INFORMATION REGULATOR (SOUTH AFRICA)

Ensuring protection of your personal information and effective access to information

FORM H

ENFORCEMENT NOTICE

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

REF NO:	**108/2023**

To: **Ms. Yoliswa Makhasi**
Director-General
Department of Public Service and Administration
546 Edmond Street
Pretoria

E-mail: [redacted]

Dear Ms. Makhasi

NAME OF COMPLAINANT	Mr. [redacted]
NAME OF THE RESPONDENT (PUBLIC BODY)	The Department of Public Service and Administration ("DPSA").

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

1.1. The decision of the Information Officer of the public body to refuse access to a copy of the legal opinion / internal memorandum dated 30 January 2023, is hereby set aside.

1.2. The Information Officer is directed, in terms of section 77J(1)(b) of PAIA, to grant the complainant access to a copy of the legal opinion / internal memorandum provided by the DPSA Legal Services to the Director: Finance, Ms. [redacted].

1.3. Disclosure of the said legal opinion / internal memorandum must be made within **10 days** of receipt of the Enforcement Notice, in the format as requested by the complainant.

INTRODUCTION

1. The complainant in this matter is Mr. [redacted] *("the complainant")*, employed at the Department of Public Service and Administration. The complainant is not legally represented and acts in his personal capacity.

2. The public body is the Department of Public Service and Administration ("*the public body*" or "*the DPSA*"), a national government department responsible, *inter alia*, for the establishing of norms and standards for the public service, promoting an efficient, effective and development-orientated public administration, and ensuring sound governance within the public sector. The normative framework governing public administration, as articulated through the DPSA, is firmly anchored in section 195 read with section 197 of the Constitution of the Republic of South Africa[1], and given legislative effect through the Public Service Act[2] and the Public Administration Management Act[3].

[1] Act 108 of 1996
[2] Act 103 of 1994
[3] Act 11 of 2014

3. The issue that lies at the heart of this matter is the public body's refusal to grant the complainant access to the requested record, a copy of a legal opinion, on the basis that the requested record falls within the scope of section 40 of PAIA.

4. The public body is represented by its Information Officer, Ms. Yoliswa Makhasi (*"Ms. Makhasi"* or *"the IO"*) and its Deputy Information Officer, Ms. R Naidoo (*"Ms. Naidoo"* or *"the DIO"*).

The internal request for access to the records:

5. On 23 February 2023, the complainant made a request for access to records on the prescribed form, Form 2, to the Information Officer of the public body for the following records:

> ***"THE RECORD IS A LEGAL OPINION PROVIDED BY THE DPSA LEGAL SERVICES TO THE DIRECTOR: FINANCE IN THE DPSA, MS [redacted] WITH REGARD TO THE CELLPHONE ALLOWANCE OF MR [redacted]"***

6. In the Form 2, the complainant explained as follows as to why the record is required:

> ***"I WANT TO LODGE A GRIEVANCE AND POSSIBLY LEGAL ACTION AND I NEED TO ACCESS THE LEGAL OPINION TO PREPARE FOR SUCH."***

7. Per e-mail dated 23 February 2023, the public body, through its senior legal administration officer, a certain Mr. [redacted] ("Mr. [redacted]"), acknowledged receipt of the said request.

8. Per e-mail dated 01 March 2023, Mr. [redacted] requested specific information from the complainant, namely the context within which the legal opinion was requested and by whom within the particular Department.

9. On 01 March 2023, the complainant responded that he had previously been informed by the Director: Financial Accounting and Management, a certain Ms. [redacted] ("Ms. [redacted]"), of her intention to obtain an in-house legal opinion from Legal Services. The complainant shared the e-mail correspondence he had previously received from Ms. [redacted], with Mr. [redacted]. In her e-mail of 19 January 2023, Ms. [redacted] stated, *inter alia*, the following:

> *"Dear* [redacted]
>
> *I have sent the matter to legal services for advice. Will let you know as soon as I get a response.*
>
> *…….*
>
> ***Hope to have clarity from Legal Services before your next claim is due for payment, which will guide the way forward.***
>
> *Kind Regards*
>
> [redacted]"

10. The complainant went on to explain that, on 21 February 2023, Ms. [redacted] had advised him that she had received the legal opinion but would not share same with the complainant as same was privileged information. However, Ms. [redacted] then proceeded to give the complainant a written summary of the legal opinion as follows:

"*Dear* [redacted]

Firstly, I would like to clarify that after your email I requested that my staff obtains copies of the approvals for the cell phone allowances from payment batches of you previous claims. It seemed that not all the required documents could be obtained, and I requested that the documents be obtained from the internal IT directorate where these documents are kept, as they are the policy owners. This documentation was required to get a full picture of the situation at hand.

I have also received a response from Legal Services and will summarise the opinion below.

The validity of the deviation approval by the Director-General, to make use of more than two devices and to exceed the normal allowances, was approved in the context of the work being done and the position you held in the Chief Directorate [redacted]. *It is the legal opinion that this deviation lapsed on approval of the new Mobile device policy on 25 February 2021.*

After approval of the new Mobile device policy dated 25 February 2022, an email was sent out on 18 May 2021 that indicated that where an employee have a personal allowance limit related to the need of the post and require a

higher allowance a written motivation recommended by both the responsibility and programme managers must be submitted to the Chief Financial Officer for consideration and approval. You did not submit such a request to the Chief Financial Officer.

You did complete an Appendix A form, and it was signed by the Programme Manager on 24 March 2021. This form, however, included 3 devices and it therefore not in line with the policy (paragraph 3.9 which indicates that no employee will be allowed to have multiple voice or data numbers: only one device for voice and one for data) and therefore considered to be unlawful. The application should have been treated as a deviation from two devices and should have been considered and approved by the Director-General in accordance with paragraph 24 of the mobile device policy.

When you assumed duty in another position, you again completed a new Appendix A in line with par 13 of the Mobile device policy, which indicates that in a case where a user is entitled to an allowance in a particular post and is therefore transferred to another post, re-approval of the allowance must be obtained in line with the duties of the new position occupied. The programme manager signed this on 19 September 2021 but again it included three devices, which is a deviation from the policy that should have been approved by the Director General. This ***Appendix is therefore considered unlawful.***

Your attention is also drawn to paragraph 5 of the policy that state that when the duties of the employee change to such an extent that he/she no longer meets the eligibility criteria, the obligation in terms of the mobile device, the

contract remains the responsibility of the contract holder and all the other obligations in terms of this policy cease.

The way forward:

The Finance section will be doing a reconciliation on all claims paid from March 2021 to determine the amount overpaid. You will then be informed accordingly, and arrangements can then be made on the repayment of the overpayment.

You should immediately complete a new Appendix A form for signature by the programme manager where only two devices are included. Your future claims can then be processed in line with the new approval with two devices up to a maximum of R1 450 per month, which is broken down to a maximum if, R1 050 for cell phone device and a maximum of R400 for a data device. Payment is, however, done based on actual expenditure incurred up to the maximum allowance as per paragraph 4.1 of the Mobile device policy.

Please note that the legal opinion is legally privileged and can therefore not be shared.

Kind Regards

[redacted]"

11. It must be highlighted that, prior to the Form 2 request and the Information Officer's refusal of access to the requested record, there was substantive communication between the complainant and the DPSA officials.

12. Of significance is e-mail correspondence between the complainant and Ms. [redacted] on 13 January 2023, which deals, *inter alia*, with the misinterpretation of departmental policies in relation to cell phone allowances and approvals by the Director-General for three of the complainant's mobile devices in circumstances where the complainant changed posts and had been transferred to a different department. The correspondence also deals with the complainant's ***"new approvals"***, ***"discrepancy on the approval compared to the invoices"*** and ***"older claims … that …have in fact been overpaid…"***. In the e-mail of 13 January 2023, Ms. [redacted] then expresses her concern that non-compliance with the policies could lead to audit enquiries. It was as a result of the foregoing that Ms. [redacted] undertook to seek internal advice from Legal Services. Regard must be had to the fact that, at this juncture, there was no iota of an indication that the complainant intended to institute legal proceedings. In fact, the issue of possible legal proceedings only came to the fore after the complainant was officially refused access to the legal opinion.

