respect of African Rainbow Minerals Ltd, Eskom Holdings Ltd, Sasol South Africa, ArcelorMittal South Africa, Exxaro Coal, Anglo Operations Ltd, South32 (Hillside Aluminium and Samancor Manganese), SAPPI Southern Africa Ltd, and PPC Cement Ltd (attached as received, as **Annexure A10**);

26.4. Unredacted copies of the annual progress reports in respect of Anglo Operations Ltd, African Rainbow Minerals Ltd, South32 Ltd, Sappi Ltd and PPC Ltd; and

26.5. Redacted copies of the annual progress reports in respect of Eskom, Sasol and ArcelorMittal (attached as **Annexure A11**).

27. It is the redacted records (Annexures A9, A10 and A11) that form the subject of this Appeal.

28. In respect of the GHG emission data reports (Annexure A9), the numerical values of the companys' GHG emissions are provided, but the numerical values of the unit activities giving rise to such GHG emissions are redacted, such as values of activity data. In Glencore, Seriti and Sasols' reports, the units of activity data have been redacted as well, whereas the activity data units are not redacted for others. In ArcelorMittal's report, internal consumption information is also redacted.

29. In respect of the pollution prevention plans (Annexure A10), the value of expected GHG emissions for the covered years (generally ranging 2017 to 2020) have been redacted from all the pollution plans received.

30. In respect of the annual progress reports (Annexure A11), the anticipated and actual emission reductions, and their totals, for the following companies: ArcelorMittal (for years 2018 to 2021); Sasol (for years 2018 to 2020); and Eskom (for years 2018 to 2020) have been redacted.

31. Details of contact persons – names, contact details and signatures, in some instances, have been redacted from some of the records, but not all of the records. It is not clear why this kind of information has been redacted from some records and not others.

32. No justifications are provided for why this specific information has been redacted or for the discrepancies for example, why certain information is redacted from certain documents, such as the pollution prevention plan annual progress reports, but the same information is not redacted from others.

STEPS PRECEDING THIS APPEAL

Appellant's objections to the decision and request for reasons

33. On 6 June 2019, the Appellant wrote a letter to the Department (attached as **Annexure A12**), advising that it had received the first set of records on 17 May 2019 (excluding the item 4 records) and noted that significant portions of the records had been redacted, allegedly in terms of sections 28 and 36 of PAIA.[19] The Appellant also noted that substantial portions of some of the records were illegible and that it was not clear whether it was intentionally so (in other words, that that was the manner in which the records had been redacted), or if the records were simply unclear. The Appellant sought clarity on this and confirmation of what had been redacted from the records.

34. In that letter, the Appellant also pointed out that no justification or explanations had been provided for the redactions, setting out (i) what had been redacted and (ii) why that information meets the requirements for redaction in terms of section 28 read with section 36 of PAIA.

35. In this regard, the Appellant noted that section 25(3) of PAIA requires an information officer to furnish a requestor with adequate reasons as to why any items were wholly or partially refused, and that simply quoting the provisions of sections 28 and 36 of PAIA in the decision letter is not sufficient to qualify as reasons for the refusal of the information.

36. The Appellant requested that the Department provide adequate reasons for the redactions made to the requested records, including on what basis the information is claimed to meet the requirements of section 36 of PAIA.

37. On 5 August 2019, the Department responded by email (attached as **Annexure A13**) with the following:

    "After giving due regard to all representations received from third parties in terms of section 48 of PAIA, the Department redacted certain portions of the records, as these portions would likely cause harm to the financial or commercial interest of the third parties, if disclosed. The Department is of the view that disclosure of such records, sans the redactions, may compromise any competitive advantage that have been achieved, or might be achieved by third parties in the future."

[19] Promotion of Access to Information Act 2 of 2000. Hereafter "PAIA".

38. The Department provided the Appellant with legible hard copies of the redacted records via courier on 13 August 2019.

39. In the 2 September letter to the Department (Annexure A7), the Appellant reserved its rights to challenge, on appeal, the response in respect of all the records requested, until such time as the Department's response in terms of the annual progress reports was received. The Appellant also recorded that adequate reasons for the redactions in the records already received had still not been given, despite the Appellant's request for those in its letter of 6 June 2019. The Appellant reserved its rights in that regard as well.

Requests to the third party companies

40. The Appellant also sought to provide the third party companies, in respect of which the records had been requested, an opportunity to make the requested records available, unredacted, and sought to obtain the records from them.

41. On 10 October 2019, the Appellant wrote to the third party companies listed in the PAIA request, to request that they make available directly, unredacted copies of the records requested by the Appellant. In those letters,[20] the Appellant indicated which records it had received from the Department, which information it had not received from the Department, and that its intention was to appeal the Department's decision to redact the records.

