



**INFORMATION  
REGULATOR  
(SOUTH AFRICA)**

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

**FORM H**

(Sub-rule 9.2)

**ENFORCEMENT NOTICE**

(In terms of section 77J of Promotion of Access to Information Act 2 of 2000, as amended)

[Complaint or Any Matter]

<b>REF NO:</b>	<b>CI 161/23</b>
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**TO: Mr Peter McElliot**  
Sibanye Stillwater

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Dear Mr McElliot

<b>NAME OF COMPLAINANT</b>	Centre for Applied Legal Studies
<b>NAME OF THE RESPONDENT (BODY)</b>	Sibanye Stillwater Limited

**BE PLEASED TO TAKE NOTICE** that the Information Regulator (Regulator), after having considered the report of the Enforcement Committee hereby makes the following orders:

1. The decision of the head of the private body to refuse access to the records sought by the complainant is hereby set aside.

2. The Deputy Information Officer of the private body is directed, in terms of section 77J(i)(a) of the Promotion of Access to Information Act, 2 of 2000 (“*PAIA*”) to grant the complainant access to the following records:
  - 2.1. All annual compliance reports in terms of section 25(2)(h) of the Mineral and Petroleum Resources Development Act, 28 of 2002 (“*MPRDA*”) for the 2019 to 2023 Social and Labour Plans (“*SLP*”) for the Eastern and Western Platinum Mines.
3. The Deputy Information Officer (“*DIO*”) is directed to provide the complainant access to the records within 10 days of issuing the Enforcement Notice, by way of email and cloud share / file transfer, upon receipt of payment of the prescribed fee.

**Introduction:**

4. The complainant is the Centre for Applied Legal Studies (“*CALS*”), a research centre and law clinic related to the University of the Witwatersrand, Johannesburg. *CALS* is represented by Mr. RD Krause, a researcher in its employ. The complainant lodged the complaint with the Regulator on 15 September 2023 in terms of section 77A of *PAIA*, pursuant to the refusal of access to records held by the private body. The private body is Sibanye-Stillwater Limited (“*Sibanye*”) a mining company with various other operations, projects and activities, and which is listed on the Johannesburg Stock Exchange.

## Complaint

5. On 10 August 2023, the complainant submitted a request for access to records held by the private body.
6. The records sought by the complainant were the following:
  - 6.1. All annual compliance reports in terms of section 25(2)(h) of the MPRDA for the 2019 to 2023 SPL for the Eastern and Western platinum mines.
  - 6.2. Any amendments in terms of section 102 of the MPRDA in respect of the 2019 to 2023 SLP for the Eastern and Western platinum mines.
7. On 22 August 2023, the DIO, responded to the request and refused to grant access to the requested records. In doing so, he relied on sections 68(1)(b) and 68(1)(c)(i) of PAIA. Section 68 relates to commercial information of the private body.
8. The complainant therefore lodged a complaint with the PAIA Division of the Regulator (*"the PAIA Division"*) on 15 September 2023 against the refusal of the request.
9. The PAIA Division conducted a pre-investigation and advised the complainant and the private body that it had decided to conduct further investigation of the complaint. The private body was requested to respond to the complaint and produce to the PAIA Division any information, substantiated reasons or grounds for refusal, item, or document on which its decision to refuse access was based and the complainant was afforded an opportunity to make submissions in support of its complaint and in response to the submissions of the private body.
10. The PAIA Division succeeded in facilitating a settlement of a portion of the complaint through a conciliation meeting held on 28 February 2024. The PAIA Division and the private body accepted the affidavit submitted by the DIO in terms of section 55 of PAIA, wherein he submitted that the approved amendments in terms of section 102 of the MPRDA for the relevant mining operations do not exist.
11. Pursuant to its investigation, the PAIA Division issued an investigation report in terms of section 77C(1)(a) (*"the Report"*). The findings therein may be summarised as follows:

- 11.1. The complainant had complied with the procedural requirements prescribed in PAIA.
  - 11.2. The complainant had specified the nature of the rights to be exercised or protected.
  - 11.3. The complainant reasonably requires the requested records to exercise or protect the rights established.
  - 11.4. The DIO relied on sections 68(1)(b) and 68(1)(c)(i) of PAIA but failed to adduce sufficient evidence upon which the PAIA Division can be satisfied that the requested records fall within the ambit of the exemptions, thereby failing, on a balance of probabilities, to discharge the burden of justifying the limitation of the complainant's right of access to that information on the basis of such sections.
12. The PAIA Division accordingly recommended that:
- 12.1. The decision of the DIO to refuse access to the records be set aside; and
  - 12.2. The DIO be directed to grant the complainant access to the records.
13. The complainant accepted the provisional findings and recommendations in the Report. However, the private body rejected the findings and recommendations and made submissions in relation thereto to the Enforcement Committee. The submissions were made in the form of an affidavit deposed to by the DIO, who comprehensively responded to the PAIA Division's Report, paragraph by paragraph.