13. Section 25(1) of the Promotion of Access to Information Act, Act 2 of 2000 ("PAIA") provides, *inter alia*, that the Information Officer of a public body to whom a request for access to records is made or transferred, must, as soon as reasonably possible, but in any event within 30 days after the request has been received, decide whether to grant the request and notify the requester of its decision.

14. In a letter addressed to the complainant on 28 March 2023, the Information Officer refused access to the requested record on the basis that the record is legally privileged *"in terms of section 40, read with section 46 of PAIA"* and cannot be disclosed to the complainant. In terms of the provisions of section 74(1) read with section 75(1) of PAIA, the complainant was advised of his right to lodge an internal appeal with the Minister for Public Service and Administration within 60 days of the decision to deny access to the requested record. The letter stated the following:

"*In terms of section 40, read with section 46 of PAIA, access to the legal opinions are not granted as they are legally privileged.*

You are hereby advised that you may lodge an internal appeal with the Minister for the Public Service and Administration against my decision within 60 days of receiving this letter in terms of section 74(1) read with section 75(1) of PAIA."

15. In terms of section 74(1)(a) of PAIA, a complainant / requester may lodge an internal appeal against a decision of the Information Officer of a public body referred to in paragraph (a) of the definition *of "public body"* in section 1. A public body in terms of section 1 of PAIA is limited for purposes of an internal appeal and means – *"(a) any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government."* As the DPSA is included in the definition of *"public body"* for purposes of an internal appeal, an internal appeal was therefore mandatory.

16. On 31 March 2023, the complainant lodged an internal appeal against the decision of the Information Officer to refuse access to the requested record. The prescribed internal appeal form, Form 4, was accompanied by a detailed memorandum setting out the basis for the complainant's request for the record and the subsequent internal appeal. The internal appeal to the line Minister read as follows, *inter alia*:

"The Director-General as the Information Officer of the DPSA, is refusing to grant me access to a legal opinion provided to the Chief Financial Officer by the DPSA Legal Services regarding my Cellphone Allowance. The Chief Financial Officer has decided to reduce my Cellphone Allowance from December 2022 and when I lodged a Grievance, he decided not to pay my

Cellphone Allowance for March 2023, and it seems none will be paid going forward even though the Acting DDG: NLRRM has approved."

17. On 31 March 2023, the Office of the Minister, per a certain Ms. [redacted] ("Ms. [redacted]"), requested more background information with regards to the appeal lodged by the complainant.

18. In an internal memorandum dated 31 March 2023, and addressed to the Minister, the complainant explained, *inter alia*, that:

18.1. The memorandum outlines the complainant's grievance regarding the refusal of the DPSA Information Officer to grant the complainant access to a legal opinion concerning his cell phone allowance.

18.2. The complainant was informed in December 2022, by a certain Ms. [redacted], a payments officer, that a previously approved deviation from the Mobile Device Policy Management, allowing the complainant to have three devices instead of two, would no longer apply following the complainant's transfer due to departmental restructuring. Despite not being legally obligated to comply, the complainant initially accepted this decision, expecting his approved cell phone allowance of R1,450.00 to be paid. However, the complainant received reduced amounts in December 2022 and January 2023, and from March 2023, the allowance was entirely withheld, causing the complainant financial prejudice.

18.3. Upon realising the discrepancy, the complainant rescinded his acceptance of the policy change and demanded full payment of his invoices as per the approved deviation. Subsequently, the Director: Finance, Ms. [redacted], informed the complainant that a legal opinion had been sought from DPSA Legal Services

regarding the matter. On 21 February 2023, Ms. [redacted] communicated that the legal opinion supported a reconciliation of the complainant's claims, with the potential recovery of alleged overpayments. The complainant requested access to the legal opinion, but his request was denied on the grounds of legal privilege.

18.4. On 23 February 2023, the complainant formally applied to the Information Officer in terms of the provisions of PAIA, to access the legal opinion. The complainant's request was declined on 23 March 2023, with the Information Officer citing legal privilege. The complainant was informed of his right to lodge an internal appeal with the Minister.

18.5. The complainant appealed to the Minister, seeking to overturn the Information Officer's decision and to obtain the legal opinion. The complainant asserts that access to the opinion is essential for engaging his attorneys to challenge the validity of the Chief Financial Officer's actions, including the retrospective implementation of a policy and the cessation of his approved allowance. The complainant emphasised his intention to exhaust internal remedies before resorting to legal action, expressing hope to avoid litigation against the Minister. The complainant enclosed supporting documentation for the Minister's reference, including his PAIA request, the Information Officer's response, and relevant policy documents.

19. The record demonstrates that there was a Teams meeting scheduled for 20 April 2023 and that the Minister instructed Legal Services to meet and determine whether the internal appeal of the complainant could be resolved amicably. According to the complainant this meeting was led by the DPSA Chief Director: Legal Services and included officials from the Office of the Chief Financial Officer as well as the Director:

Information Technology. At the said meeting the complainant was made to understand that submissions would be made to the Minister in order for the Minister to make a final decision regarding the internal appeal.

20. On 05 May 2023, Mr. [redacted] sent an e-mail to the complainant advising that the Minister as the relevant authority must decide, in terms of the provisions of section 77(3)(a) of PAIA, within 30 days of receipt of the internal appeal, whether or not to grant access to the requested record. Further, that in the event that the Minister fails to give notice of her decision within the 30-day period, the internal appeal shall be regarded as having been dismissed by the relevant authority as contemplated in terms of section 77(7) of PAIA.

21. In correspondence dated 17 July 2023, addressed to the Minister, the complainant explained that, after having lodged an internal appeal 70 working days prior, there had been no formal response forthcoming notwithstanding the meeting of 20 April 2023 as well as an extension of time for the Minister to make a decision regarding the internal appeal by 14 July 2023. The complainant advised that he would now seek external intervention.

22. The reading of the report of the Enforcement Committee demonstrated that, even pursuant to the lodgement of the internal appeal, there was again communication and meetings between the complainant and the DPSA officials. Contrary to the prescripts of PAIA[4], there was even an agreement on extending the time frames for the DPSA to file its response to the internal appeal. However, after a lapse of more than 120 days after the internal appeal was lodged, the DPSA still failed to decide or to give notice of

[4] Section 77(3)(a) of PAIA

its decision on the internal appeal. Accordingly, the appeal was regarded as a deemed dismissal by the public body as contemplated in terms of section 77(7) of PAIA.

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

24. It was against the foregoing backdrop that the complainant lodged a formal complaint with the Regulator's PAIA Division on 08 August 2023.

The complaint to the Information Regulator.

25. The Regulator, through its PAIA Division, proceeded with its investigations in terms of section 77C(1)(a) of PAIA. In terms of the provisions of PAIA, the Regulator is empowered to investigate the complaint in the prescribed manner[5]. Section 77G of PAIA provides that the Regulator, when investigating a complaint, has similar powers to those of the High Court in examining any record of a public or private body to which PAIA applies. Further, that no such record may be withheld from the Regulator on any grounds. Section 81 of the Protection of Personal Information Act, Act 4 of 2013 ("POPIA") also confers upon the Regulator vast investigative powers.

26. The Regulator, through its PAIA Division, commenced a preliminary investigation in terms of section 77E of PAIA. In the execution of this function, the Information Officer of the public body was directed to submit a full and reasoned response to the allegations raised by the complainant. This included the provision of all relevant information, substantiated legal grounds, and supporting documentation upon which the

[5] See sections 77E and 77G of PAIA and its Regulations. See also section 81 of POPIA

decision to refuse access to the requested record was based, as contemplated in Regulation 11(2)(c) of the PAIA Regulations. This process was undertaken to enable the PAIA Division to assess, at a *prima facie* level, whether the refusal complied with the prescripts of PAIA and whether further regulatory intervention was warranted.