42. The Appellant received 11 responses out of the 15 company letters sent.[21]

    42.1. Sappi made the records available, unredacted.

    42.2. Mbuyelo Coal made the GHG reports for its 3 subsidiary companies available, unredacted (it avers it is not obliged to submit pollution prevention plans under the PPP Regulations, and thus none were provided).

    42.3. Anglo American's response confirms that it did not request its records to be redacted by the Department. It made its pollution prevention plan for the entities within Anglo American Coal South Africa available unredacted.

[20] To avoid burdening the appeal papers, these letters are not attached but can be made available upon request.
[21] To avoid burdening the appeal papers, these letters are not attached but can be made available upon request.

42.4. Sasol initially advised that the redacted information is commercially sensitive, but subsequently made a copy of its progress report against its pollution prevention plan available, unredacted. The GHG emission report and pollution prevention plan were not made available.

42.5. ArcelorMittal advised that the records are commercially confidential.

42.6. Eskom and Glencore opted to defer to the access to information process being followed with the Department, advising that the Appellant continue to pursue the access to information process with the Department.

42.7. The remaining entities do not make any submissions on the commercial confidentiality of the records, nor have they made records available unredacted.

43. Exxaro, African Rainbow Minerals, PPC and South32 have not responded, despite follow-ups from the Appellant.

GROUNDS FOR THIS APPEAL

44. The Appellant submits that, in: deciding to redact the records requested; refusing to grant the Appellant unredacted access to the records requested; and failing to provide the requested reasons as to why the redacted records are treated as confidential, the Respondent:

44.1. has failed to apply its mind to the request and failed to provide adequate reasons ("**first ground of appeal**");

44.2. has not appropriately interpreted PAIA so as to promote transparency and in favour of disclosure ("**second ground of appeal**"); and

44.3. has not discharged its onus of proof ("**third ground of appeal**").

45. The Appellant submits that the records requested do not fall within the scope and ambit of section 36 of PAIA and can therefore not be refused on these grounds ("**fourth ground of appeal**").

46. The Appellant furthermore submits that, in any event, the public interest in the disclosure of GHG emission data and plans to mitigate emissions clearly outweighs any harm contemplated in making the redacted information available ("**fifth ground of appeal**").

First ground of appeal: Failure to apply the mind and provide adequate reasons

47. The Respondent was obliged to assess the PAIA request and appropriately determine whether or not the Appellant was entitled to the information. If the decision is taken to refuse access, that refusal ought to have been legitimately based on one of the grounds of refusal as listed within chapter 4 of PAIA, and supported by adequate reasons.

48. According to the Respondent's initial outcome letter of 5 April 2019 (Annexure A2) the records were redacted in accordance with section 28[22] of PAIA, which relates to severability, read with section 36[23] of PAIA, which relates to the mandatory protection of commercial information of third party.

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[22] *Section 28(1) 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.

(2) If a request for access to—

(a) a part of a record is granted; and

(b) the other part of the record is refused,

as contemplated in subsection (1), the provisions of section 25 (2) apply to paragraph (a) of this subsection and the provisions of section 25 (3) apply to paragraph (b) of this subsection.

[23] *Section 36 (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—*

(a) trade secrets of a third party;

(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; or

(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.

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

(a) already publicly available;

(b) about a third party who has consented in terms of section 48 or otherwise in writing to its disclosure to the requester concerned; or

(c) about the results of any product or environmental testing or other investigation supplied by a third party or the result of any such testing or investigation carried out by or on behalf of a third party and its disclosure would reveal a serious public safety or environmental risk.

(3) For the purposes of subsection (2) (c), the results of any product or environmental testing or other investigation do not include the results of preliminary testing or other investigation conducted for the purpose of developing methods of testing or other investigation.

49. Simply stating the two provisions of PAIA being relied upon, as the Respondent did in its outcome letter, does not discharge the Respondent's obligation to provide adequate reasons, in terms of section 25(3)(a) PAIA, particularly as adequate reasons had been requested by the Appellant.

50. Similarly, the "reasons" provided for the redactions of the 3 annual progress reports under the PPP Regulations, for Sasol, Eskom and ArcelorMittal on the basis that disclosing the information "*may compromise any competitive advantage*" (see Annexure A8), are inadequate. Nowhere is it explained *how* the disclosure of the redacted information would, or could, have such a compromising effect. Nor are reasons given for why this would jeopardise Sasol, Eskom and ArcelorMittal's interests in particular, when it would not have this effect for the 5 companies in respect of which the reports were disclosed unredacted.

51. The failure to provide adequate reasons contravenes PAIA and also indicates that the Respondent failed to apply its mind to the Appellant's request.