### **Legislative framework**

14. In terms of section 32(1)(a) of the Constitution "*everyone has the right of access to any information that is held by the State.*" PAIA was enacted in accordance with section 32(2) of the Constitution to give effect to the aforesaid right of access to information.
15. The entrenchment of the right of access to information in the Constitution must be viewed against the background of obsession with secrecy under the Apartheid Government.
16. "Section 32 of the Constitution marks a decisive break with the past, by entitling everyone to information held by the state. Our Courts have held that the effect of the right of access to information is that public authorities are no longer permitted to 'play possum' with

members of the public where the rights of the latter are at stake. The purpose of the right of access to information ‘is to subordinate the Organs of State to a new regimen of openness and fair dealing with the public.’

17. PAIA, however, extends to information in private hands. The Act assumes that any information in so-called private hands with a demonstrable and sufficient connection to the exercise or protection of any rights, legitimately belongs in the public domain. This is probably because according to section 9(e) of PAIA, the Act is intended to promote transparency, accountability and effective governance of all public and private bodies (own emphasis). In addition, it is intended to protect rights and to promote “*a human rights culture and social justice*”.

18. In **Smuts N.O. and Others v Members of the Executive Council: Eastern Cape Department of Economic Development, Environmental Affairs and Tourism and Others**, the Court identified the following three fundamental principles:

*“Importantly, three fundamental principles may be distilled following a purposive interpretation of the Constitutional right to access to information, read with PAIA. Firstly, access to information is the norm and PAIA must be interpreted to promote this objective. Exemption from disclosure is the exception. As is evident from the wording of s 11, the exercise of the right has been formulated in peremptory terms once there has been compliance with formalities and should there be no basis for refusal. Secondly, withholding information is permitted only in instances described in PAIA. These exemptions and grounds of refusal must be narrowly construed because they involve limitation of a Constitutional right. While access may be denied where it is clearly justified, doubts should typically be resolved in favour of disclosure, and a discretion exercised accordingly. Thirdly, the burden of justifying a limitation of a right falls on the party wishing to do so, and not on the right-holder. This is to be discharged on a balance of probabilities by providing evidence that the record in question falls within the description of the ground of refusal that is claimed.” (Footnotes omitted)*

19. This passage from **Smuts N.O.** must be qualified. In that case the relevant records were held by a public body and section 11 of PAIA applied. Section 50, the corresponding provision in relation to private bodies, includes the additional requirement that the requester demonstrate that the record is required for the exercise or protection of any right.

20. Section 3(b) of PAIA provides that the Act applies to a record of a private body regardless of when the record came into existence.
21. PAIA recognises that there are “*reasonable and justifiable*” limitations on the right of access to information, even in an open and democratic society, and to this end exempts certain information from disclosure. Those limitations appear in Chapter 4 of Part 3 of the Act.
22. Chapter 4, comprising of sections 62 to 70, provides for mandatory grounds of refusal of access to records held by a private body, in which instances the head of the private body is *mandated* to refuse access to the records, unless the applicable exceptions or public interest override is applicable, and in other instances for discretionary grounds for refusal of access to the records, in which case the head of the private body has a discretion to refuse access to the records, once again unless the applicable exceptions or public interest override is applicable.
23. Where the requestor has demonstrated that the record is required for the exercise or protection of a right, if none of the grounds of refusal apply, and the requester has complied with the procedural requirements, neither the private body nor the Court has a discretion to refuse access.<sup>7</sup>

***Locus standi* of complainant:**

24. The complainant is a public interest organisation and a not-for-profit organisation. The complainant also explains that it is a part of the University of the Witwatersrand. The University is a public body. It would appear to be common cause that public body status attaches to the complainant due to its role in or relationship with the University and we have no reason to dispute this characterisation.
25. With reference to s 50(2) of PAIA, which provides that –
- “(i)n addition to the requirements referred to in sub-section (1), when a public body ... requests access to a record of a private body for the exercise or protection of any rights, other than its rights, it must be acting in the public interest”,*
26. Sibanye submitted that an entity such as CALS that requires a record in order to exercise or protect its own rights, cannot claim to be acting in the public interest; it is either the

one, or the other. The complainant's contentions that it requires the record in order to exercise and protect its own rights and that it is acting in the public interest, are inconsistent with section 50(2) of PAIA.

27. The underlying purpose of section 50(2) is the understanding that where the state requests records from a private body, there is a significant power imbalance. The intention was to limit that imbalance by ensuring that a public body is not acting on a frolic but has some purpose that is in the public interest.