27. A perusal of the record before the Enforcement Committee demonstrated that:

27.1. A formal complaint in the prescribed Form 5, dated 08 August 2023, was lodged with the Regulator's PAIA Division.

27.2. On 18 August 2023, the PAIA Division addressed a letter to the Information Officer of the public body, notifying the public body of the complaint it had received from the complainant and of the Division's intention to conduct a pre-investigation into the said complaint. The letter stated the following:

> *"1 The Information Regulator ("Regulator") has received the attached complaint from the above-mentioned complainant.*
>
> *2. Kindly be advised that the Regulator has decided to conduct a pre-investigation of the complaint, in accordance with section 77E of the Promotion of Access to Information Act 2 of 2000.*
>
> *3. Kindly confirm receipt and the date thereof, of the complainant's request for information. If a decision, in response thereto, was communicated to the complainant, please provide us with a copy thereof.*
>
> *4. If a decision rejecting the request was made, please produce to the Regulator, within three (3) working days after receipt of this letter, any information, item or document, on which your decision which is the subject of the aforesaid complaint*

is based.

5. *If a deemed refusal occurred in terms of section 27 or 58 of PAIA, please confirm same.*

6. *Lastly, please confirm whether you are amicable to an early settlement of this complaint.*"

27.3. On 24 August 2023, the Information Officer of the public body responded to the PAIA Division's letter of 18 August 2023, and stated, *inter alia*, that:

"1. Your letter dated 18 August 2023 regarding the above matter refers.

2. The complainant, a Department of Public Service and Administration (DPSA) employee, worked in the Chief Directorate [redacted] *and was transferred to the Chief Directorate:* [redacted] *due to a re-organisation within the Department. As an employee at the Chief Directorate* [redacted]*, he was entitled to a cell phone allowance which was approved at the time by the acting Deputy Director-General responsible for his directorate.*

3. Subsequently a deviation from the Mobile Device Policy Management allowing the complainant an increase of R500 per month to subscribe to a Wi-Fi service was granted. However, the DPSA's Mobile Device Policy Management directs that when an employee is transferred to a different component, he/she must reapply for cell phone allowances within the new component/unit.

4. *On the 20th April 2023, the Chief-Directorate: Legal Services had a meeting with the Chief Financial Officer (CFO), Director: Finance, Director: ICT Management and Support, and the complainant to discuss the internal appeal and possibly find an amicable settlement to the matter.*

5. *During the said meeting, it was indicated by the CFO that Finance was in the process of resolving all outstanding payments of the complainant's cell phone allowance claims and would continue to do so. The payment of the cell phone claims is the reason for the current impasse between complainant and the department which culminated in his request for access to the legal opinion on the interpretation of the cell phone policy which was provided by the Chief Directorate: Legal Services to the Directorate: Finance.*

6. *The Chief Directorate Legal Services, in its legal opinion, indicated to the CFO, that the correct interpretation of the Mobile Device Policy Management is that an employee of the DPSA needs to apply for cell phone allowance within his/her Branch which the Deputy Director-General of that Branch may approve. When an employee is transferred to another Branch within the DPSA, he/she needs to reapply for cell phone allowances as the new functions to be executed may have different requirements regarding cell phone usage.*

7. *Section 37(1)(a) of PAIA provides that the Information Officer of a public body must refuse a request for access to*

a record of the body if the disclosure of the record would constitute an action for a duty of confidence owed to a third party in terms of an agreement. Section 37(1)(b)(i) of PAIA provides that the Information Officer of a public body may refuse a request for access to a record of the body if the record consists of information that was supplied in confidence by a third party and the disclosure of which could reasonably be expected to prejudice the future supply of similar information, or information from the same source.

8. *Furthermore, section 40 of PAIA states that the Information Officer of a public body must refuse a request for access to a record of the body if the record is privileged from production in legal proceedings unless the person entitled to the privilege has waived the privilege.*

9. *In the case,* ***South African Airways SOC v BDFM Publishers (Pty) Ltd and Others, Case No. 2015/33205, GLDJ, Per Sutherland J****, the court held that a person may rely on a right to the preservation of confidentiality in one's own information, inclusive of legal advice privilege where confidentiality is not yet breached.*

10. *The request for access to such a record (legal opinion) was therefore not granted by the Information Officer as we are of the considered view that the legal opinion requested by the CFO on this matter is covered under the common law definition of legal advice privilege. To release such an*

opinion to the complainant will undermine the essence of the legal advice privilege principle as entrenched in our legal system.

11. It was also determined that the exceptions (i.e. contravention of the law or public interest) contained in section 46 of PAIA do not apply in this case. Unfortunately, the complaint was referred to the Information Regulator before the Minister could make a decision on the matter although it is conceded that the 30-day prescribed period afforded to the relevant authority has already lapsed.

12. As previously stated, the DPSA is amenable to the amicable settlement of the complaint as envisaged in section 77F of PAIA and such discussions may be arranged in conjunction with the Deputy Information Officer on …"

27.4. To summarise the public body's letter of 24 August 2023:

27.4.1. The complainant previously served in the Chief Directorate: [redacted] but was later transferred to the Chief Directorate: [redacted] as a result of organisational restructuring.

27.4.2. During his tenure in the Directorate: [redacted], the complainant qualified for and was granted a cell phone allowance, and a further deviation allowed an additional R500 per month for a Wi-Fi subscription.

27.4.3. The public body's Mobile Device Policy makes cell phone allowances unit specific. Accordingly, any employee transferred to a new unit had to submit a new application for such an allowance and subject to the operational requirements of that unit. Legal Services confirmed this to be the correct interpretation.

27.4.4. A meeting was convened on 20 April 2023 with Legal Services, the CFO, Finance, ICT, and the complainant to address the internal appeal and explore the possibility of an amicable settlement. Finance indicated that outstanding cell phone allowance claims were being processed.

27.4.5. The complainant requested access to the legal opinion relating to the interpretation of the cell phone policy. The public body refused to provide access, citing statutory confidentiality and privilege. The public body now also relied on:

27.4.5.1. Section 37(1)(a) of PAIA, which mandates refusal where disclosure would breach a duty of confidence owed to a third party.

27.4.5.2. Section 37(1)(b)(i) of PAIA, permitting refusal where information was supplied in confidence and disclosure may prejudice future supply of similar information.

27.4.5.3. Section 40 of PAIA, which protects records subject to legal privilege unless waived.

27.4.5.4. The authority of *South African Airways SOC v BDFM Publishers (Pty) Ltd and Others*[6] confirming entitlement to preservation of confidentiality, including legal advice privilege.

27.5. Despite asserting its legal position, the public body expressed its willingness to pursue an amicable settlement with the complainant in terms of section 77F of PAIA.

27.6. It must be highlighted that, in its letter dated 24 August 2023, the public body, in addition to its reliance on sections 40 and 46 of PAIA as grounds for refusal, now raised new grounds for refusal, namely, sections 37(1)(a) and 37(1)(b)(i) of PAIA.

27.7. The PAIA Division did not immediately interrogate these new grounds and only did so per letter dated 09 July 2024. We will revert to this issue later.

27.8. The Enforcement Committee report noted that the Investigation Report it considered referred to a Pre-Investigation Report that was sent to parties communicating the PAIA Division's decision to conduct further investigation into the complaint. The Pre-Investigation Report sent to the parties under cover of a letter dated 29 August 2023. However, neither the letter nor the report formed part of the record before the Enforcement Committee. The record also demonstrates that, on 04 September 2023, a settlement meeting was held between representatives of the PAIA Division and the public body.

27.9. The public body's letter dated 16 September 2023, appears to be in response to the PAIA Division's letter of 29 August 2023 which accompanied the Pre-

[6] 2016 (2) SA 561 (GJ).

