

Acting Director General Ms Mandisa Fatyela-Lindie  
The Information Officer  
Department of Public Works

By email: [Mandisa.Fatyela@dpw.gov.za](mailto:Mandisa.Fatyela@dpw.gov.za)

By fax: 086 272 8831

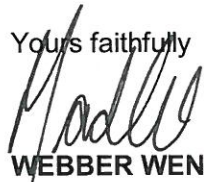
Your reference	Our reference	Date
Mandisa Fatyela-Lindie	Mr D Milo/Ms E Sadleir 230784	10 September 2012

Dear Madam

## Request for access to documents relating to the upgrade of the Nkandla Presidential Precinct

1. We act on behalf of the M&G Centre for Investigative Journalism ("**our client**").
2. We have been instructed to submit the attached internal appeal on behalf of our client.
3. We look forward to hearing from you.

Yours faithfully



WEBBER WENTZEL

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## FORM B

### NOTICE OF INTERNAL APPEAL

(Section 75 of the Promotion of Access to Information Act 2000 (Act No. 2 of 2000))

[Regulation 8]

#### A. Particulars of public body

The Information Officer/Deputy Information Officer:

Ms Mandisa Fatyela-Lindie  
Private Bag X 64  
Pretoria  
0001  
Tel: 021 406 1170  
Fax: 086 272 8831  
email: [Mandisa.Fatyela@dpw.gov.za](mailto:Mandisa.Fatyela@dpw.gov.za)

#### B. Particulars of requester/third party who lodges the internal appeal

- (a) The particulars of the person who lodge the internal appeal must be given below.
- (b) Proof of the capacity in which appeal is lodged, if applicable, must be attached.
- (c) If the appellant is a third person and not the person who originally requested the information, the particulars of the requester must be given at C below.

Full names and surname: **Emma Sadleir**

Identity number: **8411130317085**

Postal address: **PO Box 61771, Marhalltown, Johannesburg, 2196**

Fax number: **011 530 6895**

Telephone number: **011 530 5895**

E-mail address: [emma.sadleir@webberwentzel.com](mailto:emma.sadleir@webberwentzel.com)

Capacity in which an internal appeal on behalf of another person is lodged:

**I am acting in my capacity as the appellant's attorney**

#### C. Particulars of requester

This section must be completed ONLY if a third party (other than the requester) lodges the internal appeal.

Full names and surname: **M&G Centre for Investigative Journalism**

Identity number: **N/A**

#### D. The decision against which the internal appeal is lodged

Mark the decision against which the internal appeal is lodged with an X in the appropriate box:

X	Refusal of request for access
	Decision regarding fees prescribed in terms of section 22 of the Act
	Decision regarding the extension of the period within which the request must be dealt with in terms of section 26(l) of the Act
	Decision in terms of section 29(3) of the Act to refuse access in the form requested by the requester

	Decision to grant request for access
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**E. Grounds for appeal**

If the provided space is inadequate, please continue on a separate folio and attach it to this form. You must sign all the additional folios.

State the grounds on which the internal appeal is based: **See annexure A**

State any other information that may be relevant in considering the appeal:

**F. Notice of decision on appeal**

You will be notified in writing of the decision on your internal appeal. *If* you wish to be informed in another manner, please specify the manner and provide the necessary particulars to enable compliance with your request.

State the manner: By e-mail

Particulars of manner: [emma.sadleir@webberwentzel.com](mailto:emma.sadleir@webberwentzel.com)

Signed at ILLOVO this 10<sup>TH</sup> day of SEPTEMBER 2012

  
SIGNATURE OF APPELLANT

**FOR DEPARTMENTAL USE:**

**OFFICIAL RECORD OF INTERNAL APPEAL**

Appeal received on ..... (date) by  
(state rank, name and surname of information officer/deputy information officer).

Appeal accompanied by the reasons for the information officer's/deputy information officer's decision and, where applicable, the particulars of any third party to whom or which the record relates, submitted by the information officer/deputy information officer on (date) to the relevant authority.