52. Had the Respondent applied her mind to the request, the Respondent would have provided a justification or explanation setting out precisely what has been redacted, and why this information meets the requirements for redaction in terms of sections 28 read with section 36 PAIA.

Second ground of appeal: Failure to interpret PAIA appropriately

53. PAIA has its genesis in section 32 of the Constitution, which provides:

> *"32 (1) Everyone has the right of access to*
>
> *(a) any information held by the state; and*
>
> *(b) any information that is held by another person and that is required for the exercise or protection of any rights.*
>
> *(2) 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."

54. Section 32, in turn, had its origin in Constitutional Principle IX in Schedule 4 to the Interim Constitution which required the Constitutional Assembly to produce a Constitution which made provision for "*freedom of information so that there can be open and accountable administration at all levels of government*". Commenting on Constitutional Principle IX, the Constitutional Court emphasised that what the principle required was: *"not access to information merely for the exercise or protection of a*

right, but for a wider purpose, namely to ensure that there is open and accountable administration at all levels of government".[24]

55. PAIA is constitutionally-mandated legislation as envisaged in section 32(2) of the Constitution and captures the spirit of the Constitution. 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 of their rights…".*[25]

56. The Constitutional Court has stated that: "*[t]he importance of this right too, in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the State. Indeed one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency must be fostered by providing the public with timely, accessible and accurate information'. . . Apart from this, access to information is fundamental to the realisation of the rights guaranteed in the Bill of Rights."*[26]

57. The courts have emphasised that PAIA must be interpreted to promote transparency and accountability,[27] and that grounds of refusal must be interpreted strictly and narrowly so as to promote the overriding purposes of PAIA.[28]

58. One of the aims of PAIA is to enhance transparency, accountability and effectiveness of government. It is applicable to public bodies, which includes national, provincial and local government. Public bodies are legally obliged to provide any information requested in terms of PAIA by a member of the public – subject to the limited exceptions in PAIA.

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[24] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) at para 83.
[25] Preamble to PAIA.
[26] *Brümmer v Minister for Social Development and Others* [2009] ZACC 21; 2009 (6) SA 323 (CC); 2009 (11) BCLR 1075 (CC).
[27] *Minister for Provincial and Local Government v Unrecognised Traditional Leaders, Limpopo Province (Sekhukhuneland)* 2005 (2) SA 110 (SCA) at para 18. *MEC for Roads & Public Works, EC v Intertrade Two (Pty) Ltd* 2006 (5) SA 1 (SCA) at para 21; *Claase v Information Officer, SAA (Pty) Ltd* 2007 (5) SA 469 (SCA) at para 1; *President of the Republic of South Africa and Others v M&G Media Ltd* 2011 (2) SA 1 (SCA); *Centre For Social Accountability v Secretary of Parliament and Others* 2011 (5) SA 279 (ECG) at paras 50-59.
[28] *Avusa Publishing Eastern Cape (Pty) Ltd v Qoboshiyane* NO 2012 (1) SA 158 (ECP) at para 17.

59. It is manifest from the Respondent's responses (Annexures A2, A4 and A6) that the Respondent has not interpreted the provisions of PAIA with a view to promoting transparency and accountability, in that it is in the interests of transparency and accountability that all data and records regarding companies' GHG emissions – which affect us all and have far-reaching and irreversible negative impacts for the people of South Africa – be made available. GHG emissions are of relevance to the public in terms of climate impacts in South Africa and also in terms of the country's GHG emission reduction targets. Reducing South Africa's GHG emissions is a Constitutional imperative, given the far-reaching implications that climate change has globally, and on all human rights in the Bill of Rights. The spirit of promoting the overriding purposes of PAIA would require that the information be made available.

60. The Supreme Court of Appeal's (SCA) 2014 judgment in *Company Secretary of ArcelorMittal South Africa v Vaal Environmental Justice Alliance,*[29] confirmed that:

    60.1. "*AM's [ArcellorMittal's] industrial activities, impacting as they do on the environment, including on air quality and water resources, has (sic) an effect on persons and communities in the immediate vicinity and is ultimately of importance to the country as a whole. Translated, this means that the public is affected and that AM's activities and the effects thereof are matters of public importance and interest. Put differently, the nature and effect of AM's activities are crucially important. AM is a major, if not the major, polluter in the areas in which it conducts operations*" (emphasis added);

    60.2. "*It is clear, therefore, in accordance with international trends,[6] and constitutional values and norms, that our legislature has recognised, in the field of environmental protection, inter alia the importance of consultation and interaction with the public. After all, environmental degradation affects us all. One might rightly speak of collaborative corporate governance in relation to the environment*"; and

    60.3. "*Corporations operating within our borders… must be left in no doubt that, in relation to the environment in circumstances such as those under discussion, there is no room for secrecy and that constitutional values will be enforced*" (emphasis added).