Investigation Report. In this letter the public body attempts to justify its reliance on section 40 by stating that:

"3. *In his pursuit for access to the record, the complainant stated that he wants to be furnished with a legal opinion in order to prepare for the lodgement of a grievance and legal action against the Department.*

4. *It was previously stated that the DPSA's Information Officer relied on section 40 read with section 46 of the Promotion of Access to Information Act, 2000 (Act No 2 of 2000) (PAIA) in declining a request for access to an opinion prepared by Legal Services on behalf of the office of the CFO/Finance.*

5. *Section 40 of PAIA provides that the Information Officer of a public body must refuse a request for access to a record of the body if the record is privileged from production in legal proceedings unless the person entitled to the privilege has waived the privilege.*

6. *As already mentioned, it is important to consider whether the provisions of section 46 of PAIA overrides section 40, amongst others, namely, 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.

27.10. The letter then goes on to explain that:

"7. *It would not be necessary to traverse issues previously canvassed in our correspondence save to mention the fact that the case between South African Airways SOC v BDFM Publishers (Pty) Ltd and Others, Case No. 2015/33205, GLDJ, Per Sutherland J, is quite succinct in terms of how matters of this nature must be handled or processed whenever they arise. In a nutshell, the court summarised the issues as follows:*

(a) Legal advice privilege is a negative right to refuse to disclose, in proceedings, any confidential information exchanged between an attorney and their client.

(b) Legal advice privilege cannot be invoked to assert a positive right to the protection or preservation of information whose confidentiality has or may be breached through unauthorised means as a result of which the information has become or may become known to strangers.

(c) *The limitations on the application of legal privilege position do not inhibit a person from seeking relief to prevent publication of confidential information because of the claim of privilege or because it is confidential in a general nature.* ***Emphasis added.***

(d) *Any relief sought from a court to protect any form of confidential information can be overridden by a recognised public interest. This requires a balancing of contending values in a fact-specific context.*

8. *Accordingly, the court held that a person may rely on a right to the preservation of confidentiality in one's own information, inclusive of legal advice privilege where confidentiality is not yet breached precisely because once the privileged information comes into the public domain there is no remedy to suppress its disclosure. It is common cause that the complainant has repeatedly stated that he wants access to the said record to possibly launch a legal action.*

9. *As pointed out in the matter between Thint (Pty) Ltd v National Director of Public Prosecutions and Others: Zuma v National Director of Public Prosecutions and Others 2009 (1) SA 1 (CC) the following requirements for legal professional privilege to apply must be met, namely:*

(a) *the legal practitioner must have acted in a professional capacity. This goes beyond the mere fact that the legal practitioner is an admitted attorney or advocate;*

(b) *the client must have consulted with the legal practitioner in confidence. A communication must have been intended to be confidential for it to be privileged; and*

(c) *the communication must have been made for the purpose of obtaining legal advice (or, at least, closely connected thereto).*

10. *It is important to distinguish between legal professional privilege and litigation privilege. Legal advice privilege relates to all communications between the legal practitioner (attorney/advocate/salaried legal adviser) and the client (in order to give client advice in a professional capacity). Litigation privilege pertains to and protects all communications between the legal practitioner and the client or between either of them and a third party with respect to actual or contemplated litigation, in so far as the case is in the process of investigation and/or preparation for trial.* ***Emphasis added****.*

11. *Our courts have held that legal professional privilege applies or extends to salaried legal advisors in the employ of government (Mohammed v President of the Republic of South Africa 2001 (2) SA 1145(C), and in the employ of*

private bodies (an international Auditing firm giving tax and legal advice) (Van der Heever v Die Meester en Andere).[7]

12. The Mohamed decision follows English law, from which our law originates, where it was held in Alfred Crompton Amusement Machines Limited v Customs and Excise Commissioners, a decision of the Court of Appeal, that, because a salaried legal advisor (whether a barrister or a solicitor) who is employed by a government department has the same duties as a lawyer in private practice, professional privilege within defined limits attaches to confidential communications between the salaried advisor and his client. Lord Denning, in that case, said that salaried legal advisors are regarded by the law in every respect as being in the same position as those who practice for their own account. They, and their clients, have the same privileges."

27.11. Returning to the new grounds raised, in letters dated 09 July 2024 and 17 July 2024, the PAIA Division taxed the public body on its reliance on the brand-new grounds as communicated in its letter of 24 August 2023, and requested substantiation on the grounds of refusal raised, specifically sections 37(1)(a), 37(1)(b)(i), 40 and 46 of PAIA:

"*1. We refer to your response letter dated 24 August 2023, specifically, the information officer's refusal in terms of sections 37(1)(a); 37(1)(b)(i); 40 and 46 of the Promotion of*

[7] Angela Itsikowitz: Legal Professional Privilege/ Intermediary confidentiality: June 2006.

Access to Information Act 2 of 2000 ("PAIA").

2. *Please be advised that the Information Regulator ("the Regulator") is finalising its investigation of the matter and wishes to afford the public body an opportunity to respond to the following prior to the Regulator's communication of an outcome of the investigation of the complaint to all parties.*

3. *We note your refusal of access on the basis that the disclosure of the record would constitute an action for a duty of confidence owed to a third party in terms of an agreement; that the disclosure could reasonable be expected to prejudice the future supply of similar information, or information from the same source; as well as the fact that the record is privileged from production in legal proceedings.*

4. *In light of the above, kindly furnish us with the following information/documents:*

    4.1 *The name of the third party in this instance;*

    4.2 *A copy of the agreement that imposes the duty of confidence on the body;*

    4.3 *A substantiation of how the disclosure of the legal opinion could reasonably be expected to prejudice the future supply of similar information, or information from the legal advisor who is employed to provide said information;*

4.4 Whether there are any legal proceedings, where legal privilege has been raised in terms of the legal opinion; and

4.5 Any evidence that the legal opinion was made in confidence.

5. Kindly provide the Regulator with a response to the above on or before 15 July 2024."

27.12. In its response dated 25 July 2024, the public body clarified that reference to the new grounds, namely sections 37(1)(a), 37(1)(b)(i), were in fact incorrect and maintained that its grounds for refusal remained that of sections 40 and 46 of PAIA:

"1. Your letter dated 17 July 2024 regarding the above matter refers.

2. You indicated that to finalise your investigation into the complaint the following information and/or documents are needed:

2.1 the name of the third party in this instance;

2.2 a copy of the agreement that imposes the duty of confidence on the body;

2.3 a substantiation of how the disclosure of the legal opinion could be expected to prejudice the future supply of similar information, or information from the legal advisor who is employed to provide said

information;

2.4 *whether there are any legal proceedings, where legal privilege has been raised in terms of the legal opinion; and*

2.5 *any evidence that the legal opinion was made in confidence.*

3. *The response to each of these questions will be dealt with in the following subparagraphs in the same sequence as indicated in the abovementioned subparagraphs.*

3.1. *With regards to your first three questions, we apologise for our reference to section 37(1)(a) of the Promotion to Access of Information Act No 2 of 2000 (PAIA), as this reason for the refusal of access to information is not correct. In our letter to Mr. [redacted], dated 23 March 2023 (Annexure A), the correct section for the refusal, i.e. section 40 read with section 46 of PAIA, was quoted.*

3.2. *Regarding the legal proceedings, where legal privilege has been raised in terms of the legal opinion, our letter dated 16 September 2023 addressed this question, and is attached as Annexure B.*

3.3. *The Internal Memorandum, containing the legal*

opinion marked "Legally Privileged" is attached at Annexure C. It was compiled in confidence in reply to the request from the Chief Financial Officer, to determine if Legal Services agrees with his interpretation of the Mobile Device Policy Management.