28. According to Currie & Klaaren, there are two scenarios under which a public body could request a record from a private body – when seeking the enforcement or protection of its own rights, or when seeking to protect the rights of others. A public body acting to enforce the rights of members of the public is, by definition, acting in the public interest.

29. This makes it necessary to take a closer look at the rights CALS seeks to protect, and the related purpose for which the records are required, but first, it is necessary to give the requested records some context.

30. The private body is the holder of a mining right. Section 2(i) of the MPRDA includes, as one of the purposes of the Act, to “*ensure that holders of mining and production rights contribute towards the socio-economic development of the areas in which they are operating*”. In terms of regulation 42 to the MPRDA, the private body was obliged to submit a Social and Labour Plan (SLP) contemplated in regulation 46 together with the application for the right. Once approved, the SLP is valid and binding for 5 years, and the holder of the mining right must submit annual compliance reports, as prescribed in regulation 45. The SLPs are public documents, that is not in dispute. At issue, are the annual compliance reports.

31. In the request for records, the following rights contained in the Constitution are identified:

31.1. the right to access to information (under section 32);

31.2. the right to academic freedom and freedom of scientific research (under section 16);

31.3. the right to have the environment protected for present and future generations through reasonable legislative and other measures (section 24); and

31.4. the right to administrative justice (section 33).

32. The purpose for which the records are required, is poorly stated. We understand Mr. Krause to be saying that:

32.1. Regulation 45 requires Sibanye to submit an annual report on its compliance with the SLP to the Regulator;

32.2. Sibanye is required to hold three meetings per year with the mining community and interested and affected parties, to update them on progress made with the implementation of the SLP;

32.3. These consultations (meetings) ought to be reflected in the annual report to the Regulator.

32.4. This means that the content of the SLP report is in the interests of both the public and legal practitioners who work with the communities, to monitor SLP compliance.

33. Mr. Krause states, under the heading "*Particulars of Right to be Exercised or Protected*", *inter alia* the following:

*"Academic freedom and freedom of scientific research (s 16(d) of the Constitution: the right to freedom of expression is contained in s 16 of the Constitution. A subset of this right is the right to academic freedom and freedom of scientific research. Research, in testing natural phenomena, ideas, concepts and institutions is crucial for the success of a society and for the vibrant contestation of ideas pivotal to the open, accountable and responsive democracy guaranteed in our Constitution. The realisation of this right requires that to the greatest extent possible, information is available to researchers. Only where information clearly and meaningfully falls into one or more of PAIA's grounds for refusal should such information be withheld. As a part of the University of Witwatersrand, a substantial portion of CAL's work involves the production of research. For this reason exercise of its right to academic freedom is central its daily functioning."*

34. The Regulator concurs with the Enforcement Committee that if the complainant had disclosed the purpose of the research more fully, it would have been easy to determine

whether the end-purpose is in the public interest, or simply in the complainant's own interest (as it undoubtedly is). The Regulator notes that the Enforcement Committee assumed, as the PAIA Division did in paragraph 10.2.4 of its Report, that the research pertains to SLP implementation and thus compliance. The Regulator concurs with the Enforcement Committee that as a general proposition, any information sought by a university for purposes of research, is likely to be in the public interest. In this instance the research appears to be intended to further the rights that the SLP is supposed to protect, which is already in the public interest.

35. Insofar as the right to research may constitute a right exercised by CALS as a public body in its own interest only, the Enforcement Committee also considered whether any of the other rights identified in its request, are that or those of the public.

36. Mr. Krause further states under the heading "*Particulars of Right to be Exercised or Protected*", the following in relation to the right to have the environment protected:

*"The right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures (Section 24 of the Constitution): The right to an environment conferred by section 24 is very broad in ambit and embraces all aspects of one's living environment with an impact on one's health and well-being. Being designed to respond to the needs of employees and communities, Social and Labour plans address issues with great implications for these parties' both health and well-being. For example, portions of SLPs are devoted towards meeting infrastructure and housing needs. The sufficiency and quality of housing available to people have a very clear impact on both their health and well-being. For example, the lack of adequate shelter will sharply increase the likelihood of a number of illnesses including respiratory diseases while a residence with secure tenure, adequate space, sanitation and privacy is critical for well-being. The duty conferred by section 24 is to have the environment protected through reasonable legislative and other measures. Sourced in the MPRDA and its regulations, the social and labour plan system constitutes, in part a legislative measure to protect the environment as defined in the first part of the right."*

37. Clearly, the rights identified under section 24 of the Constitution are not the complainants' rights they affected community rights.