[29] (69/2014) [2014] ZASCA 184 (26 November 2014)

61. The exact same principles apply in this instance, which pertains to access to GHG emission information, contributing directly to climate change – which affects us all. There is simply no room for secrecy. Consultation and transparency with the public in respect of companies' GHG emissions and anticipated GHG emission reductions is a basic necessity, which cannot be disregarded.

62. The sections on which the Respondent has relied to refuse the request have been interpreted by it to have far-reaching application, and, in redacting some of the information from the records, the Respondent has not taken into consideration the spirit of promoting the overriding purposes of PAIA.

Third ground of appeal: Failure to discharge onus of proof

63. 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.[30] 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.[31]

64. The onus of justification resting on the party refusing disclosure comprises two separate parts:[32]

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

    64.2. Second, there is a true onus of proof. If any of the facts alleged in justification are 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.

65. In order to discharge the onus resting on it, the party seeking to justify non-disclosure - in this instance, the Respondent - must identify every document which is being withheld and the basis upon which the document is being withheld in terms of PAIA.[33]

66. 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

[30] Section 81(3) of PAIA.
[31] *BHP Billiton PLC Inc v DE Lange* (189/2012) [2013] ZASCA 11 (15 March 2013) at para 25
[32] *President of the RSA v M&G Media Ltd* 2011 (2) SA 1 (SCA) at para 14.
[33] *CCII Systems (Pty) Ltd v Fakie NNO (Open Democracy Advice Centre, as Amicus Curiae)* 2003 (2) SA 325 (T).

defending non-disclosure cannot merely offer a bald allegation to this effect. This is so, as the relevant facts are often particular to this party.[34]

67. The court has explained the degree of proof that is required, in relation to sections 36(1)(b) (information which could harm the commercial or financial interests of a thirds party) and 36(1)(c) (information provided in confidence that could reasonably be expected to prejudice the third party in commercial competition or put the party at a disadvantage) – as follows:

"*It follows that the difference between (b) and (c) 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*."[35]

68. In its decision letters, the Respondent did not justify its redactions, or provide any supporting evidence. It did not discharge its onus of proving that any of the information requested in the application falls within the scope and ambit of section 36(1) of PAIA:

    68.1. The Respondent has not offered adequate reasons as to why the records requested fall within the scope and ambit of section 36(1) (see the first ground of appeal above) or put forward any evidence that would support its decision and the justifications relied on. It has failed to establish a causal link between the information requested and its reliance on section 36(1).

    68.2. The Respondent has not adequately shown the basis upon which it asserts the right to withhold the information. Rather, it has merely stated that the redactions are in accordance with section 28 and section 36 of PAIA. It is not clear on what basis it is alleged that the information requested contains trade secrets of a third party and/or financial, commercial, scientific or technical information or on what basis the information requested was supplied in confidence by a third party the disclosure of which could reasonably be expected: to put

[34] *President of the RSA v M&G Media Ltd* 2011 (2) SA 1 (SCA) at paras 18-19.
[35] *Transnet Ltd & another v SA Metal Machinery Co (Pty) Ltd* 2006 (6) SA 285 (SCA) para 42.

the third party at a disadvantage in contractual or other negotiations or to prejudice that third party in commercial competition.

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

70. The Respondent has merely alleged that the aforementioned grounds of refusal apply, without indicating why or how this is so.

Fourth ground of appeal: Records do not fall within the scope and ambit of section 36 of PAIA

71. Section 36(1) of PAIA has already been set out in footnote 23 above. It is denied that these grounds are applicable in the circumstances. The content of the information requested does not contain trade secrets (section 36(1)(a)) of the companies; is not likely to cause harm to the commercial or financial interest of the third parties (section 36(1)(b)); nor was information supplied in confidence with its disclosure reasonably expected to put the third parties at a disadvantage in contractual or other negotiations, or prejudice their commercial competition (section 36(1)(c)). As a result, the Respondent cannot rely on these grounds to refuse the information requested.

72. The Appellant's PAIA request related (in summary) to: lists of registered entities that have submitted information to the Department under the relevant Regulations; records of GHG emissions of various entities; plans of various entities to mitigate their GHG emissions; and reports on progress in complying with those plans. These full records – without redactions – are needed in order to ascertain the extent of emissions and level of compliance. In any event, the Appellant is not obliged to show why this information is required.

73. As set out above, the Respondent's decision is founded on the ground that the records requested contain information the disclosure of which would be likely to cause harm to commercial or financial interests of the third parties involved.

