THE NORTH GAUTENG HIGH COURT – PRETORIA

(REPUBLIC OF SOUTH AFRICA)

CASE NO: 67574/12

In the matter between:

M & G CENTRE FOR INVESTIGATIVE JOURNALISM NPC	First Applicant
BHARDWAJ, VINAYAK	Second Applicant
and	
THE MINISTER OF PUBLIC WORKS	First Respondent
THE INFORMATION OFFICER:	
DEPARTMENT OF PUBLIC WORKS	Second Respondent
SAHRA	First Amicus Curiae / Applicant
DEMOCRATIC GOVERNANCE & RIGHTS UNIT	Second Amicus Curiae / Applicant

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DGRU'S SUBMISSIONS

INTRODUCTION

1 This case concerns the State's duties to disclose documents relating to spending on the recent 'upgrade' of President Zuma's Nkandla home. These documents were sought by

the Mail and Guardian ('*the M&G*') in terms of section 18 of the Promotion of Access to Information Act 2 of 2000 ('*PAIA*'). Although the State initially refused access to any documents sought on security related grounds it subsequently disclosed a tranche of documents.

2 The State now contends that it has complied with its obligations. It says that it has provided all relevant documents that it is lawfully required to disclose. Amongst those documents that are not disclosed are documents alleged to be 'security sensitive' and protected in terms of ss38 and 41 of PAIA, a source of dispute between the parties. There is also a dispute, perhaps the central dispute, between the parties as to whether documents referred to by the M&G as 'missing documents' exist at all and whether reasonable steps have been taken to ascertain that or to locate them. Indeed, on the issues in dispute the veracity of the State's version has been placed in issue.

3 These submissions are made on behalf of the Democratic Governance and Rights Unit ('*the DGRU'*).[1] The parties have consented to the DGRU's admission as second amicus curiae.[2] The submissions are intended to assist the Court in applying PAIA in context of this dispute in a manner that is consistent with the Constitution. Ultimately, each of the enquiries the Court must make are enquiries that will determine whether a right in the bill of rights, the right of access to information, is being or can be lawfully limited having regard to the provisions of PAIA viewed in light of section 36 of the Constitution and the constitutional values of transparency and accountability.

[1] The DGRU is a specialist research unit based in the Department of Public Law at the University of Cape Town. Its objective is to enhance, through research and advocacy, the principles and practices of constitutional democratic governance and human rights in Africa. The DGRU's primary research and advocacy focus is on the relationship between governance and human rights. The right of access to information is a key focus area for the DGRU and it has participated extensively in initiatives relating to this right. (See Vol 7: **R608,** paras 5-7)
[2] Vol 7: **R611**, paras 14 and 15. The application will be formally moved at the hearing insofar as this is necessary.

4 Reliance on security-related exemptions and adjudication of security-related claims are of course important matters, but in nature, are highly controversial. On the one hand, legitimate attempts to preserve secrecy, where this is necessary in order to protect the Republic and the President's safety, serve important public purposes. That is beyond sensible debate. On the other hand, as we will demonstrate below, security-related secrecy claims are readily open to abuse and historically and globally have been abused. Accordingly, under PAIA and the Constitution, courts are under an onerous responsibility when adjudicating security-related claims to subject them carefully and appropriately to proper scrutiny.

5 The DGRU's submissions are intended to assist the Court in striking the appropriate balance between security-related claims and open and accountable government, by dealing with two considerations relevant to interpretation of the Bill of Rights and the Constitution and PAIA. Both considerations show the importance that Courts subject security related claims to careful and rigorous scrutiny notwithstanding the importance of protecting the security of the Republic and the safety of the President as legitimate public purposes. They also show the dangers of undue deference to the State.

5.1 First, the submissions will highlight aspects of South Africa's history relating to secrecy about security related claims. South Africa's historical context is relevant to the interpretation and application of PAIA by courts. In particular, it is important to recall that in adjudicating security related claims, South Africa has made a decisive break from an authoritarian and repressive past in which secrecy prevailed and abuses, often at the hands of the security apparatus ensued.[3]

[3] *Shabalala v Attorney-General,Transvaal* 1996 (1) SA 725 (CC) at para 26.

5.2 Secondly, the submissions intend to facilitate the Court's exercise of its duty to consider international law and its consideration of foreign sources of law. PAIA is the legislation intended to give effect to the right to access to information in section 32 of the Constitution. As such, it must be interpreted and applied using the same constitutional interpretive methods as apply to rights in the Bill of Rights.[4] So, courts must consider international law and may consider comparative law when interpreting PAIA and in particular in determining whether any limitation of a right of access to information is warranted.[5] A consideration of international and foreign law, we submit, as with South Africa's history, shows the need for courts, when adjudicating security related claims to be mindful that important as they are, they are readily open to abuse and warrant very careful scrutiny.

6 The DGRU does not seek to advance the case of either party and does not itself seek to engage the facts on record, these being matters for the parties. Rather, it seeks to persuade the Court that because of the seriousness of the wrongs that can be shielded by unwarranted recourse to security related claims, a respectfully vigilant rather than deferent approach to the assessment of such claims is crucial in order to maintain the values of openness and accountability so central to the Constitution and the protection of human rights.

7 The need for a respectfully vigilant approach must, the DGRU submits, inform the adjudication of any case relating to security. How that approach would play out depends on the issues that are in dispute between the parties.

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[4] *President of RSA v M & G Media* 2012 (2) SA 50 p 57 para 16 fn 20.
[5] Section 39(1)(b) of the Constitution.