38. The Regulator concurs with the Enforcement Committee in finding support for its view in CALS' submissions to the PAIA Division. Therein the following is stated:

*“The benefits of disclosure of the information are clear. First, access to accurate and official information regarding the compliance status of the western and eastern platinum mine is required for the impacted communities and employees who are the beneficiaries of the SLP to enjoy the participatory development that is in line with the constitution, rather than being treated paternalistically as passive beneficiaries who are only deemed worthy of selected information but not authoritative reporting. Second, a free flow of information would lead to increased accountability of the company to the beneficiaries of SLP projects and to the sections of the public interested in social justice in the mining sector, which would in turn make full compliance and optimal realisation of the project more likely. In the context of limited state compliance monitoring and enforcement capacity as evidenced by the number of inspections per annum which average around 200-250 for 1500 operational mines, communities and labour have an important role to play in alerting and assisting the regulator. Third, there (sic) transparency regarding fulfilment of commitments is likely to lead to increased trust between the company and stakeholders. For example it has been argued in a published journal article that argues, having found a weak statistical relationship between community protests and causal factors commonly cited, and drawing on the role levels of transparency of company finances plays in labour relations, that information asymmetry between communities and the mine is likely a contributing factor to social conflict. This resonates with the experience at CALS given that we frequently interact with communities and community organisation who are frustrated at companies' lack of transparency regarding SLP issues, including but not limited to the issue of SLP compliance and who strongly suspect that companies are hiding non-compliance.”*

39. The Regulator considered the fact that the Enforcement Committee was not provided with any authority by the private body, neither were they aware of any that stipulates that a public body may only request information from a private body, to exercise or protect any right, other than its rights or to further the public interest, or stated differently, that a dual purpose is excluded.

40. The Regulator concurs with the Enforcement Committee that, the ambit of the purposes disclosed by CALS, is sufficient to place it outside the restrictions imposed by section 50(2).
41. The Regulator also notes that Sibanye did not object to CALS' *locus standi* when the request was made, and neither has it alleged that it was prejudiced by the request for this reason.
42. For these reasons, the Regulator is satisfied that the complainant has the necessary *locus standi* to make a request for access to the records of the private body.

**Authority of Mr. Krause on behalf of CALS:**

43. In its submissions to the Enforcement Committee, the private body contends that the PAIA Division failed to evaluate Mr. Krause's authority to lodge the complaint as a representative of CALS. The argument may be summarised as follows:
  - 43.1. Mr. Krause indicated on the complaint form that he was lodging the complaint "as a *representative*" of a complainant.
  - 43.2. He thereafter recorded his own details in Part A, which is reserved for the complainant, thereby misrepresenting himself as the complainant.
  - 43.3. He failed to attach a power of attorney as required by Part B.
  - 43.4. These inconsistencies rendered the complaint form fatally defective.
  - 43.5. There was no evidence that Mr. Krause was authorised to make a request and subsequently lodge a complaint.
  - 43.6. Due to the complainant's non-compliance with procedural requirements, the Regulator did not have jurisdiction to investigate the complaint.
44. Sibanye had not previously raised these objections in any correspondence with CALS or the PAIA Division. They were raised for the first time with the Enforcement Committee which found them to be without any merit and that they could easily be disposed of.

45. The request was submitted to Sibanye under cover of a letter from the CALS' director, Prof. T Madlingozi, advising that he had duly authorised Mr. Krause to submit "*the attached request for records*".
46. If Sibanye holds the view that a board meeting and resolution were required, they lose sight of the fact that the request for the records in question is exactly what CALS does in the course of its research function.
47. Section 18(2)(f) of PAIA requires no more than proof to the reasonable satisfaction of the information officer of the capacity in which the requester is making the request. The Regulator concurs with the Enforcement Committee that the private body failed to exercise its rights under section 18(2)(f) of PAIA, rather, it entertained the request and refused on merits citing section 68 of PAIA. Thereby the public body indicated its satisfaction with the authority of Mr. Krause.
48. Prof. Madlingozi clearly referred to the request that was indeed submitted. The complaint to the PAIA Division is part and parcel of the same ongoing process. Where Mr. Krause's authority had already been accepted, further proof of authorisation was simply unnecessary.
49. The Regulator agrees with the view of the Enforcement Committee that, Mr. Krause did not misrepresent himself in any way. In Part A of the complaint Form 5, he indicated that he was the representative of the complainant, CALS. Part B requires a power of attorney "*only if you are being represented*". CALS submitted its own complaint, it did not instruct attorneys or a third party to do so on its behalf. Mr. Krause was not acting on behalf of another person, he was acting in his professional capacity, in the execution of his job. He consequently was not under any obligation to file a power of attorney. The objection to Mr. Krause's authority is therefore rejected.