74. "Trade secrets", as referred to in section 36(1)(a), are *"the kind of information that consists of all confidential matter which is useful for the carrying on of the business and which could therefore be used by a competitor, if disclosed to him, to gain a relative competitive advantage... Whether information constitutes a trade secret is a factual question. For information to be confidential it must be capable of application in the trade or industry, that is, it must be useful and not be public knowledge*

and property; known only to a restricted number of people or a close circle; and be of economic value to the person seeking to protect it." [36]

75. It is submitted that the information requested does not amount to trade secrets. Trade secrets are commercially valuable pieces of information that are kept confidential. Confidential information means trade, business or industrial information that belongs to a firm, has a particular economic value, and is not generally available to or known by others.[37] The redacted information does not include business information that would provide a competitive edge to the Appellant. In any event, the Appellant is clearly not a competitor of the third parties in respect of which the information was requested.

76. Specifically focusing on section 36(1)(b) of PAIA, both categories broadly refer to information that must be of a sort that:

    76.1. is confidential, and

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

77. The test of being "likely to cause harm" to commercial and financial interests in section 36(1)(b) is a stringent test. As stated above, 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.[38] The evidentiary enquiry relates to *probable harm* and not to a risk of possible harm.

78. 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 a refinery is 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.[39]

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[36] *Experian South Africa (Pty) Ltd v Haynes and Another* 2013 (1) SA 135 (GSJ).
[37] Section 1 (iii) Competition Act No. 89 of 1998.
[38] *Transnet Ltd v SA Metal Machinery Co (Pty) Ltd* 2006 (6) SA 285 (SCA) at paras 38-39.
[39] 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.

79. 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.[40]

80. The information and documents requested by the Appellant cannot be considered confidential or commercially or financially sensitive information that could harm the third parties' interests.

81. Even if the documents were supplied in confidence, or did contain trade secrets or commercially confidential information (which is denied), it is submitted that the requested information can in no way put the third parties at a disadvantage in contractual or other negotiations or prejudice them in commercial competition. This section does not apply because reports submitted in terms of the GHG Regulations and PPP Regulations do not relate to contractual or other negotiations or commercial competition.

82. It is also denied that disclosure of the records can have any bearing on the parties' commercial competition. The Appellant is an environmental justice organisation and clearly not a competitor of the third parties. It is, in any event, denied that access to these records – even to a competitor – could prejudice the third parties in commercial competition.

83. The argument that the redacted information cannot be commercially confidential, contain trade secrets or otherwise fall within a ground of refusal in section 36 is further substantiated by the fact that:

    83.1. subsequent to the Respondent's decision, a number of the third party entities (namely SAPPI; Anglo American; and Mbuyelo Coal) provided the same reports (which had been sought from the Respondent), without the redactions; and

    83.2. many jurisdictions in other countries have mandatory reporting requirements for the same information that has been redacted by the Respondent.

[40] 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).

84. Information cannot be commercially confidential or sensitive if the same type of information is either made available by companies voluntarily or is legally required to be made available publicly in other countries. This is addressed in more detail below.

85. As stated above, the requirement under PAIA is for probable harm to a legitimate commercial interest. A remote risk or even possible harm are not sufficient to dispense with this requirement. Neither is the withholding of information in order to avoid reputational harm to business interests.

86. In the circumstances, the Respondent has not discharged its onus of proving that the information requested falls within the scope and ambit of section 36(1). Nor does the requested information fall within the scope of any of the other grounds for refusal in Chapter 4 of PAIA.

87. The basis upon which the particular redacted information fails to fall within the requirements of section 36(1) is dealt with in further detail below.

GHG emission data reports

88. As stated above, the Appellant has been given access to GHG emission data reports (Annexure A9), with the numerical values of the company's GHG emissions provided, but the numerical values of the unit activities giving rise to such GHG emissions are redacted.

89. An example: the GHG emission data report received from Anglo American Plc, reports GHG emissions from the combustion of coal and liquid petroleum gas (LPG) from its Polokwane smelter - the numerical values of GHG emissions are provided for the year 2018: specifically 61439 tons of CO2 from combustion of coal at the smelter; and 1043 tons of CO2 from the combustion of LPG at the smelter. However, the value of activity data, which represents the amount of coal and LPG used at the smelter, is redacted (see this report in Annexure A9).

90. In Glencore, Seriti and Sasols' reports, the units of activity data have been redacted as well, without justification for why this has been done and, in particular, why for only these 3 entities and not others. In ArcelorMittal's report, internal consumption information is also redacted, again, without explanation as to why this information meets the requirements of section 36 PAIA. The Appellant's submission is that it does not.