8 On the facts of this case, we submit it would inform least the following assessments in respect of the documents assessed by the State to be security sensitive:

8.1 In assessing 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*.'[6] That assessment is performed in light of the '*nature of the exemption*' in issue.[7]

8.2 Deciding whether the Court should independently examine documents claimed to be security sensitive in terms of section 80(1) of PAIA and more particularly whether it is '*in the interests of justice to do so*'.[8]

9 In respect of the documents that fall into the M&G's category '*missing documents*', this approach would inform the assessment of compliance with section 23 of PAIA. More particularly, it would inform the Court's approach to the "*reasonableness*" of the steps taken by the State to find documents sought and the "*reasonableness*" of any grounds asserted for a belief that any documents sought do not exist. It would also inform the Court's willingness to subject the State's claims, the veracity of certain of which have been placed in issue, to further scrutiny whether by a referral to oral evidence or another appropriate order.

10 We start by setting out the historical context from which South Africa and PAIA has emerged. We then draw the Court's attention to certain features of the treatment of national security in international and comparative law. Together, the historical and

[6] As held in *President of the RSA v M&G Media i2012(2) SA 50(CC) that is the test for whether the burden of proof on the State has been met in terms of section 81(3).*
[7] See *M&G Media at para 25*.
[8] The legal principles and authorities relating to section 80 are dealt with in the M&G's submissions at paragraph 88 et seq. The respondent does not take issue with the principles, just its application.

global context in which PAIA operates serve as reminders why a respectfully vigilant approach to security claims must be adopted in an open and democratic society.

THE HISTORICAL CONTEXT - NATIONAL SECURITY DURING APARTHEID

Introduction

11 In *Shabalala v Attorney-General, Transvaal* 1996 (1) SA 725 (CC) at para 26 the Constitutional Court stated that:

> *'[T]he Constitution is not simply some kind of statutory codification of an acceptable or legitimate past. It retains from the past only what is defensible and represents a radical and decisive break from that part of the past which is unacceptable. It constitutes a decisive break from a culture of apartheid and racism to a constitutionally protected culture of openness and democracy and universal human rights for South Africans of all ages, classes and colours. There is a stark and dramatic contrast between the past in which South Africans were trapped and the future on which the Constitution is premised. The past was pervaded by inequality, authoritarianism and repression. The aspiration of the future is based on what is 'justifiable in an open and democratic society based on freedom and equality'. It is premised on a legal culture of accountability and transparency. The relevant provisions of the Constitution must therefore be interpreted so as to give effect to the purposes sought to be advanced by their enactment.'*

12 The security apparatus of the apartheid state enabled the past to be pervaded by 'authoritarianism and repression'. Its features and the courts approaches to security legislation remind us how important it is in the constitutional era to avoid repeating mistakes of the past and instead to promote a culture of accountability and transparency.

13 The apartheid security apparatus was composed of a cluster of legislation that gave the Executive broad sweeping powers to deal with those who stood in the way of apartheid ideology. The exercise of security related powers was systematically shielded from the

scrutiny of the courts by the twin use of ouster clauses that sought to preclude judicial scrutiny of executive decisions and the use of evidentiary rules that allowed the executive to block relevant evidence from discovery or being led. Any oversight parliament and the public may have had was stymied by a slew of legislation which had the effect of preventing abuses from being uncovered or reported by an independent media.

14 It was in this context that state and national security was used to justify and permit many human rights abuses including the banning of organisations (such as the ANC and the PAC), the detention without cause of activists, the abuse of detained persons, the disgraceful activities of the security police in townships, the closure of newspapers, and the denial of information to the public about the South Africa engaging in wars or acts of aggression in neighbouring states.

15 An examination of the history of those abuses reveals the following themes, elaborated upon below:

15.1 Parliament bestowed broad, largely unfettered powers of discretion on the state president, prime minister, or ministers concerned to determine whether state security (or a similar interest) was threatened. That determination was made in secret without judicial oversight and anyone who disputed whether there were valid grounds for making such a determination had to be satisfied with nothing more than the *ipse dixit* of the official concerned.

15.2 Similarly, when individuals went to court to try to protect their rights against such invasions, ministers were given broad powers to deny courts access to important and relevant oral and documentary evidence.

15.3 The Courts' own role in this arrangement was at best controversial. Some judges were very willing to interpret arguably ambiguous legislation as ousting the court's jurisdiction when state security was an intended purpose of the legislation in question. Similarly, when determining the extent of the apartheid state's powers, courts were quick to justify extending those powers by reference to the need to protect state security.

15.4 Because legislation gave unfettered discretion to officials, there were considerable abuses since those left to decide whether state security justified their actions were not subject to independent oversight.

15.5 The public was systematically denied access to information that would allow it to hold the government to account to its actions – indeed, the public were frequently prevented from even knowing what the government's actions were.

The Suppression of Communism Act and its successor Acts

16 These themes are well illustrated by the *Suppression of Communism Act* 44 of 1950 and its successor acts the *Unlawful Organisations Act* 34 of 1960 and the *Internal Security Act* 74 of 1982. Various provisions of these Acts permitted serious curtailment of rights at the subjective discretion of a state functionary,[9] features that are now regarded as wholly inimical in the constitutional era.

[9] Section 2(2) of the *Suppression of Communism Act* permitted the banning of organisations if the state president was 'satisfied' that the organisation in question fell within a very broadly defined category of organisations that may have promoted communism or furthered any of the objects of communism. He could also ban publications if 'satisfied' that they would promote the spread of communism. Similarly, section 9 of the Act allowed individuals to be placed under banning orders if '*in the opinion of* the Minister there is reason to believe that the achievement of any of the objects of communism would be furthered'. The *Unlawful Organizations Act* allowed the State President to ban any organization which in his opinion had been established for the purpose of carrying on the activities of the PAC or the ANC.