**OUTCOME OF APPEAL:**

DECISION OF INFORMATION OFFICER/DEPUTY INFORMATION OFFICER CONFIRMED/NEW DECISION

SUBSTITUTED

NEW DECISION:

.....DATE  
RELEVANT AUTHORITY

RECEIVED BY THE INFORMATION OFFICER/DEPUTY INFORMATION OFFICER FROM THE RELEVANT AUTHORITY  
ON (date):

## ANNEXURE A

### Reasons for Appeal

#### 1. Factual Background

- 1.1 We act for the M&G Centre for Investigative Journalism ("**our client**").
- 1.2 On 6 July 2012, our client lodged a Promotion of Access to Information Act ("**PAIA**" or "**the Act**") request with the Department of Public Works ("**the Department**") requesting various documents relating to the upgrade of the Nkandla Presidential Precinct ("**the request**").
- 1.3 The request includes all records pertaining to the "*procurement by the State of goods or services to improve, upgrade, alter, add to or secure the Nkandla Estate of the President*" which were created during the period May 2009 to present. In particular, the requester sought access to any documents relating to the financial implications of such improvement or upgrade.
- 1.4 More specifically, the requester sought access to any records evidencing any:
- "a. needs assessments/motivations;*
  - b. budgetary availability;*
  - c. bid evaluations and outcomes; and*
  - d. contracts awarded and their values."*
- 1.5 Significantly, our client stated in its request as follows:
- "We emphasise that our interest is not in the technical detail of security-sensitive improvements, but in the financial implications of procurement by the State in respect of Nkandla Estate."*
- 1.6 The request was refused by the Information Officer, Acting Director General Ms Mandisa Fatyela-Lindie ("**the Information Officer**") in a letter which is dated 13 August 2012, but which was only sent to our client via email on 27 August 2012.

#### 2. The response

- 2.1 The refusal of our client's PAIA request states as follows:
-

*"Please be advised that Nkandla Presidential Residence, like all other Presidential residences in South Africa, is a National Key Point.*

*As such, information related to the National Key Point is protected in line with the provisions of the Protection of Information Act 84 of 1982, the Minimum Information Security Standards (MISS) and other relevant security prescripts of the State Security Agency.*

*You are therefore informed that the National Department of Public Works will not be in a position to accede to your request in compliance with the prescripts mentioned above."*

2.2 The response is wholly inadequate on a number of bases.

2.3 Firstly, the response fails to take into account at all our client's constitutional right of access to information. In *Brümmer v Minister for Social Development and Others*,<sup>1</sup> the Constitutional Court set out the importance of the right of access to information held by the state in the following terms:

*"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'...*

*Apart from this, access to information is fundamental to the realisation of the rights guaranteed in the Bill of Rights. For example, access to information is crucial to the right to freedom of expression which includes freedom of the press and other media and freedom to receive or impart information or ideas... Access to information is crucial to accurate reporting and thus to imparting accurate information to the public."*<sup>2</sup>

2.4 Secondly, the request has not been determined in accordance with PAIA as required by section 25(1) of the Act.

*"25. Decision on request and notice thereof*

*(1) Except if the provisions regarding third party notification and intervention contemplated in Chapter 5 of this Part apply, the information officer to whom the request is made or transferred, must, as soon as reasonably possible, but in any event within 30 days, after the request is received—*

*(a) decide **in accordance with this Act** whether to grant the request..." (our emphasis)*

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<sup>1</sup> 2009 (6) SA 323 (CC).

<sup>2</sup> At para 62-63.



2.5 We record that there is no reference to PAIA or its provisions anywhere in the response. The information officer has simply approached the request as if PAIA was not in force.