91. Several jurisdictions allow the public to access GHG emission data, with different approaches to the disclosure of "activity data" – the data which has been redacted in the companies' GHG emission data reports.

92. Australia proactively publishes energy consumption data:

    92.1. Under Australia's GHG inventory program, regulated facilities must report emissions and energy consumption data, among other information.[41]

    92.2. Section 24 of the National Greenhousegas and Energy Reporting Act 2007 directs the Clean Energy Regulator, which maintains Australia's GHG inventory, to publish facility-level emissions data, as well as net energy consumption information.[42]

    92.3. No facilities have objected to public disclosure of energy consumption data, except Amazon.[43]

93. The United Kingdom's Environmental Information Regulations 2004,[44] which govern the disclosure of environmental information, state that public authorities may never refuse to disclose information regarding pollutant emissions, as such information is explicitly beyond the scope of confidential commercial or industrial information. Section12(9) states: *"(9) To the extent that the environmental information to be disclosed relates to information on emissions, a public authority shall not be entitled to refuse to disclose that information under an exception referred to in paragraphs (5)(d) to (g)."*

94. The above examples of requirements in other jurisdictions are set out because if GHG emission data, including activity data is publicly disclosed and available in other jurisdictions, there is no competitive or financial harm in its disclosure. In other words, the disclosure of activity data in South Africa surely cannot pose any harm to the commercial interests of the relevant entities if the very same information is publicly available in other countries. Were the same companies to be operating in Australia, for example, they would be required to disclose that same information. Information cannot be commercially confidential or sensitive in one country but not another.

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[41] See National Greenhouse and Energy Reporting Regulations 2008, Part 4 (reporting obligations generally) & Subdivision 4.45 (energy consumption reporting requirements), available at: https://www.legislation.gov.au/Details/F2018C00533.

[42] Available at: https://www.legislation.gov.au/Details/C2019C00044. The current inventory may be accessed at this link: http://www.cleanenergyregulator.gov.au/NGER/National%20greenhouse%20and%20energy%20reporting%20data/Corporate%20emissions%20and%20energy%20data (2017-18 data, published Feb. 28. 2019).

[43] A news article reports that Amazon submitted a request for confidentiality to withhold the data in October 2018 on the basis of trade secret concerns. It does not appear that Amazon's application has been resolved yet. ABC, "Amazon fights emissions transparency in Australia, citing 'trade secrets,'" (July 3, 2019) (available at: https://www.abc.net.au/news/science/2019-07-04/amazon-emissions-energy-data-australia-transparency-questions/11268918).

[44] Available at: http://www.legislation.gov.uk/uksi/2004/3391.

95. Even if disclosure of the GHG emission data, in particular the activity data, could possibly harm a legitimate economic interest (which it cannot), then redacting the information would not outweigh the public interest in disclosing the information (see fifth ground of appeal below). Activity data are fundamental to the basic equation of GHG emissions. Access to an emitter's activity data is relevant, *inter alia*, to enable the verification of the stipulated GHG emissions in the report.

Pollution Prevention Plans

96. As stated above, the value of expected GHG emissions for the covered years (generally ranging 2017 to 2020) have been redacted from the pollution prevention plans received.

97. Anticipated GHG emissions are simply not commercially confidential. This information does not fall under any of the section 36 grounds. Its disclosure would pose no harm, from a competition perspective, to the legitimate business interests of the third party companies.

98. A company's expected GHG emissions in a pollution prevention plan have no attributes relating to legitimate economic interests. In almost every instance, a company's expected GHG emissions are based simply on the rate of carbon-based fuels or materials it will combust or consume. Redacting such information does not: help retain or improve a company's market position; prevent competitors from gaining access to commercially valuable information; protect a commercial bargaining position in the context of existing or future negotiations; and otherwise avoid a loss of revenue or income.

99. As stated above, withholding information to avoid reputational damage - for example, being revealed as a source of excessive GHG emissions – is not a legitimate ground for refusal under section 36.

100. Expected GHG emissions from a company are routinely revealed by companies in other jurisdictions such as California in the USA and the European Union. This information cannot be considered commercially sensitive information in South Africa if it is not commercially sensitive elsewhere.

101. Furthermore, SAPPI and Anglo have subsequently voluntarily made this information available without redactions.

102. Even if disclosure of expected GHG emissions in pollution prevention plans could possibly harm a legitimate economic interest (which it cannot), then redacting the information would not outweigh the public interest in disclosing the information (see fifth ground of appeal below).

103. The redaction of company/facility commitments in respect of their future GHG emissions is indefensible. The very purpose of the pollution prevention plans is to solicit GHG emission reduction commitments from companies. These commitments must be made public in order to hold emitters accountable and to ensure transparent tracking and data-gathering of GHG emissions.