17 In a series of now controversial cases, courts held that decision makers only had to subjectively determine that, in their opinion, the relevant statutory provision's jurisdictional requirements had been met. Once they had made that determination, courts would not interfere, and would treat the decision-makers determination as conclusive for all practical purposes.[10]

18 Some judges, particularly those in the early Appellate Division under apartheid, tried to ameliorate the impact of these draconian pieces of legislation by interpreting them in favour of the liberty of the individual whenever they believed that the wording allowed them the freedom to do so. However, as apartheid entrenched itself, and the Bench became increasingly staffed by judges loyal to apartheid, courts themselves became instrumental in protecting the State's security objectives. The Appellate Division's decision in *SA Defence and Aid Fund v Minister of Justice* 1967 (1) SA 263 (A) is particularly illustrative of this.[11] In that case, the court held that section 17 of the amended Suppression of Communism Act had excluded the operation of the *audi* principle. The majority's reasoning is telling. It found:

> *'There is nothing in sec. 17 indicative of an intention to incorporate therein the maxim audi alteram partem. If anything, a contrary intention rather*

[10] See, as examples: *SA Defence and Aid Fund v Minister of Justice* 1967 (1) SA 31 (C) at 634H-635D interpreting the requirement that the state president be 'satisfied' that a section 2(2) ground was present; *R v Sachs* 1953 (1) SA 392 (A) at 400E-F and 405C stating that the power to ban an individual is exclusively in the hands of the Minister; and *Klopper v Minister of Justice* 1964 (4) SA 31 (N) at 35G-H where Fannin J found that the power to prevent the disclosure of the information on which the Minister had made a decision to ban an individual was in the sole discretion of the Minister.

[11] See, as a further example, *Schermbrucker v Klindt, NO* 1965 (4) SA 606 (A). In this matter the AD decided that Rule 9(a) of the Transvaal Rules of Court could not be used to make a detained person appear personally before the Court for the purposes of giving *viva voce* evidence of their abuse while in solitary detention. The Court justified their reasoning on the ground that the purpose of the *General Law Amendment Act* 37 of 1963 would be defeated if those in detention were permitted a trip to Court to report on their abuses. The minority judgment of Williamson JA makes it abundantly clear that the AD's primary concern was with how their ruling would affect efforts to combat organizations and individuals intent on undermining the state (see 621D-E). See also *Huyser v Louw NO and Others* 1955 (2) SA 321 (T) where Steyn J (Murray and Rumpff JJ concurring) decided that section 4(10) of the Suppression of Communism Act, which allowed a 'reasonable opportunity' to a person to show why his name should not be listed as a member or officer bearer of a banned organisation, did not include the right to discovery of the documents that the liquidator had in his possession when deciding whether to list a person.

> *seems to appear from a consideration of the kind of legislation here in question, and from the expressed exclusion of the maxim at the only stage where the rights of an organisation can be affected. The purposes of the Act are clearly the maintenance of order and the protection of the safety of the State. These purposes are best achieved by prompt preventive action, and could be defeated by affording to an organisation of the kind referred to in paras. (a) to (d) of sec. 2 (2) an opportunity of being heard by the committee before submitting its report to the Minister.'* at 273H per Botha JA.

19 In contrast, Trollip JA at 285G, writing in a minority judgment, firmly rejected the argument that national security is a sufficient ground for ousting the *audi* principle.[12]

20 Furthermore, the oversight functions of courts were curtailed by the power of the state to prevent evidence of abuse being placed before a court. This was made possible by section 29 of the *General Law Amendment Act* of 1969. This section authorised the Prime Minister, his delegate, or any other Minister of State, to prevent oral or documentary evidence from being given in any court of law or other body or tribunal established by or under law, if *in their opinion* as the case may be, the evidence affects the interests of the State, or public security and disclosure would be prejudicial to such interests.

21 The enactment of this provision caused considerable backlash including from several judges and led to the formation of the Potgieter Commission.[13] In response to these criticisms and the Potgieter report[14], there was an amendment in 1972 such that the

[12] See, for example, *R v Ngwevela* 1954 (1) SA 123 (A) where the AD found that before a person could be banned from attending certain meetings, he or she would have to be afforded a hearing by the Minister. In response to this Parliament amended the Suppression of Communism Act retroactively to explicitly exclude the audi principle. See also *R v Sachs* 1953 (1) SA 392 (A) at 309F-400G.

[13] Anthony S Mathews Law, Order and Liberty in South Africa 1971 Juta & Company: Cape Town at 258-9.
[14] *Report of the Commission of Enquiry into Matters Relating to the Security of the State* (RP 102/1971)

courts' jurisdiction was only removed in matters which related to national security as the basis of claiming state privilege.[15]

22 This was then repealed and replaced by the Internal Security Act which authorised the responsible minister, or the administrator of a province, to claim privilege for information on the ground that its production to a court or commission of enquiry would prejudicially affect state security. If made in a proper form (on affidavit by the minister after personal consideration of the matter), the claim of privilege was conclusive.

23 Courts saw their ability to subject government abuses to scrutiny and transparency consistently eroded by legislative interventions that removed their jurisdiction. However, at times courts appeared willing themselves to play a role in assisting the state in keeping secret the inner workings of its security apparatus. For instance, in *Real Printing and Publishing Co (Pty) Ltd v Minister of Justice* 1965 (2) SA 782 (C) the Court was asked by *The New Age* to order the Minister to make discovery of certain documents. These documents related to the appointment of the committee that had been charged with preparing the factual report that preceded the newspaper's banning by the State President. The Minister responded by alleging that it would be contrary to public policy and detrimental to the public interest for the state to have to make any such disclosure. The court upheld the Minister's contention, not after subjecting the Minister's claims to scrutiny, but instead as follows:

> *"In regard to the discovery order the Minister stated categorically on affidavit that there were documents in existence relative to the appointment of the committee and relative to the proof of its having functioned, that he*

[15] Section 25 of the General Law Amendment Act 102 of 1972.