4. *As stated in my previous correspondence we believe this clarifies the issues raised in our previous meeting and therefore submit that the Information Regulator should, in terms of section 77D of PAIA, decide to take no action on the complaint based on what the complainant has already stated in relation to the referral of the matter to court. You may contact Ms. Renisha Naidoo: Deputy Information Officer on … for any other information."*

28. Following its interaction with the complainant and the public body and upon completion of its investigation, the PAIA Division referred its Investigation Report dated 09 August 2024, to the Enforcement Committee for consideration in terms of section 77C(1)(b).

29. On 22 August 2024, the public body responded to the PAIA Division's Form A referral notice by rejecting the preliminary findings and recommendations as set out in the report of 09 August 2024. Further, that the public body requested another opportunity to present its case before the Enforcement Committee.

30. On 20 June 2025, the Enforcement Committee issued a directive calling upon the public body and the PAIA Division to make written legal submissions in relation to the

public body's reliance on section 40 of PAIA as a ground for the alleged refusal, the preliminary findings and recommendations.

31. The Enforcement Committee considered the written submissions received from the public body dated 25 June 2025. No submissions were received from the PAIA Division.

32. This matter was subsequently enrolled for hearing before the Enforcement Committee on 26 June 2025.

LEGISLATIVE FRAMEWORK

33. Section 32(1)(a) of the Constitution[8] provides that everyone has the right of access to any information held by the State whilst section 32(2) obliges the State to enact national legislation to give effect to this right. The national legislation contemplated in section 32(2) was assented on 02 February 2000 with the adoption of PAIA and which commenced on 09 March 2001.

34. PAIA was amended by POPIA, with effect from 30 June 2021, in terms of which the Regulator is empowered to conduct investigations and where violations pertaining to the right of access to information are encountered, to take appropriate enforcement action to redress such violations.

35. In its preamble, it is stated that the purpose of PAIA is to give effect to the constitutional right of access to any information held by the State or another person. It further recognises that the system of government in South Africa before 27 April 1994, amongst others, resulted in a secretive and unresponsive culture in public and private bodies which often led to an abuse of power and human rights violations. It concludes

[8] The Constitution of the Republic of South Africa 108 of 1996

by stating that the purpose of PAIA is also to foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information and to actively promote a society in which the people of South Africa have effective access to information to enable them to more fully exercise and protect all their rights.[9] PAIA is therefore aimed at promoting access to records and not withholding it.

36. Section 11(1) of PAIA confers upon a requester a right of access to records held by a public body[10], subject to compliance with the prescribed procedural requirements. It obliges the public body to grant such access unless a recognised ground of refusal, as contemplated in PAIA[11], is established. The provision thus embodies the foundational principle of transparency, placing the onus on the public body to justify any limitation of the right of access.

37. In ***Brümmer v Minister for Social Development and Others***[12] the Constitutional Court held that:

> *"The importance of this right … 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.*

[9] See also section 9 (e) of PAIA
[10] De Lange & Another v Eskom Holdings Ltd and Others 2012 (1) SA 280 (GSJ) at par 34 to 36
[11] Part 2, Chapter 4 (sections 34-45)
[12] 2009 (6) SA 323 (CC)

38. In ***Smuts NO and others v MEC, Eastern Cape Department of Economic Development Environmental Affairs and Tourism and others***[13] ("Smuts"), the Court held that:

> *"Legislation which gives effect to constitutional rights and provides mechanisms for their promotion and enforcement must be interpreted generously and purposively, and with due attention to context''.*

39. Section 3 provides that PAIA applies to records of public and private bodies, regardless of when it came into existence.

40. In **President of the Republic of South Africa and Others v M&G Media LTD**[14] the Constitutional Court held as follows:

> *"[9] As is evident from its long title, PAIA was enacted to give effect to the constitutional right of access to any information held by the State. And the formulation of section 11 casts the exercise of this right in peremptory terms - the requester 'must' be given access to the report so long as the request complies with the procedure outlined in the Act and the record requested is not protected from disclosure by one of the exemptions set forth therein. Under our law, therefore, the disclosure of information is the rule and exemption from disclosure is the exception.*

41. Insofar as the limitations on the right to access a record held by the State is concerned, the Court went on and stated as follows:

[13] (1199/2021) [2022] ZAECMKHC 42 (26 July 2022)
[14] 2012 (1) SA 50 (CC)

"[11] *But PAIA places limitations on the right of access to information. It does this by exempting certain information from disclosure. PAIA recognises, in its preamble, that there are 'reasonable and justifiable' limitations on the right of access to information, even in an open and democratic society. Those limitations emerge from the exemptions to disclosure contained in Ch 4 of the Act. The purpose of Ch 4 is to protect from disclosure certain information that, if disclosed, could cause material harm to, amongst other things: the defence, security and international relations of the Republic, the economic interest and financial welfare of the Republic and commercial activities of public bodies; and the formulation of policy and taking of decisions by public bodies in the exercise of powers or performance of duties conferred or imposed by law."*

42. A public body may only refuse access to a record on a ground covered by Chapter 4 of PAIA. The onus is on a public body to prove that the refusal of a record is covered by one of the grounds under Chapter 4. It therefore places the evidentiary burden of showing that the record is exempt from disclosure on the public body. The public body has no discretion to withhold information that is not protected.[15]

43. In ***Smuts***, the Court held that:

> *"the burden of justifying a limitation of a right falls on the party wishing to do so, and not on the right-holder."* [16]

44. When interpreting PAIA, every court must prefer any reasonable interpretation of a provision that is consistent with the objects of the Act over any alternative interpretation

[15] Section 28 of PAIA
[16] Smuts N.O. and Others, par 15

that is inconsistent with those objects.[17] The object of PAIA is, amongst others, generally, to promote transparency, accountability and effective governance of all public and private bodies by, including, but not limited to, empowering and educating everyone to understand their rights in terms of the Act in order to exercise their rights in relation to public and private bodies.[18]

45. We now turn to the pertinent issues identified in this matter.

ISSUES TO BE DETERMINED

Did the complainant comply with the procedural requirements prescribed in PAIA, relating to the request for access to the record held by the public body?

46. In ***Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)***,[19] the Supreme Court of Appeal considered the consequences of non-compliance with the procedural requirements for seeking access to a record under the provisions of PAIA. The court held that:

> *"… access to information in terms of that Act is subject to compliance with a comprehensive process that contains its own checks and balances."*[20]

47. The Regulator is satisfied that the complainant has complied with the procedural requirements of PAIA, and that the PAIA Division, has jurisdiction to investigate the complaint. In this regard:

[17] Section 2(1) of PAIA
[18] Section 9 (e) (1) of PAIA
[19] 2007 (5) SA 540 (SCA)
[20] Ibid para 26.

47.1. The applicable PAIA request form, Form 2, was duly submitted to the Information Officer of the public body in accordance with section 18(1) of PAIA.

47.2. The Information Officer of the public body made a decision to refuse access to the requested record on the basis of section 40, read with section 46 of PAIA, and duly notified the complainant of such decision.

47.3. The complainant lodged an internal appeal in terms of section 75 of PAIA and submitted the prescribed form, Form 4, within 60 days from date of the decision.

47.4. As no response was received in respect of the internal appeal, same was regarded as having been dismissed.

47.5. The complainant has exhausted all internal processes.

47.6. The complainant did not apply to Court for appropriate relief regarding the matter under investigation.

47.7. The complaint was lodged with the Regulator on the prescribed form, Form 5 of Annexure A to the PAIA Regulations.

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

Did the information officer of the public body correctly refuse access to the requested record in terms of any grounds contemplated in terms of Chapter 4 of part 2 of PAIA?

48. In ***Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others***[21] the Constitutional Court held that:

> *"[53] PAIA provides a statutory right of access to records held by the state and private bodies. In the latter instance, this right is exercisable to the extent that a requested record is required for the exercise or protection of rights. Both private and public bodies are under a duty to provide access to requested records, or part thereof unless refusal of the request is permitted by one or more grounds of PAIA. The grounds of refusal is permitted by one or more grounds of PAIA. The grounds of refusal limit the constitutional right of access to information in order to protect fundamental rights and important aspects of public interest."*

49. It must be remembered that PAIA is not merely a piece of legislation which gives effect to the constitutional right of access to information. PAIA is also a law of general application that limits the rights of access to information under specific grounds for refusal of access to records held by public bodies.