**Procedural requirements:**

50. In the premises, and with due regard to the requirements stipulated in sections 53 and 77A(2)(d) of PAIA, the Regulator concurs with Enforcement Committee that the complainant has complied with the procedural requirements of PAIA, and that the Regulator, through its PAIA Division, has jurisdiction to investigate the complaint.

**Whether the record is requested for the exercise or protection of any right:**

51. In terms of section 50 of PAIA a requester must be given access to any record of a private body if that record is required for the exercise and protection of any rights, that person complies with the procedural requirements in the Act and access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of Part 3.
52. We have already set out the rights relied on by the complainant when submitting its request, in paragraphs 31, ,33 and 36 above.
53. We have already set out the rights relied on by the complainant when submitting its request, in paragraphs 31, 33 and 36 above.
54. The PAIA Division referred, in its report, to section 50(1)(a) of PAIA which mentions records required for the protection of exercise of any rights. This means, says the PAIA Division, that the relevant rights do not necessarily have to be rights provided for in the constitution. The Regulator concurs with the Enforcement Committee that this is correct, but does not take the matter any further because the rights have been clearly identified.
55. The requester must demonstrate that the record sought is *required* for the exercise or protection of his/her rights.
56. In **Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others** the SCA explained this requirement for access to records in the context of section 32, as follows:

*“Information can only be required for the exercise or protection of a right if it will be of assistance in the exercise or protection of the right. It follows that, in order to make out a case for access to information in terms of s 32, an applicant has to state what the right is that he wishes to exercise or protect, what the information is which is required and how that information would assist him in exercising or protecting that right.”*

57. In the case of **My Vote Counts NPC v Speaker of the National Assembly and Others** Cameron J (then), in the minority judgment of the Constitutional Court, described the test for “required”:

*“Required’ in the context of s 32(1)(b) does not denote absolute necessity. It means ‘reasonably required’. The person seeking access to the information must establish a substantial advantage or element of need. The standard is accommodating, flexible and in its application fact bound.”*

58. In **Clutchco (Pty) Ltd v Davis** the SCA also considered the word “required” within the context of sections 32(1)(b) and 50(1)(a). Comrie AJA (then) stated that:

*“... I think that ‘reasonably required’ in the circumstances is about as precise a formulation as can be achieved, provided that it is understood to connote a substantial advantage or an element of need. It appears to me, with respect, that this interpretation correctly reflects the intention of the legislature in s 50(1)(a).”*

59. **Unitas Hospital v Van Wyk and Another** dealt with section 50(1) of PAIA. Having considered a number of previous judgments wherein the meaning of the term was considered, the Court concluded that what is meant by the phrase, “required for the exercise or protection of any rights gives rise to a fact-based enquiry and does not allow an abstract determination”

60. All the cases referred to herein above are aligned with the approach adopted in **Cape Metropolitan Council**.

Required by the complainant:

61. The PAIA Division considered the complainant’s status as a legal research unit within the University, that it required information from time to time to enable it to conduct research; that the Department of Mineral Resources and Energy (“*the DMRE*”) is a regulatory body within the mining sector and that the private body has an obligation to comply with its mining licence conditions relating to the implementation of the SLP, and concluded that the Annual Compliance Reports will assist the complainant to conduct its research on the implementation of the SLP, to determine if the DMRE is properly regulating the

compliance with the licence conditions in so far as it relates to the SLP, and to monitor the private body's compliance with the SLP.

62. The DIO took exception to this finding by the PAIA Division, arguing that CALS had not made such a statement, and that (presumably) the PAIA Division doing so, is inconsistent with **Cape Metropolitan Council**, which states that the applicant for information (is required) to state how the information would assist him in exercising or protecting that right. He also submitted, on behalf of Sibanye, that *“even with the PAIA Division’s own version of facts, a case for access to the annual compliance reports by the complainant, has not been made out.”*
63. The PAIA Division summarised the submissions made to it by the complainant, in motivating its aforesaid conclusion. These submissions were not shared with Sibanye. Sibanye was also invited to make submissions to the PAIA Division and indeed did so.
64. The DIO further points out that the explanation offered by CALS in making its request, was limited to that referred to in paragraph 32 above. He submitted that the further explanations offered by CALS (if accepted as such), are insufficient for the purposes of the Act because:
- 64.1. they do not provide an explanation of why the records are reasonably required for the protection or exercise of the right identified; and they are completely unrelated to the records requested and appear to be made with reference to approved SLPs, which are publicly available records.
65. The Enforcement Committee disagreed with the latter contention and the Regulator supports this view. A distinction is clearly made between the obligation to develop an SLP, and the obligation to implement the SLP and comply with the further obligations arising from the SLP. The complainant is concerned with the latter obligation.
66. The Regulator concurs that, **Carolina Local Economic Development Centre & Another v Ilima Coal Company (Pty) Ltd & Others**, relied on by the private body, does not assist it. That application was brought in terms of sections 78 and 82 of PAIA, for access to the first respondent's SLPs submitted to the DMRE from 2018 to 2022. The Court held that *on the facts before it* the applicants had failed to state what the right is they wish to protect with sufficient precision, what information is requested and how that information would assist in exercising or protecting that right. Under the circumstances,

the Court stated *obiter*, that it is not for the applicants to request the documents from the first respondent because the applicants have no right in terms of regulation 45, and it is not for them to determine whether there was compliance with the regulation.