> *had given careful consideration to the question of disclosure of these documents and that he had come to the conclusion that it would be against public policy and detrimental to the public interest of the State to make any disclosure thereof.*
>
> *Although it is a matter for the Court to decide this statement by the Minister should be regarded as conclusive. As was said by LORD PARKER (in The Zamora, 1916 (2) A.C. 77) -*
>
> > *'Those who are responsible for the national security must be the sole judges of what the national security requires.'"*
>
> At 786C-E.[16]

24 Secrecy was made possible both by legislative ousters of judicial review over claims to the state security privilege as well as by the courts not assessing those claims robustly even when that option was available.

25 Anthony Mathews, writing in, 1986 makes the following chilling and cautionary remarks around claims of state privilege in the context of the apartheid state:

> *'South African ministers are prone to confusing the interests of the government with those of the state and in many cases in which they have refused to provide information about security-law operations there is a strong suspicion, if not certainty, that the government is protecting itself (and not state security) against political embarrassment. There is little doubt that the reason for embarrassment in many instances is that release of the information will show conclusively that the government has misused its security powers; in other words, non-production of information is a device for concealing the bankruptcy of its case against security-law victims. The convenience of being able to mask security actions in this way is certainly attractive to those who exercise power but that convenience is no reason for invoking the doctrine of state privilege and thereby denying the individual justice in the particular case and depriving the public of knowledge of how government powers are being exercised and frequently misused.*
>
> *The courts' jurisdiction over state privilege in both security and non-security matters should be restored notwithstanding the readiness of judges Potgieter and Rabie to abdicate to the executive. The judiciary will know what secrets are worthy of protection; after all, the courts had no hesitation in protecting military secrets in the Duncan and Reynolds judgments. If granted the necessary power, the judges will also curb the executive by denying a claim of state privilege where it is put forward for improper*

[16] See similarly *Klopper v Minister of Justice* 1964 (4) SA 31 (N) at 35G-H.

> *reasons – but that, surely, is why free societies have independent judiciaries. The removal of judicial control in state privilege cases has simply provided the executive with a licence to abuse the noble purposes that underlie the doctrine.'*[17]

26 The dangers of abuses of secrecy extended beyond the ambit of claims of state privilege. The use of the Suppression of Communism Act to ban 41 members of the Liberal Party in the period of 1961 to 1966 is an almost farcical example of the extent to which the Act was abused (within its own terms) to combat those opposed to the apartheid state. Many of the banned members, including Patrick Duncan, were avowedly anti-communist. The state justification for banning them? That these people nevertheless 'wittingly or unwittingly' furthered the aims of communism.[18]

Suppression of freedom of expression

27 The apartheid security apparatus wasn't simply protected by its own open ended offences and judicial deference. A number of statutes were enacted to ensure that the public was prevented from learning about the activities of the police and military. A common theme in these statutes is that prohibitions were made in broad and open ended language designed to catch as wide array of conduct as possible. For example:

27.1 The Official Secrets Act 16 of 1956 included a prohibition on reporting on military, police or security matters if doing so was prejudicial to 'the safety or interests of the Republic', a term so vague and susceptible to abuse that the prohibition would inevitably be overused.

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[17] *Anthony Mathews* Freedom, State Security and the Rule of Law *1986 Juta p 178*.
[18] See Anthony S Mathews *Law, Order and Liberty in South Africa* 1971 Juta & Company: Cape Town at 110-111.

27.2 Section 57(a) of the Defence Amendment Act 85 of 1967 made the publication without ministerial authority of any statement, comment or rumour relating to any member or activity of the Defence Force which was 'calculated to prejudice or embarrass the government in its foreign relations or to alarm or depress members of the public' an offence. This offence could be penalised with a period of imprisonment not exceeding five years coupled with a fine not exceeding R1000. The effect of the Defence Act was to place a blanket ban on knowledge about defence matters. Such was the chilling effect of the Defence Act that Anthony S Mathews goes so far as to say that the bans created by it allowed South Africa to invade Angola in 1975 and keep its presence there secret to its citizens until after the war. So too could South Africa keep its clandestine support to resistance movements in neighbouring states such as RENAMO in Mozambique secret.[19]

27.3 Under the Publications and Entertainments Act 26 of 1963 there were a range of prohibitions on publishing, *inter alia*, anything that might bring any section of the inhabitants of the Republic into ridicule or contempt, be harmful to the relations between any sections of inhabitants of the Republic or be prejudicial to the safety of the State, the general welfare or peace and order. This Act was replaced with the Publications Act 42 of 1974 which contained similar provisions.

28 The cumulative effect of the above film and media framework was to shroud in secrecy swathes of the apartheid regime's activities. South Africans were often left entirely in

[19] Anthony S Mathews *Freedom, State Security and the Rule of Law: Dilemmas of the Apartheid Society* at 158.

the dark as to the State's actions. The combination of that framework coupled with the security legislation set out in the preceding section meant that the apartheid state could exercise grossly abusive powers and never have those excesses revealed in court or by the media.

Conclusion

29 In short, secrecy in context of security related claims shielded the very abuses that made apartheid what it was. A consideration of the historical context reveals just how important it is for Courts vigilantly to assess security related claims given that South Africa is now an open and democratic society. PAIA thus serves as a crucial legislative instrument that must enable "*a radical and decisive break from that part of the past which is unacceptable*." Its tools will only enable such claims to be properly assessed if each claim is scrutinised carefully and vigilantly.

NATIONAL SECURITY IN INTERNATIONAL AND COMPARATIVE PERSPECTIVE

Introduction

30 We now turn to international law and foreign law experiences in the area of access to information and national security.