Annual Progress Reports

104. The Appellant received redacted annual progress reports from the following companies: Eskom Holdings Ltd, Sasol, and ArcelorMittal South Africa (see Annexure A11), with the anticipated emission reductions redacted from the reports.

105. For the remaining entities that submitted progress reports, the progress reports received were unredacted. No justification is provided for why the reports for Eskom, Sasol and ArcelorMittal are redacted but not the others, only that "*the reason for redacting the specific portions is due to the fact that these portions would likely cause harm to the financial or commercial interest of the Third Parties, if disclosed. The Department is of the view that disclosure of such records, sans the redactions may compromise any competitive advantage that have (sic) been achieved of that might be achieved by the above stated Third Parties*."

106. Sasol subsequently voluntarily made its progress report available, without redactions. This confirms that the redacted information, if disclosed, could not pose any harm to the entity's financial or commercial interests.

107. As already stated above, it is untenable that certain information is made publicly available for one entity, yet the same information is argued to be commercially confidential for another – particularly where one of the entities in respect of which the information is being withheld (Eskom), has no competitors, as a vertically-integrated monopoly.

108. In any event, information on anticipated emission reductions, is simply not commercially confidential information, the disclosure of which could harm a legitimate economic and/or competitive interest.

109. As stated above, it is not legally permissible to withhold, through redactions, information about expected GHG emissions in order to avoid reputational damage – and any potential commercial harm that would flow from that.

110. There is simply no acceptable basis upon which anticipated emissions could be withheld as being confidential, particularly given that Eskom, Sasol and ArcelorMittal are three of the largest emitters in South Africa and globally.

Fifth ground of appeal: Public interest override

111. The public is entitled to know the extent of companies' GHG emissions; whether or not polluting activities are being lawfully conducted; and whether or not emission reduction efforts have been put in place and are being carried out. Withholding of information on these points seriously hampers the Appellant's ability to monitor and evaluate the extent of GHG emissions and on-going impacts of the emissions resulting from the companies' operations.

112. Even if it were accepted that some or all of the redacted information did fall within the scope and ambit of section 36(1)(a), (b) or (c) of PAIA (which, expressly, it is not), the request was made in the public interest and disclosure of the requested documents may reveal evidence of a substantial contravention of, or failure to comply with, the law. As such, the "general override provision" contained in section 46 of PAIA finds application.

113. Sections 36(1)(a), (b) and (c) are 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— (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."*

114. 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" (emphasis added).

115. 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.

116. It is submitted that, in the present case, there *is* a harm and risk to the environment and the public associated with substances released into the environment, in this case GHG emissions – as clearly demonstrated above at paragraphs 4 to 8.

117. As set out above, activities which require GHG emission data reports, pollution prevention plans and annual progress reports are those which contribute to, and have a significant detrimental effect on, the environment and the public. The requested records would reveal how much some of South Africa's biggest GHG emitters are emitting (the GHG reports); what they plan to do (if anything) to reduce those emissions (the pollution prevention plans); and whether they are, in fact, reducing their emissions and meeting their commitments (the annual progress reports). The records would also reveal the extent to which the companies are operating in accordance with the applicable law – namely the governing regulations under the National Environmental Management: Air Quality Act, 2004, and the Constitution. This information has a direct bearing on South Africa's GHG emission reductions and thus on the country's contribution, and exposure, to harmful climate impacts – a significant public safety and environmental risk.

118. The practice in the Europe serves as a good example:

    118.1. The Council of the European Union adopted an "environmental information" directive in 2003.[45] EU member states were required to adopt legislation implementing the directive by early 2005. The directive includes within the definition of "*environmental information*", any information on "*the state of the elements in the environment, such as air and atmosphere*"

[45] Directive 2003/4/EC of the European Parliament and of the Council on Public Access to Environmental Information (available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:041:0026:0032:EN:PDF).

and "*factors, such as . . . emissions . . . affecting or likely to affect the elements of the environment*".[46]

118.2. The exceptions to disclosure are limited and are described in article 4 of the directive. With regard to commercial and business interests, environmental information may be withheld from public release if disclosure will adversely affect the confidential business information that is necessary to protect a "legitimate economic interest" or intellectual property rights.[47] Public authorities are not allowed to assert business confidentiality as a ground for withholding information on emissions into the environment.[48] Furthermore, all grounds for refusal "*shall be interpreted in a restrictive way, taking into account for the particular case the public interest served by disclosure*."[49]

118.3. The European Court ruled in 2013 in a pesticide case that there is a strong public interest in access to information about emissions into the environment that overrides commercial interests. Specifically the Court declared that an agency must disclose a document "*where the information requested relates to emissions into the environment, even if such disclosure is liable to undermine the protection of the commercial interests of a particular natural or legal person, including that person's intellectual property, within the meaning of Article 4(2) of the environmental information Directive*."[50]

119. Again, the SCA's judgment in the ArcelorMittal case, referred to in paragraph 60 above, bears relevance here in emphasising that activities which have harmful effects on the environment are matters of public interest and must be disclosed.