50. As indicated herein above, a public body may only refuse access to a record on grounds of refusal covered by Chapter 4 of Part 2 of PAIA. These grounds of refusal are laws of general application as contemplated in section 36(1) of the Constitution.

[21] 2023 (5) SA 319 (CC) at par 53

These grounds of refusal are, subject to section 36, reasonable and justifiable grounds for limiting the constitutional right of access to any information.

51. PAIA recognises, in its preamble, that there are *"reasonable and justifiable"* limitations on the right of access to information and that those limitations emerge from the exemptions to disclosure contained in Chapter 4 of the Act. Once the records requested have been determined not to fall within the statutory exceptions, access must be granted forthwith in the form requested.

52. The PAIA Division, applying a purposive interpretation of PAIA as endorsed in the *Smuts* case, concluded that none of the cited grounds for refusal met the statutory threshold. The burden of proof, which lies with the public body, was not discharged, and thus the refusal cannot be upheld.[22]

53. In ***President of the Republic of South Africa and Others v M&G Media LTD***[23] the Constitutional Court further held as follows:

> *"[23] In order to discharge its burden under PAIA, the State must provide evidence that the record in question falls within the description of the statutory exemption it seeks to claim. The proper approach to the question whether the State has discharged its burden under s 81(3) of PAIA is therefore to ask whether the State has put forward sufficient evidence for a court to conclude that, on the probabilities, the information withheld falls within the exemption claimed.*

[22] See President of the Republic of South Africa v M & G Media Ltd 2011 (2) SA 1 (CC).

[23] 2012 (1) SA 50 (CC) at par 23 to 26.

[24] ***The recitation of the statutory language of the exemptions claimed is not sufficient for the State to show that the record in question falls within the exemptions claimed.*** *Nor are mere ipse dixit affidavits proffered by the State.* ***The affidavits for the State must provide sufficient information to bring the record within the exemption claimed.*** *This recognises that access to information held by the State is important to promoting transparent and accountable government, and people's enjoyment of their rights under the Bill of Rights depends on such transparent and accountable government.*

[25] *Ultimately, the question whether the information put forward is sufficient to place the record within the ambit of the exemption claimed will be determined by the nature of the exemption.* ***The question is not whether the best evidence to justify refusal has been provided, but whether the information provided is sufficient for a court to conclude, on the probabilities, that the record falls within the exemption claimed.*** *If it does, then the State has discharged its burden under s 81(3). If it does not, and the State has not given any indication that it is unable to discharge its burden because to do so would require it to reveal the very information for which protection from disclosure is sought, then the State has only itself to blame."*

(own emphasis).

54. As indicated herein above, the Information Officer of the public body refused access to the requested record on the basis that the record was legally privileged as envisaged in section 40 of PAIA. In this regard, the Information Officer explained that:

"In terms of section 40 read with section 46 of PAIA, access to the legal opinions are not granted as they are legally privileged."

55. In terms of section 40 of PAIA:

"40 Mandatory protection of records privileged from production in legal proceedings

The information officer of a public body ***must refuse*** *a request for access to a record of the body* ***if the record is privileged from production in legal proceedings*** *unless the person entitled to the privilege* ***has waived the privilege****."*

(own emphasis)

56. At this point, and in order to determine whether access was correctly refused in terms of section 40 by the public body, it is important that we explore the concept of *"privilege"*.

57. The right to legal professional privilege received authoritative affirmation in ***Thint (Pty) Ltd v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions***, where the Constitutional Court observed that legal professional

privilege is a substantive doctrine of the common law founded upon public policy and intimately connected to the proper administration of justice.[24]

58. Similarly, in ***Competition Commission of South Africa v ArcelorMittal South Africa Ltd***, the Supreme Court of Appeal reaffirmed that legal professional privilege exists because the public interest is best served where clients are encouraged to communicate candidly with their legal advisers, free from fear that confidential communications will later be disclosed.[25]

59. The clearest explanation of the juridical character of legal professional privilege appears in ***South African Airways SOC v BDFM Publishers (Pty) Ltd and Others***[26], where Sutherland J held that:

> *"[45] The point of departure is to identify exactly what is meant by the concept of 'privilege' in the context of the taking of legal advice. With the possible exception of s 201 in the Criminal Procedure Act 51 of 1977, the idea of a legal right to the confidentiality of communications between a client and a legal advisor is judge-made law. As such the rationale for the idea of privilege has evolved over time in response to judicial perceptions and evolving social mores about how court proceedings might appropriately be conducted. In our era it is incontrovertible that the 'right' vests in the client. Also, it is clearly recognised that there are two subspecies of this right.* ***One is called legal professional privilege, or legal advice privilege.*** *I prefer the label of legal advice privilege on the grounds that this phrase actually tells one what it is about, whilst the former phrase demands further*

[24] Thint (Pty) Ltd v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions 2009 (1) SA 1 (CC) para 184.
[25] Competition Commission of South Africa v ArcelorMittal South Africa Ltd and Others 2013 (5) SA 538 (SCA).
[26] 2016 (2) SA 561 (GJ) at paras 45 to 49.

explanation. ***The other subspecies is litigation privilege, which label too is self-explanatory.*** *What SAA claims is legal advice privilege.*

[46] The more interesting question is the content of the right, i.e. what does the right which vests in the client entitle the client to do? In the discourse about the privilege it is commonplace to read or hear it said that a 'document is privileged'. This is a convenient shorthand way to express oneself but it suffers from three drawbacks in distilling the exact content of the right:

[46.1] First, it is not, in truth, the document which is 'privileged', rather what is really meant to be said is that the information which is contained in the document is privileged. This distinction is less precious than it may seem, at first glance, to be.

[46.2] Secondly, to describe the information as privileged obscures the point that the right vests in the client, not in the information, and that the right is an entitlement to claim 'privilege' over the information. This can and must mean no more than a right to refuse to divulge the information and prevent it being adduced in evidence in any proceedings, usually legal proceedings, but also any sort of adversarial proceedings where the recipient of legal advice is involved. The information is, thus, never more than the subject matter of a claim of privilege.

[46.3] Third, the 'privilege' cannot reside in the information anyway, because it only becomes the subject matter of the claim of

privilege when that right not to disclose it is claimed, and not before. At most, the information per se can never be more than eligible to be the subject matter of legal advice privilege, i.e. if it satisfies the test of being (1) legal advice; (2) given by a legal advisor; (3) in confidence to a client; and (4) is claimed. If privilege is not claimed the information about the legal advice can be adduced in legal proceedings because then, to use the shorthand, it is not 'privileged'.

[47] *Moreover, in divining the exact nature of the right, its rationale must dictate the nature of the right. The rationale for the concept of legal advice privilege has been distilled from what has been understood to be the essence of the adversarial legal system. The right of a person to a guarantee of confidentiality over communications with that person's legal advisor is an indispensable attribute of the right to counsel and the adversarial litigation system. The professional duty of legal practitioners towards their clients is inseparable from the duty to respect their clients' wishes about the secrets revealed by the clients and the confidential advice given to the clients. The legal advisor is by reason of that relationship forbidden to reveal the communications in any proceedings because the relationship between the legal advisor and the client establishes a right by the client against the legal advisor to preserve confidentiality. It is plain that the privilege is so called precisely because it is an exception to the rule about what must be adduced.*

[48] *By invoking such legal advice privilege, no less than litigation privilege, the client invokes a 'negative' right, i.e. the right entitles a client to refuse*

disclosure by holding up the shield of privilege. What the right to refuse to disclose legal advice in proceedings cannot be is a 'positive right', i.e. a right to protection from the world learning of the advice if the advice is revealed to the world without authorisation. The client may indeed restrain a legal advisor on the grounds of their relationship, and may also restrain a thief who takes a document evidencing confidential information on delictual grounds.