31 The DGRU submits that the following themes, elaborated on below, emerge from comparative and international law's treatment of national security:

31.1 The right to access to information is now generally recognised at both an international level and in most foreign jurisdictions.

31.2 National security exemptions should be narrowly and strictly interpreted;

31.3 The State must make a strong and compelling case that a safety and security exemption applies;

31.4 There are troubling examples in foreign law that show that claims of national security often shield governments from scrutiny and allow them to hide embarrassing revelations and maladministration.

32 As with the historical context, these considerations reveal the importance of Courts vigilantly exercising their duties to assess security-related claims under PAIA and not shying away from their responsibilities on the basis that security related claims are matters of legitimate and important public concern.

Sources of international law and comparative law

33 There is a substantial amount of international and foreign law material on the right of access to information and security related exemptions. We have not conducted any comprehensive review of foreign law but highlight what we submit is an important feature of the foreign law experience, namely the susceptibility to abuse of security related exemptions to open access to information.

34 There are two international documents which are relevant to national security: *The Johannesburg Principles on National Security, Freedom of Expression and Access to Information* ('*Johannesburg Principles*') of 1 October 1995 and the *Global Principles*

on National Security and the Right to Information (*'the Tshwane principles'*) of 12 June 2013. While constituting 'soft' and 'non-binding' international law, these documents seek to capture the state of international law on national security and the right to access to information.[20]

The Johannesburg Principles

35 The *Johannesburg Principles* were drafted by a group of independent experts with the aim of safeguarding the right to freedom of expression and information and the prerogative of governments to limit the right when necessary to protect a legitimate national security interest. The Principles are based on international and regional law and standards relating to the protection of human rights, evolving state practice (including judgments of national courts), and general principles of law. Thirty-seven experts participated in the drafting, representing expertise in the relevant areas of law and practice of nineteen countries from all regions of the world, the United Nations, the Council of Europe, the European Union, the Organization of American States, and the African Union.[21]

36 The Principles were endorsed in 1992 by the UN Special Rapporteurs on Freedom of Opinion and Expression.[22] The Johannesburg Principles were similarly endorsed by the United Nations Special Rapporteur on Freedom of Opinion and Expression in his reports to the 1996, 1998, 1999 and 2001 sessions of the United Nations Commission

[20] Non binding international law is relevant to s39(1)(b) of the Constitution: See S v Makwanyane 1995(3) SA 391 (CC) at para 35 and Glenister v President of the RSA 2011 (3) SA 347 (CC) from para 178 fn 28.
[21] *The Johannesburg Principles on National Security, Freedom of Expression and Access to Information* page 4; Sandra Coliver, "Commentary on the Johannesburg Principles on National Security, Freedom of Expression and Access to Information", in *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information* (1999), page 3.

[22] Mssrs. Danilo Türk & Louis Joinet, in *The Right to Freedom of Opinion and Expression: Final Report by Mr. Danilo Türk and Mr. Louis Joinet, Special Rapporteurs* U.N. ESCOR, Commission on Human Rights.44th Sess., ¶ 77, UN Doc. E/CN.4/Sub.2/1992/9 (14 Jul. 1992)

on Human Rights, and have been referred to by the Commission in their annual resolutions on freedom of expression since 1996. [23]

The Tshwane Principles

37 The *Tshwane principles* '*were developed in order to provide guidance to those engaged in drafting, revising, or implementing laws or provisions relating to the state's authority to withhold information on national security grounds or to punish the disclosure of such information*.'[24]

38 They are based on international and national law and standards, evolving state practice, general principles of law recognised by the community of nations, and the writings of experts. They were drafted by 22 organisations and academic centres in consultation with over 500 experts, having consulted with the UN Special Rapporteur on Freedom of Opinion and Expression, the UN Special Rapporteur on Counter-Terrorism and Human Rights, the OSCE Representative on Freedom of Expression, the OAS Special Rapporteur on Freedom of Expression, and the African Commission's Special Rapporteur on Freedom of Expression and Access to Information.[25]

39 The Special Rapporteur on Freedom of Expression reported in 2013 that he "considers that the Tshwane Principles provide a key tool for States to ensure that national laws

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[23] Article 19 Report: '*The Johannesburg Principles on National Security, Freedom of Expression and Access to Information*, http://www.article19.org/data/files/pdfs/standards/joburgprinciples.pdf
[24] *Tshwane Principles* Introduction, page 1.
[25] *Tshwane Principles* Introduction, page 1.

and practices regarding the withholding of information on national security grounds fully comply with international human rights standards."[26]

The right of access to information

40 Central to the Johannesburg and Tshwane Principles is that everyone has the right to seek, receive use and impart information held by or on behalf of public authorities, including information relevant to national security. The public has a right of access to information, and conversely states have a legitimate interest in keeping certain information secret. Striking an appropriate balance between these interests is regarded as vital to a democratic society.[27]

Establishing a national security exemption

National security exemptions must be narrowly construed and subject to effective oversight

41 The Principles contemplate that any restriction on the grounds of national security should be circumscribed. A state may not categorically deny access to all information related to national security but must designate in law those narrow categories the disclosure of which could harm legitimate national interests. Furthermore, the public interest in obtaining the information requested must be given substantial weight in assessing the need for secrecy. The *Tshwane Principles* provide that:

> *"No restriction on the right to information on national security grounds may be imposed unless the government can demonstrate that: (1) the restriction (a) is prescribed by law and (b) is necessary in a democratic society (c) to protect a legitimate national security interest, and (2) the law provides for adequate safeguards against abuse, including prompt full,*

[26] See page 4, para 11, fn 2; and from p14 para 64ff. See especially para 65.
[27] *Tshwane Principles*, Preamble and principle 1(a); *Johannesburg Principles* principle 11.