120. The disclosure to the public of GHG emissions in GHG emission reports and expected GHG emissions in pollution prevention plans is relevant to South Africa's commitment to the global effort to mitigate climate change, the adverse effects of which are a stark reality for South Africa, as confirmed in its own climate policy and NDC. Redacting such information, even if to avoid damage to economic

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[46] Art. 2(1)(a)-(b).
[47] Art. 4(2)(d), (e).
[48] Art. 4(2)(h).
[49] Art. 4(2)(h).
[50] Stichting Greenpeace Nederland and Pesticide Action Network Europe v. Commission, Case T-545/11, para. 38 (available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=142701&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=223010).

interests, could not possibly outweigh the public interest in disclosing the information. The overall purpose of the administration of justice, requires the disclosure of the redacted information.

121. The CER recently released a report – Full Disclosure 5 – which assesses the extent to which South Africa's big emitters are considering and addressing the risks of climate change. The companies listed in the PAIA request, are also the subject of the report. The report shows that 10 companies are responsible for 61% of emissions in South Africa, with Eskom and Sasol taking by far the largest portions (39% and 13.52% respectively). In 10 out of 15 companies assessed, climate-related risks are viewed as a "material business risk". Yet only African Rainbow Minerals, Sappi, and South32 set out how short- medium- and long-term climate-related risks will impact their business, strategy, and financial planning, in their publicly available (mainstream) annual reports. 6 (out of 15) companies disclose how climate risks and opportunities are incorporated into their strategy through efforts such as mitigation, adaptation, resource efficiency, pollution reduction and transition plans.[51] This serves as further evidence of the importance of public disclosure of GHG emissions of companies and their plans to address climate change.

122. For the above reasons, the public interest would override any alleged basis (including section 36) to refuse access to the records.

APPELLANT'S COMPLIANCE WITH PAIA

123. On 17 October 2019, the Appellant sent a final letter to the Department (attached as **Annexure A14**) indicating that it had received the annual progress reports and confirming that:

"*In terms of section 75(1)(a)(i) of PAIA, and the right to a fair process, we record that, as we received your full response to our PAIA request of 11 February 2019, on Tuesday 15 October 2019, the PAIA deadline to appeal will be calculated to run from 15 October 2019, and we reserve our rights to appeal the decision on that basis*."[52]

124. Insofar as compliance with the section 75(1)(a)(i) PAIA timeframe is concerned, due to the Appellant receiving only piecemeal responses, this appeal has been submitted within the timeframe calculated from the date that the Appellant received the response to item 4, and thus the full response to the PAIA Request.

[51] See https://fulldisclosure.cer.org.za/2019/findings.
[52] Annexure 10 at para 3.

125. We submit that this appeal is being submitted well within the PAIA timeframe but insofar as any condonation for late filing may be necessary, we submit that it would be within the interests of justice to allow it, given the public interest in, and importance of, these records.

126. The Appellant hereby submits its appeal of the Respondent's redactions of the records in accordance with the provisions of Section 75 of PAIA:

126.1. the appeal is submitted within 60 days of the refusal;

126.2. CER is delivering this appeal to the Information Officer, and to the Minister of Environment, Forestry and Fisheries, as the designated appeal authority, per electronic mail;

126.3. the subject of the appeal and the reasons for the appeal are identified in this Annexure A document, including the grounds of appeal above;

126.4. these grounds of appeal accompany the Internal Appeal Form prescribed by the Department;

126.5. the Appellant has tendered the prescribed appeal fee (if any);

126.6. the Appellant wishes to be informed of the appeal decision in writing and by email; and

126.7. the Appellant's postal address is reflected on the cover letter accompanying this appeal.

RELIEF SOUGHT

127. The refused, redacted information does not fall within the grounds set out in PAIA, and cannot be withheld on the basis of the grounds of appeal as set out above.

128. In terms of section 11 of PAIA, the Appellant has the right to the requested information. It has complied with all the procedural requirements in PAIA relating to a request for access, and there is no ground on which the information should be redacted.

129. The Appellant calls on the responsible authority to uphold this appeal and disclose the unredacted copies of the records requested.

CENTRE FOR ENVIRONMENTAL RIGHTS

Per: 

Nicole Loser
Attorney
Direct email: nloser@cer.org.za
13 December 2019