67. It follows from what is set out in paragraphs 51 to 66 and the discussion of the complainant's *locus standi*, that the Regulator is persuaded that the records requested by the complainant are required for the purpose of:

67.1. determining how the compliance (or failure to comply) with the SLP is impacting the affected community and beneficiaries of the SLP; and

67.2. determining if the DMRE is properly regulating compliance with the licence conditions, insofar as it relates to the respective SLPs or whether its capacity is limited.

and as this is aligned to the business in which CALS engages, are thus required for the exercise of the right that it has identified

Required by the affected community or public:

68. Although the rights of the complainant and that of the community or public that have been identified as such, are different and distinct, they are in our view linked. This is because the research is clearly intended to further the rights that the SLP is supposed to be protecting and advancing, being the communities' rights, specifically or including section 24.

69. The Regulator is satisfied that the records are required to exercise the community's rights under the SLPs.

**Grounds for refusal:**

70. The next enquiry pertains to the grounds relied on by Sibanye for its refusal of access. There are two separate grounds, both to be found in section 68.

71. Section 68(1)(b) of PAIA (Commercial information of private body):

Section 68(1)(b) reads, in the relevant part, as follows:

“(1) Subject to sub-section 2, the head of a private body may refuse a request for access to a record of the body if the record –

(b) contains financial, commercial, scientific or technical information, other than trade secrets, of the private body, the disclosure of which would be likely to cause harm to the commercial or financial interests of the body;”

72. The private body did not disclose any facts to substantiate these grounds, in its refusal of the request for records.

73. In its initial submissions to the PAIA Division, dated 20 October 2023, the private body stated that the SLP Compliance Report contains personal commercial information of Sibanye which, if released, has the potential to cause commercial or financial harm to Sibanye and puts Sibanye at a disadvantage when it comes to contractual or other negotiations. As a private body, Sibanye is protected by POPIA and PAIA and the rights of CALS to access the requested information do not outweigh Sibanye’s right to privacy.

74. Section 63 (1) of PAIA (Privacy of a third party who is a natural person) Section 63 (1) reads as follows: “Subject to subsection (2), the head of a private body must refuse a request for access to a record of the body if its disclosure would involve the unreasonable disclosure of personal information about a third party, including a deceased person.”

74.1. The PAIA Division concluded that because:

74.1.1. The SLPs’s, which are published, disclose the proposed budgets for the period of the respective projects;

74.1.2. The requirement that stakeholders be updated on the implementation of the approved SLP, suggests that it is not a private matter; and

74.1.3. Section 30 of the MPRDA provides for disclosure of information submitted in terms of sections 21, 28 and 29, under specific circumstances, including to give effect to the right of access to information,

it was unsubstantiated that the disclosure of details of expenditure would compromise Sibanye's personal information.

- 74.2. The "privacy" of the record holder does not constitute an exemption under PAIA. Section 63 (1) of PAIA exempts personal information of a third party who is a natural person from disclosure.

Potential to cause harm:

75. The private body was requested by the PAIA Division to substantiate its reliance on the ground based on section 68(1)(b), by indicating which part of the SLPs constitute information specified under this section and which part under s 68(1)(c)(i).
76. Curiously, in its submissions to the Enforcement Committee, Sibanye objected to this request, contending that the PAIA Division had acted beyond the scope of its investigative powers in trying to determine whether Sibanye had provided sufficient information for the PAIA Division to conclude that the record falls within the exemptions. This, according to Sibanye, is a determination that is reserved for a Court to make in terms of section 81(3) of PAIA, pursuant to an application that is made to the Court by an aggrieved party in terms of section 78 of PAIA. In Sibanye's submission, in terms of section 56(3)(a) of PAIA it is only required to state adequate reasons for the refusal of access.
77. The private body seems to be saying that the Regulator only has investigative powers and not adjudicative powers, i.e. the Regulator can make no finding on the facts that it has investigated.
78. The argument entirely negates the role of the Regulator. It is also in contrast to at least the following provisions of PAIA:
- 78.1. Section 77J, which permits the Regulator, inter alia, to serve an enforcement notice on the head of the private body setting aside the decision which is the subject of the complaint;
- 78.2. Section 77K, which renders non-compliance with an enforcement notice an offence.