> *accessible and effective scrutiny of the validity of the restriction by an independent oversight authority and full review by the courts"*[28]

42 The European Court of Human Rights has held that exceptions to freedom of information "must be narrowly interpreted and the necessity for any restrictions must be convincingly established."[29]

43 And the United States Supreme Court has held that the concept of national security is:

> *"... intended to comprehend only those activities of the Government that are directly concerned with the protection of the Nation from internal subversion or foreign aggression and not those which contribute to the strength of the Nation only through their impact on the general welfare."*[30]

44 The Scottish Information Commissioner has held that information may be withheld to safeguard national security, but not simply because the information requested relates to national security.[31]

What is national security?

45 Under the Johannesburg Principles, in order to establish that a restriction of freedom of expression or information is necessary to protect a legitimate national security interest, a government must demonstrate that: (a) the expression or information at issue poses a serious threat to a legitimate national security interest; (b) the restriction imposed is the least restrictive means possible for protecting that interest; and (c) the restriction is compatible with democratic principles.[32]

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[28] *Tshwane Principle* 3. See also *Johannesburg Principles* 12, 13 and 19.
[29] *Thorgeirson v. Ireland*, 25 June 1992, Application No.13778/88, 14 EHRR 843, paragraph 63.
[30] *Cole v. Young*, 351 U.S. 536, 544 (1956), paragraph 4.
[31] *Mr. Rob Edwards of the Sunday Herald v. Scottish Executive* (23 Aug. 2007), Dec. 151/2007, 23-42.
[32] *Johannesburg Principle* 19.

46 Any restriction justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government.[33]

47 The *Tshwane Principles* explain a 'legitimate national security interest' to be —

> *'an interest the genuine purpose and primary impact of which is to protect national security, consistent with international and national law… . A national security interest is not legitimate if its real purpose or primary impact is to protect an interest unrelated to national security, such as protection of government or officials from embarrassment or exposure of wrongdoing; concealment of information about human rights violations, any other violation of law, or the functioning of public institutions; strengthening or perpetuating a particular political interest, party, or ideology; or suppression of lawful protests.'*[34]

48 It is not enough for a public authority simply to refer to an alleged risk of harm if information is disclosed – it is under a duty to state reasons, and should provide specific information, and if necessary, documentation, to support its assessment of risk. In no case may the mere assertion that disclosure would harm national security be deemed to be conclusive.[35]

49 In order for a restriction to be considered necessary, there must be a pressing social need for the restriction. The reasons given for the restriction must be "relevant and sufficient", and the restriction must be proportionate to the aim pursued. Restrictions going beyond what is necessary, for example by making more information secret than

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[33] *Johannesburg Principle* 2(a).
[34] *Tshwane Principles* Definitions. See also Johannesburg Principle 2(b). And Further *Observer and Guardian v. United Kingdom*, 216 Eur. Ct. H.R. (ser. A) ¶ 69 (1991), and discussion by Sandra Coliver, "Commentary on the Johannesburg Principles on National Security, Freedom of Expression and Access to Information", in *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information* (1999), page 10.
[35] Draft Principles 4(c)-(d); see also *Center for International Environmental Law v Office of the United States Trade Representative et al, United States District Court for the District of Columbia*, 01-498 (29 February 2012)

is strictly required to protect the legitimate aim, will not pass muster. Restrictions must undermine the right as little as possible.[36]

Abuses of secrecy claims in other jurisdictions

50 The requirement that national security exemptions be narrow and applied only on clear and well established grounds are there for good reason. Government secrecy can mask incompetence and provide cover for wrongdoing.

51 Some argue that many of the most contentious secrecy cases in the United States, Europe, and other jurisdictions were in fact more about hiding government malfeasance than protecting against genuine threats to the state. Smolla, for instance, remarks that:

> *"History is replete with examples of governmental efforts to suppress speech on the grounds that emergency measures are necessary for survival that in retrospect appear panicky, disingenuous, or silly."*[37]

52 The United Nations Special Rapporteur on Freedom of Expression and Opinion has identified the use of national security exemptions as one of the ten key challenges to freedom of expression, noting that: "*The notion of national security has historically been abused to impose unduly broad limitations on freedom of expression."* Particular concern was expressed over *"vague and/or overbroad definitions of key terms such as security*."[38]

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[36] *Lingens v Austria*, 8 July 1986, Application No. 9815/82, 8 EHRR 407, paragraphs 39 - 40; Toby Mendel, *Freedom of Information: A Comparative Legal Survey* (2nd edition, 2008), page 30.
[37] Rodney A. Smolla, *Free Speech in an Open Society* (1992), page 319; Helen Darbishire, "Preface", in *National Security and Open Government,* p ix.
[38] Report of the Special Rapporteur on the promotion and protection of the rights to freedom of opinion and expression, 25 Mar. 2010 A/HRC/14/23/Add. 2, 6 - 7.