[49] But if the confidentiality is lost and the world comes to know of the information, there is no remedy in law to restrain publication by strangers who learn of it. This is because what the law gives to the client is a 'privilege' to refuse to disclose, not a right to suppress publication if the confidentiality is breached. A client must take steps to secure the confidentiality and, if these steps prove ineffective, the quality or attribute of confidentiality in the legal advice is dissipated. The concept of legal advice privilege does not exist to secure confidentiality against misappropriation; it exists solely to legitimise a client in proceedings refusing to divulge the subject matter of communications with a legal advisor, received in confidence. This vulnerability to loss of the confidentiality of the information over which a claim of privilege can and is made flows from the nature of the right itself. The proposition about the consequences of loss of confidentiality is endorsed by the authorities." (own emphasis)

60. Sutherland J further held that:

"[52] As held in Midi Television (Pty) Ltd t/a ETV v Director of Public Prosecutions (Western Cape) 2007 (5) SA 540 (SCA) (2007 (2) SACR

493; E 2007 (9) BCLR 958; [2007] 3 All SA 318) by Nugent JA in para 9ff, a balancing is unavoidable to reconcile contending values protected in the Constitution. The way in which the Promotion of Access to Information Act 2 of 2000 (PAIA) deals with legal privilege illustrates its place in the legal normative system. Section 40 requires a public body to refuse to hand over information which is 'privileged from production in legal proceedings'. But that is subject to the s 46 public interest override. That section provides:

'Despite any other provision in this Chapter [i.e. including section 40] the information officer of a public body must grant a request for access to a record of the body contemplated in [various sections of the chapter] if —

(a) The disclosure of the record would reveal evidence of —

(i) a substantial contravention of or a failure to comply with the law; or

(ii) an imminent and serious threat to 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.'

[53] In summary therefore in my view the law is as follows:

*[53.1] **Legal advice privilege is a negative right to refuse to disclose, in proceedings**, any confidential information exchanged between attorney and client.*

[53.2] Legal advice privilege cannot be invoked to assert a positive right to the protection or preservation of information whose confidentiality has or may be breached through unauthorised means as a result of which the information has become or may become known to strangers.

[53.3] The limitations on the application of legal advice privilege do not inhibit a person from seeking relief to prevent publication of confidential information, whether confidential because of the claim of privilege or because it is confidential in a general sense.

*[53.4] **Any relief sought from a court to protect any form of confidential information is subject to any recognised public interest overrides**, an exercise which requires a balancing of contending values in a fact specific context."*

(own emphasis)

61. In ***Thint*** Langa CJ stated that:

"[184] The right to legal professional privilege is a general rule of our common law which states that communications between a legal advisor and his or her client are protected from disclosure, provided that certain requirements are met.[27] The rationale of this right has changed over time. It is now generally

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[27] See footnote 124 of THINT: The legal advisor must have been acting in a professional capacity at the time; the advisor must have been consulted in confidence; the communication must have been made for the purpose of obtaining legal advice; the advice must not facilitate the commission of a crime or fraud; and the privilege must be claimed.

accepted that these communications should be protected in order to facilitate the proper functioning of an adversarial system of justice, because it encourages full and frank disclosure between advisors and clients. This, in turn, promotes fairness in litigation. In the context of criminal proceedings, moreover, the right to have privileged communications with a lawyer protected is necessary to uphold the right to a fair trial in terms of section 35 of the Constitution, and for that reason it is to be taken very seriously indeed." (own emphasis)

62. Returning to the facts of this matter, the following must be highlighted:

62.1. The Regulator, having had sight of the Internal Memorandum, concurs with the Enforcement Committee that Legal Services had been instructed to advise on the cellular telephone and data allowance of the complainant and in particular on the validity of the deviation approval of 2019, following the complainant's transfer to a new department. Further, Legal Services also had to advise whether the deviation approval was still valid, and if so, the procedure which had to be followed to have the previously approved deviation withdrawn. The memorandum then lists the information upon which the advice was sought and which related to deviations and approvals by the Director-General, the new Mobile Device Policy of 2021 and the transfer of the complainant to a different department.

62.2. The Information Officer's letter addressed to the PAIA Division dated 24 August 2023, gives a similar explanation and interpretation of the Mobile Device Policy, the deviation of that policy, the re-organisation within the departments and corrective measures to be taken by the complainant, as the advice given by Legal Services.

62.3. Similarly, what was conveyed to the complainant by Ms. [redacted], the payments officer, during December 2022 and which was included in the complainant's internal memorandum to the line Minister.

63. Having had regard to the foregoing, it is important to interrogate the e-mail of Ms. [redacted] of 21 February 2023. The e-mail effectively discloses the contents and imports of the legal opinion / internal memorandum obtained from Legal Services. Although Ms. [redacted] states that the legal opinion itself is privileged and may not be shared, the e-mail nevertheless conveys the material facts, conclusions, reasoning and legal effect of the opinion. In doing so, the public body voluntarily communicated the gist of what they claimed to be the privileged advice to the very party affected by it. In fact, Ms. [redacted] states in no uncertain terms that ***"I have also received a response from Legal Services and will summarise the opinion below"***. It is precisely this conduct which brought about the loss of confidentiality. Properly construed, this may constitute a waiver, at least partial, of legal professional privilege in respect of the opinion, as the privilege cannot ordinarily be maintained over the underlying advice while simultaneously relying on and disclosing its substance to justify the public body's position against the complainant.

64. In ***IBEX RSA Holdco Limited & Another v TISO Blackstar Group (Pty) Ltd & Others 2025 (2) SA 408 (SCA)***, Steinhoff invoked the protection afforded to private bodies by section 67 of PAIA, which is, insofar as the mandatory protection of a record of a public body is concerned, materially equivalent to the protection contemplated in section 40 of PAIA.

65. In assessing the issue of waiver, regard must be had to the following as pronounced in ***IBEX***:

"Has Steinhoff waived privilege?

[76] *Even if the Report were legally privileged within the meaning of s 67 of the PAIA, Steinhoff has waived such privilege by publishing the overview. Although the overview states that the Report is confidential and subject to legal privilege, the mere assertion of privilege does not preclude a finding that privilege has been waived. Consequently, Mr. Lewis' statement that '[t]he Overview is accurate and contains the information which Steinhoff was comfortable to release at that time without waiving privilege', is not decisive.*

[77] *Waiver may be express or implied. Recently this Court explained implied waiver as follows:*

> *'Implied waiver, as all the cases on the subject show, arises where the conduct of the person concerned is objectively inconsistent with the intention to maintain confidentiality and, if permitted, will unfairly fetter the opponent's ability to respond to the case or defence advanced in reliance on the privileged material. It arises notwithstanding any express reservation of the right to invoke privilege.'*

[78] *The test is objective: whether there has been an implied waiver is judged by its outward manifestations – from the perspective of how*

a reasonable person would view it. An implied waiver may be inferred from the objective conduct of the party claiming the privilege in disclosing part of the content or the gist of the material. However, disclosure of part of a document does not necessarily mean that privilege over the full document is waived and in this regard, the nature, extent and purpose of the disclosure is fundamental.

[79] *Applied to the present case, the first inquiry is what, in essence, was disclosed in the overview. Steinhoff did not merely refer to the existence of the investigation or its outcome. It issued an 11-page overview of the Report, which states that the Supervisory Board and the Management Board of Steinhoff (the Boards) received a report from PwC setting out its findings, following an investigation (conducted over 14 months in South Africa and other jurisdictions) initiated at the request of the Supervisory Board.*

…

[85] *I have outlined the main points raised in the overview, to show that the ineluctable inference to be drawn from the facts stated in that document and those relating to the procurement of the Report, is that the overview is a summary of the content of the Report….*

[86] *The purpose of the disclosure in the overview is consistent with Steinhoff's presentation to shareholders …*

[87] *The overview describes the key findings in the Report …*

[88] *Given the nature, extent and purpose of the voluntary disclosure*

in the overview, Steinhoff's submission that the overview is not a summary of the Report, is untenable. The effect of the disclosure was, and was intended to be, a short, clear description of the accounting irregularities and the irregular transactions in which the wrongdoers had engaged, and their impact on the Steinhoff Group, as contained in the Report.