- 78.3. Section 78, which permits an aggrieved requester the choice to apply to Court after exhausting his/her/its internal appeal procedures or the section 77A complaints procedure.
79. The DIO misunderstands the basis for the PAIA Division's statement that it does not have jurisdiction to investigate a matter pending before a Court or already adjudicated upon by a Court. Once a complainant has made an election to approach the Court, it cannot follow a dual process before the Regulator; that would constitute forum shopping. The Regulator has to establish that a court has not already been seized with the matter, thereby excluding the Regulator's jurisdiction.
80. The DIO's reference to section 81 is irrelevant to determining the powers of the Regulator; it clearly refers to the court proceedings which may be brought either as an alternative to approaching the Regulator, or pursuant to having exhausted the procedures before the Regulator. Finally, it is settled law that simply quoting the provisions of the exemption, is not adequate.
81. Sibanye responded to the PAIA Division's enquiry (despite its present objection) in a further submission dated 2 April 2024. The submissions may be summarised as follows:
- 81.1. The compliance reports contain details of the progress of SLP projects measured on a yearly basis, including a measure of actual spend versus budgeted spend during the year in question. However, the obligation to complete projects and incur total budgeted spend is measured over a total period of 5 years, and not on an annual basis. Each report is thus just snapshot and not representative of whether progress over the entire 5-year period will result in undertakings being achieved or not.
- 81.2. It has been the modus operandi of some third parties to highlight shortfalls relative to a specific year, without providing the full context or reasons or to mention that the shortfall was addressed or is intended to be addressed at a later stage. Sibanye's research indicates that CALS has used this modus operandi in the past.
- 81.3. *It is submitted that disclosure of the compliance reports would likely result in the information reflected in such report being misconstrued, either due to lack of context or due to a specific agenda.*
- 81.4. This would negatively impact the reputation of Sibanye.

- 81.5. Sibanye is a publicly traded company, and such conduct would also negatively impact the Sibanye share price. The very nature of a public company lends itself to being commercially and financially negatively impacted by misinformation and a reduction in share price comprises harm to Sibanye's financial and commercial interests.
82. In its submissions to the PAIA Division, CALS contended that Sibanye had not met the threshold requirements for showing that the records indeed fall into the cited categories of PAIA and are non-severable.

Assessment:

83. The first enquiry is whether the requested records do contain financial or commercial information, and the second is whether disclosure will be likely to cause harm to the private body's commercial or financial interests.
84. According to Currie & Klaaren, 26 records are commercial if the holder has a "commercial interest" in them. We accept that the private body satisfies the first leg of the test.
85. In *Transnet Ltd & Another v SA Metal Machinery Co (Pty) Ltd*,<sup>27</sup> the SCA considered the difference between the terms "likely", used in section 68(1)(b) and "could reasonably be expected", as used in section 68(1)(c). The court concluded that the former is "something which is indeed expected", which necessarily includes "at least that which would reasonably be expected". The latter refers to consequences that "could be expected as probable if reasonable grounds exist for that expectation".
86. The Regulator agrees with the Enforcement Committee that the private body's suspicions of what the complainant intends to do with the content of the compliance reports, or whether they will be properly understood, does not constitute an independent ground of refusal under PAIA. The Regulator is satisfied that the complainant has demonstrated why it requires the records. and concurs with the Enforcement Committee that the private body has not set out a factual basis for its contention that disclosure is likely to cause harm to its commercial or financial interests. Its contention is mere speculation. In any event, we find it strange that the private body suggests that it would not be able to respond appropriately, should the requester not subsequently present the contents of the compliance reports fairly.

87. The burden of proof is upon the person relying on the ground to justify the refusal. This is to be discharged on a balance of probabilities. Exemptions are construed narrowly because they limit the constitutional right of access to information.
88. The Regulator concurs with the Enforcement Committee that the private body has not provided sufficient facts upon which the Committee is able to conclude that the private body's reliance on section 68 (1) (b) of PAIA is justified.
89. Section 68(1)(c)(i) of PAIA (Commercial information of private body):

*Section 68(1)(c)(i) reads, in the relevant part, as follows:*

1. *"Subject to sub-section 2, the head of a private body may refuse a request for access to a record of the body if the record –*

*(c) contains information, the disclosure of which could reasonably be expected –*

*(i) to put the private body at a disadvantage in contractual or other negotiations;"*

90. The public body submitted to the PAIA Division that a perception that Sibanye is not complying with its SLP obligations would place Sibanye at a disadvantage not only in discussions with suppliers, but also in its ongoing engagements with its regulator, the DMRE. It noted that a constructive relationship with the DMRE is critical to Sibanye and the integrity of its mining rights.
91. In its submissions to the Enforcement Committee, the DIO seemed to misunderstand the PAIA Division's point that an exemption, such as section 68(1) that it relies on, constitutes a limitation of a right of access to records.
92. In the process, however, the DIO fails to deal with the finding by the PAIA Division in paragraph 10.4.26 of its report that *"mere conjecture or speculation that the disclosure of the compliance reports may create a perception that Sibanye is not complying with its SLP obligations would place Sibanye at a disadvantage (as stated), is not adequate reasons to justify a limitation of a constitutional right of access to the information"*.