53 Academic commentators on the situation in the United States argue that bureaucratic interests in secrecy should caution against accepting every claim of national interest. In 1976, the Church Committee made the following remarks regarding Cold War secrecy:

> *"What is a valid national secret? Assassination plots? The overthrow of an elected democratic government? Drug testing on unwitting American citizens? Obtaining millions of private cables? Massive domestic spying by the CIA and the military? The illegal opening of mail? Attempts by the agency of a government to blackmail a civil rights leader? These have occurred and each has been withheld from scrutiny by the public and the Congress by the label "secret intelligence."*[39]

54 It is for these reasons that the *Tshwane Principles* note:

> *"Access to information, by enabling public scrutiny of government action, not only safeguards against abuse by government officials but also permits the public to play a role in determining the policies of the government and thereby forms a crucial component of genuine national security and democratic participation."*[40]

55 Insofar as Courts are persuaded to defer to security claims, the *Tshwane Principles* state that:

> *"This deference is reinforced by provisions in the security laws of many countries that trigger exceptions to the right to information ... upon a minimal showing or even the mere assertion by the government of a national security risk. A government's over-invocation of national security concerns can seriously undermine the main institutional safeguards against government abuse: independence of the courts, the rule of law, legislative oversight, media freedom, and open government."*[41]

56 There are numerous instances of the misuse of claims of national security in comparative case law. The evidence of this does not normally emerge during a particular case. Instead, states come to court claiming national security as a ground for refusing disclosure of records, getting gagging orders against newspapers, or justifying

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[39] Quoted by Thomas S. Blanton, "National Security and Open Government in the United States: Beyond the Balancing Test", in *National Security and Open Government: Striking the Right Balance* (2003), page 42.
[40] Draft Principles, Background page ii.
[41] Draft Principles, Preamble, page 3.

draconian and extraordinary powers. The court then accepts that claim of national security only to have it revealed subsequently that the state wilfully misled the court in order to avoid embarrassment, conceal misconduct, or hide abuses rather than to sincerely protect national security.

57 This highlights the importance of Courts assessing security claims carefully and robustly while acknowledging that legitimate and serious public interests may be at stake.

58 Examples of abuses include:

58.1 In the *Leander* case, Leander had been dismissed from a Swedish government job, ostensibly on national security grounds, but was refused access to information about his private life, which had provided the basis for dismissal. The European Court of Human Rights found that there had been an interference with private life, but that this was justified to protect Sweden's national security. No direct evidence was presented of the threat allegedly posed by Leander, but the Court accepted that official safeguards against the abuse of the system sufficed. It later emerged that Leander had been fired for his political beliefs, and that Swedish authorities had misled the court. The Swedish government officially recognised that there were never any grounds to label Leander as a security risk, and that he had been wrongfully dismissed.[42]

58.2 In Britain, Clive Ponting, a senior civil servant in the Ministry of Defence, was prosecuted for leaking documents relating to the Falklands War. He supplied

[42] *Leander v. Sweden*, 116 Eur. Ct. H.R. (ser. A) ¶ 74 (1987); Toby Mendel, "National Security v Openness: an Overview and Status Report on the Johannesburg Principles", in *National Security and Open Government: Striking the Right Balance* (2003), pages 7 – 8.

information to an Opposition Member of Parliament which demonstrated that information provided by the Government concerning the presence of an Argentine warship near the Falklands/Malvinas Islands - which had been used to justify Britain's entry into war - was misleading if not false. The information illustrated that senior ministers misled parliament and the public. Ponting successfully argued that the disclosure was in the public interest, and that disclosure of information to an MP did not constitute an authorized disclosure.[43]

58.3 In *United States v Reynolds*, widows sued the Air Force after their husbands died in a bomber crash. The government refused to disclose accident reports on the grounds of national security. When the reports were later declassified, they were found to contain no national security information, but to contain evidence that a chronic maintenance problem had made the plane unsafe for flight. The court had refused to compel the government to turn over the crash reports, declined to review the disputed documents, and deferred to affidavits by the Secretary of the Air Force and the Air Force Judge Advocate General, who had claimed under oath that the crash investigation documents would reveal national security secrets about electronic equipment the plan was carrying, which was too sensitive for the courts to see.[44]

58.4 An illustration of the tendency to over-classify material on security grounds can be seen in comments by the then-United States Solicitor-General, regarding the *New York Times v. United States* (*Pentagon Papers)* case:

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[43] *R v. Ponting* [1985] Crim LR 318; John Wadham and Kavita Modi, "National Security and Open Government in the United Kingdom", in *National Security and Open Government: Striking the Right Balance* (2003) page 77.

[44] Nicole Hallett, "Protecting National Security or Covering Up Malfeasance: The Modern State secrets Privilege and Its Alternatives", *The Yale Law Journal Pocket Part* 117:82 (2007), pages 85 – 86; Thomas S. Blanton, "National Security and Open Government in the United States: Beyond the Balancing Test", in *National Security and Open Government: Striking the Right Balance* (2003), pages 47 – 48.

> *"I have never seen any trace of a threat to the national security from the publication. Indeed, I have never seen it even suggested that there was such an actual threat .... It quickly becomes apparent to any person who has considerable experience with classified material that there is massive overclassification and that the principal concern of the classifiers is not with national security, but rather with governmental embarrassment of one sort or another."*[45]

58.5 During WWII Japanese-Americans were forcibly placed in internment camps. Korematsu attempted to evade internment and, when caught and convicted, challenged the lawfulness of being placed in an internment camp by executive order alone. The Supreme Court upheld the executive order in large part on the US Government's claim that military necessity required the detention of Japanese-Americans. Korematsu used the Protection of Information Act forty years later to access to various government documents surrounding his detention. A report by the Office of Naval Intelligence had, at the time of detention, shown that there was no evidence that Japanese-Americans were acting as spies or sending signals to Japanese submarines. This report had been in the possession of the Solicitor General at the time but not disclosed to the Supreme Court. On the basis of this document, Korematsu successfully sued to vacate his conviction on the grounds of government misconduct. A Federal District court held that the government had knowingly withheld information from the courts when the question of military necessity was being considered. The judge remarked that:

> *"As historical precedent [the Korematsu case] stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees. It stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability. It stands as a caution that in times of international hostility and antagonisms our institutions, legislative, executive and judicial, must*

[45] Quoted in Thomas S. Blanton, "National Security and Open Government in the United States: Beyond the Balancing Test", in *National Security and Open Government: Striking the Right Balance* (2003), pages 46 – 47.