[89] *In my judgment, on the totality of the evidence, the inference must in fairness be drawn that Steinhoff impliedly waived privilege in relation to the Report. In this regard, the answer to the question in Wigmore, approved in Contango, as to what constitutes a waiver by implication, is apposite:*

> *'Judicial decision gives no clear answer to this question. In deciding it, regard must be had to the double elements that are predicated in every waiver, i.e. not only the element of implied intention, but also the element of fairness and consistency. A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his immunity shall cease, whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or to disclose, but after a certain point his election must remain final.'*

[90] *This is such a case. It was open to Steinhoff to elect to withhold, or to disclose the outcome of PwC's forensic investigation into the irregular transactions and wrongdoing within the Steinhoff Group. Having chosen disclosure by publishing the overview in the form that it did, its election became final; and fairness and consistency dictate that the media and the public are entitled to disclosure of the full Report. It would not only be unfair to allow Steinhoff to use part of the Report whilst claiming privilege over the remainder of it; but also inconsistent with the confidence preserved by any privilege, since Steinhoff has voluntarily disclosed the gist or substance of PwC's findings – the irregular transactions and their impact – the very reasons for the forensic investigation and the existence of the Report.*

[91] *For the above reasons, I find that by publishing the overview, Steinhoff has impliedly waived any privilege that may have existed in respect of the Report. That being so, the s 67 defence cannot succeed: privilege is a ground for refusal 'unless the person entitled to the privilege has waived the privilege'. In the light of the above conclusions in relation to privilege, it is not necessary to consider the argument by the media respondents that the privilege claimed by Steinhoff has expired and was never lawfully transferred to Ibex RSA."*

Does section 40 of PAIA create a new independent statutory privilege, or does it merely recognise and preserve the common law doctrine?

66. The question whether section 40 of PAIA creates a new species of statutory privilege cannot be answered merely by reference to the wording of the provision itself. It must

be approached against the backdrop of a long-established principle of statutory interpretation, namely that Parliament is presumed not to alter, abolish or diminish existing common-law rights except by clear and unequivocal language.

67. Section 40 does not create an autonomous category of statutory privilege. Rather, it incorporates, preserves and protects the common law doctrine within the statutory framework regulating access to information. The source of the privilege remains the common law. Section 40 merely prescribes the consequence that follows when access to privileged records is sought under PAIA.

Did the Information Officer of the public body discharge the burden of justifying the limitation of the complainant's constitutional right in terms of section 32(1)(a) of the Constitution?

68. Again, if one has regard to **Smuts,** the first fundamental principle for a purposive interpretation of the constitutional right of access to information provides that:

> *"access to information is the norm and PAIA must be interpreted to promote this objective. Exemption from disclosure is the exception".*

69. The second fundamental principle provides that:

> *"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".*

70. The third fundamental principle provides that:

> *"the burden of justifying a limitation of a right falls on the party wishing to do so, and not on the right-holder. 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".

71. Having considered the explanations advanced by the public body for its reliance on section 40 as a ground for refusal, the Regulator is of the considered view that the public body has not demonstrated that access to the requested record can be withheld on the basis of section 40.

72. As a result of the foregoing, the public body has failed, on a balance of probabilities, to discharge its burden to justify a limitation of the complainant's constitutional right of access to information, as contained in section 32(1)(a) of the Constitution.

73. Consequently, the Regulator concurs with the Enforcement Committee and is of the considered view that the ground of refusal relied upon by the public body must be rejected. Accordingly, the refusal must be set aside, and access to the record be granted.

CONCLUSION

74. It is the Regulator's considered view that, although the public body may initially have been entitled to invoke legal advice privilege in respect of the internal memorandum, that privilege was compromised by its subsequent conduct. As is the case in ***IBEX***, the public body elected, expressly and voluntarily, to communicate to the complainant the substance of the very memorandum over which privilege is now asserted. Having considered both the e-mail of Ms. [redacted] of 21 February 2023, and the internal memorandum dated 30 January 2023, the Regulator is unable to discern any cognisable prejudice that would arise from the disclosure of the memorandum itself.

75. Once the public body founded its decision, whether wholly or substantially, upon the legal opinion, fairness required that the opinion be disclosed to the complainant so that

he could properly understand the basis upon which the employer acted. A party cannot selectively deploy the contents of a privileged communication to advance its position and thereafter seek to shield the source document from scrutiny. Having summarised and relied upon the internal memorandum, the employer cannot, in these circumstances, continue to invoke confidentiality as an absolute answer to disclosure.

76. On the facts, the public body may have satisfied the formal requirements ordinarily associated with legal advice privilege. The decisive difficulty, however, lies in the absence, or subsequent loss, of confidentiality. After obtaining the internal memorandum, the public body drew materially from its contents and placed the substance thereof before the complainant. In those circumstances, it was both reasonable and proper for the complainant to request sight of the memorandum, and it would offend elementary fairness to permit the public body to rely upon it while withholding it from the complainant.

77. This conclusion is upheld by a comparison of the document in respect of which privilege is claimed to the e-mail communication which had already been furnished to the complainant. It must be emphasised that the memorandum contains no substance which is materially different from that which was conveyed by Ms. [redacted] in the e-mail. By disclosing the substance of the advice in that e-mail, the public body waived the confidentiality upon which legal professional privilege depends.

78. The public body's subsequent statement, at the foot of the e-mail of 19 January 2023, that it would not furnish the internal memorandum on the basis that it was privileged, does not alter the legal position. By that stage, the disclosure had already occurred and the confidentiality essential to the privilege had already been compromised. There was, accordingly, no meaningful confidentiality left to protect. To extend legal professional privilege to the facts and circumstances of this matter would be untenable.

79. This is not a case in which the complainant surreptitiously obtained the memorandum or sought to exploit information improperly acquired. On the contrary, and as already indicated, the substance of the memorandum was volunteered by the very party asserting privilege. In responding to the complainant, the public body / employer chose to reveal and rely upon the legal advice. That election constituted a waiver of privilege, at least to the extent of the disclosure made. The claim to privilege must therefore yield to the demands of fairness, transparency and procedural propriety.

80. In the final analysis, the Regulator finds that the public body has failed, on a balance of probabilities, to discharge its burden of justifying a limitation of the complainant's constitutional right of access to records, as contained in section 32(1)(a) of the Constitution.

81. The Information Officer is directed, in terms of section 77J(1)(b) of PAIA, to grant the complainant access to a copy of the legal opinion / internal memorandum provided by the DPSA Legal Services to the Director: Finance, Ms. [redacted] and to disclose the said legal opinion / internal memorandum within **10 days** of receipt of the Enforcement Notice, in the format as requested by the complainant.

82. **COMPLIANCE PERIOD**

The Information Officer is hereby directed to comply with this Enforcement Notice within 30 days from the date of receipt of this Notice.

83. **REVIEW OF THE DECISION OF THE INFORMATION REGULATOR**

Please be advised that the Information Officer 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 in this Notice.

The Information Officer 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 having jurisdiction for appropriate relief within a period of 180 days from date of receipt of this Notice.

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

Please note that the Information Officer who fails to comply with this Enforcement Notice is guilty of an offence and liable upon conviction to a fine or to imprisonment for a period not exceeding three years or to both such a fine and such imprisonment.

DATED at **JOHANNESBURG** on **16 NOVEMBER 2026.**



ADV. PANSY TLAKULA
CHAIRPERSON: INFORMATION REGULATOR