2.6 Another example of this failure to apply the provisions of PAIA is the Information Officer's failure to state that the requester may lodge an appeal, and the procedure to be followed if the requester wishes to lodge such an appeal, as required by section 25(3)(c) of PAIA:

(c) state that the requester may lodge an internal appeal or an application with a court, as the case may be, against the refusal of the request, and the procedure (including the period) for lodging the internal appeal or application, as the case may be." (our emphasis)

2.7 Thirdly, and in any event, the Information Officer has failed to provide any grounds for the refusal. The requirements of the Act are two-fold in this regard: the response must contain the grounds of refusal relied on in the refusal; and must refer to provisions of the Act relied upon in that refusal as required by section 25(3)(a) of the Act:

"(3) If the request for access is refused, the notice in terms of subsection (1) (b) must—

(a) state adequate reasons for the refusal, including the provisions of this Act relied upon..." (our emphasis)

2.8 The Constitutional Court has recently held in *M&G Media Limited v President of the Republic of South Africa*<sup>3</sup> that grounds of refusal must be narrowly construed and that PAIA places an onus on decision-makers who wish to deny the public access to a record to provide proper justification for the refusal. The court found that it was not sufficient for a decision-maker to simply state that a particular ground of refusal is applicable or to quote a section in the Act on which they rely.<sup>4</sup> The Information Officer has not provided a single ground of refusal recognised by PAIA upon which to refuse the request. The references to the Protection of Information Act of 1982, the Minimum Information Security Standards, "security prescripts" of the State Security Agency, and to the fact that Nkandla is a key point, take the issue no further: they are not grounds of refusal under PAIA.

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<sup>3</sup> 2012 (2) SA 50 (CC).

<sup>4</sup> At paragraph 22

- 2.9 Fourthly, there are in any event no provisions in the Promotion of Information Act, the National Key Points Act 1980 or the Minimum Information Security Standards that prohibit access to the record.
- 2.10 While section 4 of the Protection of Information Act 1982 contains prohibitions on the disclosure of certain information, it does not prohibit disclosure of the records sought by our client. The prohibitions relate primarily to prohibited places such as arsenals and military establishments, and would certainly not apply to documents detailing the information sought by our client in relation to the Nkandla Presidential precinct.
- 2.11 In fact the only provision in the legislation cited which arguably impacts on the disclosure of records is section 10(2)(c) of the National Key Points Act, which provides that where any person:
- "furnishes in any manner whatsoever any information relating to the security measures, applicable at or in respect of any National Key Point or in respect of any incident that occurred there, without being legally obliged or entitled to do so, or without the disclosure or publication of the said information being empowered by or on the authority of the Minister... shall be guilty of an offence..."* (our emphasis)
- 2.12 This provision is clearly not applicable in the circumstances, particularly in light of our client's confirmation in its request that: *"our interest is not in the technical detail of security-sensitive improvements, but in the financial implications of procurement by the State in respect of Nkandla Estate."* It has been widely reported that the South African government was planning to spend tens of millions of Rand of taxpayers' money in upgrading the Nkandla precinct. Our client is solely interested in the amount of money being spent and how it is being spent. Our client is not requesting any documentation relating to security measures at the Nkandla residence, nor *"any incident that occurred there"*.
- 2.13 In any event, even if the other legislation cited by the Information Officer contained restrictions in respect of access to information (which they do not), section 5 of PAIA expressly states as follows:

*5. Application of other legislation prohibiting or restricting disclosure.—This Act applies to the exclusion of any provision of other legislation that—*

*(a) prohibits or restricts the disclosure of a record of a public body or private body; and*

*(b) is materially inconsistent with an object, or a specific provision, of this Act.*

- 2.14 This means that where any other legislation has the effect of prohibiting or restricting disclosure of a record, and where such provision is materially inconsistent with either an object or specific provision of PAIA, then PAIA will apply and not the restrictive provision of the other legislation. Thus PAIA overrides any conflicting provision in any of the legislation cited in the response. We note that in any event the Minimum Information Security Standards is a cabinet policy document and not legislation in any event, and neither are the unspecified "security prescripts" to which reference is made in the response.
- 2.15 The response is thus wholly inadequate and does not provide any justification for withholding the records sought.
- 2.1 For the reasons set out above, our client requests that it be provided with a copy of the records it seeks as soon as possible, and in any event within 30 days of this appeal.

**Dario Milo / Emma Sadleir**

**7 September 2012**