> *be prepared to exercise their authority to protect all citizens from the petty fears and prejudices that are so easily aroused."*[46]

59 As the second *Korematsu* case recognises, even in times when a nation is at war or there is clear and real evidence that state or national security is threatened, there must be scrutiny of government actions since there is scope for abuse.

60 For this reason, a number of other jurisdictions have recognised that information may be disclosed despite impacting on issues that bring questions of national security to the fore:

60.1 In Spain, courts have ordered the disclosure of classified documents relating to counter-terrorism operations, on the basis that constitutional guarantees of the right to obtain effective judicial protection in the exercise of rights, and "*the certainty that the rule of law shall prevail, the accountability of public authorities, and the prohibition of arbitrary action of public authorities*" should take precedence over the state's security interest.[47]

60.2 In Israel, courts have openly considered challenges to methods of interrogation, despite government assertions of the national security privilege.[48]

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[46] *Korematsu v United States* 584 F.Supp. 1406 (1984) at 1420; Thomas S. Blanton, "National Security and Open Government in the United States: Beyond the Balancing Test", in *National Security and Open Government: Striking the Right Balance* (2003), page 48.
[47] Nicole Hallett, "Protecting National Security or Covering Up Malfeasance: The Modern State secrets Privilege and Its Alternatives", *The Yale Law Journal Pocket Part* 117:82 (2007), page 84.
[48] Ibid.

THE IMPLICATIONS OF THE HISTORICAL AND INTERNATIONAL PERSPECTIVES FOR THE APPLICATION OF PAIA IN THIS CASE

61 How then does the above historical and global context assist in the application of PAIA in this case?

62 First, it clarifies in context of security related claims what is being rejected in the preamble of PAIA when it recognises:

> *'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'.*

63 And it shows, in part, what is needed in order to

> *'foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information'*[49]

64 Second, it shows quite choices made by the legislature in PAIA to prevent abuses of exemptions and to enable their careful scrutiny in an open and democratic society. Of particular relevance to the present case is the following:

64.1 PAIA makes disclosure the norm and exemption from disclosure the exception.[50] Public bodies have to disclose as much as can reasonably be disclosed, including by releasing redacted documents if possible.[51]

64.2 Public bodies are put to task to take reasonable steps to find records and it would appear that they should only stop searching for those documents once reasonable

[49] PAIA Preamble.
[50] Section 11 of PAIA and *President of the Republic of South Africa and Others v M&G Media Ltd* 2012 (2) SA 50 (CC) para 9.
[51] Section 28 of PAIA

grounds exist to believe that those documents don't exist or cannot be found.[52] The steps that are taken to verify the existence of documents must be adequately and properly explained and such steps must be properly and suitably tailored to the particular circumstances of a case. That is especially so when it is claimed, as it is here, that 'high level' documents may exist.

64.3 When a public body makes a decision not to release information it *must state adequate reasons* therefore.[53]

64.4 The safety and security exemptions in sections 38 and 41 are narrowly tailored. They set out clearly defined circumstances in which they are satisfied rather than open textured and vague definitions. Sufficient information must be supplied to a court to assess whether documents fall within an exemption claimed.

64.5 Furthermore, the jurisdictional facts for each exemption are objective and not subjective. The jurisdictional facts do not turn on the information officer's subjective beliefs as to whether the section is satisfied. Instead the jurisdictional facts are objective as indicated by the use of terms '*could reasonably be expected to*...', '*would be likely to prejudice or impair*...', '*would reveal information*'.

64.6 PAIA places the burden clearly on the State to establish that any decision it makes in terms of the Act is compliant with the Act.[54]

[52] Section 23 of PAIA.
[53] Section 25 of PAIA.
[54] Section 81(3) of PAIA.

64.7 PAIA has deliberately given courts proper oversight that is not limited to review oversight but goes to the merits of the decisions made by the public body.[55] To this end courts have a number of powers:

64.7.1 Courts need not rely only on the *ipse dixit* of public bodies but may instead examine records when it is in the interests of justice to do so to determine whether those records are actually protected from disclosure.[56]

64.7.2 Courts may hold hearings *in camera* when examining records provided by a public body.[57]

64.7.3 They have broad powers to ensure that any orders they make are just and equitable.[58]

65 So, PAIA creates the mechanisms that, if properly applied, curtail the State's ability to abuse security-related exemptions. Similarly, provided courts are vigilant in their duties and subject security related claims to proper scrutiny, the ability to mislead the courts by claiming that an exemption applies or that it has satisfied its obligations to disclose is curtailed by the legislative scheme of PAIA. This reflects an appropriate response to South Africa's history and international norms and experiences. It creates a framework within which courts can responsibly and robustly scrutinise security-related claims without undermining important State objectives.

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[55] *Transnet Ltd and Another v SA Metal Machinery Co (Pty) Ltd* 2006 (6) SA 285 (SCA) paras 24 - 26; *President of the Republic of South Africa and Others v M&G Media Ltd* 2012 (2) SA 50 (CC) para 14.
[56] Section 80 of PAIA. See *President of RSA v M & G Media* 2012 (2) SA 50 para 45.
[57] Section 80(3)(b).
[58] Section 82 of PAIA.

66 However, PAIA can only work effectively if Courts are vigilant in their role and carefully scrutinise security related claims. In doing so, courts will provide oversight and independent review and can assess whether the State acts in good faith in when seeking to protect security interests or whether further accountability is demanded or, indeed, its claims must be rejected. South Africa's history and the experiences of other jurisdictions show that courts bear a very heavy responsibility to hold the State accountable when it is asserting security related claims. When courts fail to do so, abuses can be concealed and misconduct hidden.

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