93. The Regulator concurs with the Enforcement Committee that in the absence of any facts, the private body's reliance on section 68(1)(c)(i) constitutes mere conjecture and speculation. We further agree with the Committee that public disclosure of the records is more likely to promote transparency and accountability, which could offset any potential disadvantage to Sibanye. We acknowledge that Sibanye's relationship with the DMRE is of critical importance to it.
94. The discussion of section 68(1)(b) above is equally applicable in regard to section 68(1)(c), as is our conclusion.
95. The question which needs to be addressed before considering the next issue is whether the PAIA Division was compelled to provide the submissions of each party to the other to allow for comments. It appears from the Investigation Report that the complainant was afforded an opportunity to make a submission in support of the complaint and in response to Sibanye's submission. Sibanye was not given a right of reply.
- 95.1. In principle, it would allow for a fair and proper ventilation of the issues, if the complainant's submissions were to have been provided to Sibanye, however, not every statement or submission made by one party, needs to be considered and responded to by the other.
- 95.2. PAIA permits the recordholder an opportunity to provide to the Regulator a written response in relation to the complaint (per s 77E(b) of PAIA), and in terms of s 77G(2) of PAIA read with section 81 of the Protection of Personal Information Act 4, of 2013 ("POPIA"), the Regulator can receive any evidence / information it sees fit. In our view, whether the other party should be made aware of the submissions of the other, and be allowed to respond, would depend on the information or evidence and its relationship to or bearing on the primary issues.
- 95.3. In this instance, the private body has rejected the explanation furnished by the complainant, through the PAIA Division for why the records are required, as already stated. In addition, the private body was permitted to make substantial submissions to the Enforcement Committee. In these circumstances the Regulator is of the view that the failure by the PAIA Division to fully advise the private body of the complainant's submissions, has not prejudiced the private body.

### Severability

96. The private body has not identified any portions of the record that may be severed, or should be redacted, and in any event its reliance on the section 68 exemptions has been rejected. Section 59 therefore is not applicable.

### Public interest:

97. Because the private body's reliance on section 68 falls to be rejected, it is not necessary to consider section 70 of PAIA.

### Whether the annual compliance report is automatically available:

98. The PAIA Division considered the private body's PAIA Manual and concluded that as "annual reports" and "regulatory reports" are types of records that fall under the category of records of the private body that are automatically available without a person having to request access in terms of PAIA, the complainant must in accordance with regulation 5(3) of PAIA be provided with copies of the compliance reports. The PAIA Division further argued that the PAIA manual is legally binding on the private body.
99. Sibanye disputed the PAIA Division's conclusions and submitted that in terms of the PAIA manual the requested records fall in the category of records that may be refused on legal grounds contained in sections 62 to 70 of PAIA.
100. It is clear from the PAIA request that the complainant did not rely on the PAIA manual when it requested access to the relevant SLPs.
101. The Regulator concurs with the Enforcement Committee that this renders the point moot because the request was considered on the basis that it was made, and not on the basis that it could have been made.

### **Conclusion:**

102. For these reasons we find that the complainant is entitled to be provided with access to the records requested.

**COMPLIANCE PERIOD**

103. The head of a private body is hereby directed to comply with this Enforcement Notice within 31 days from the date of receipt of this Notice.

**REVIEW OF THE DECISION OF THE INFORMATION REGULATOR**

104. The head of a private body has the right to apply to a court with jurisdiction for appropriate relief, in terms of section 82 of PAIA, should he or she be aggrieved by a decision of the Regulator pertaining to this notice.

105. The head of a private body is required to notify the Regulator, within 10 working days of receipt of this notice, about his or her intention to apply to a court for appropriate relief in terms of section 82 of PAIA. The application, in terms of section 82 of PAIA, must be brought to a court for appropriate relief within a period of 180 days from date of receipt of this notice.

**CONSEQUENCES FOR NON-COMPLIANCE WITH AN ENFORCEMENT NOTICE**

106. The head of a private body who fails to comply with this Enforcement Notice is guilty of an offence and liable upon conviction to a fine or imprisonment for a period not exceeding three years or both.

**DATED at JOHANNESBURG on 22 May 2026**



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ADV. P TLAKULA

CHAIRPERSON OF THE INFORMATION REGULATOR