

**IN THE SOUTH GAUTENG HIGH COURT OF SOUTH AFRICA
(HELD IN JOHANNESBURG)**



CASE NO: **32512/13**

In the application of:

THE RIGHT2KNOW CAMPAIGN

First Applicant

THE SOUTH AFRICAN HISTORY ARCHIVE TRUST

Second Applicant

And

THE MINISTER OF POLICE

First Respondent

**THE NATIONAL DEPUTY INFORMATION
OFFICER: SOUTH AFRICAN POLICE SERVICE**

Second Respondent

**THE MINISTER OF DEFENCE AND MILITARY
VETERANS**

Third Respondent

NOTICE OF MOTION

TAKE NOTICE that the Applicants intend to make an application to the above Honourable Court for an order in the following terms:

1. Declaring that the decision of the First and Second Respondents to refuse the Applicants' request for information, as defined in the Founding Affidavit attached hereto, in terms of the Promotion of Access to Information Act 2 of 2000 ("PAIA") is unlawful and unconstitutional.

2. Reviewing and setting aside the refusal by the First and Second Respondents of the Applicants' request in terms of sections 11, 78 and 81 of PAIA.
3. Directing the First and Second Respondents to supply the Applicants with a copy of the requested information within 15 (fifteen) days of the granting of this order.
4. Directing the First and Second Respondents to pay the costs of this application.
5. Further and/or alternative relief.

TAKE NOTICE FURTHER that the accompanying Founding Affidavits of **CATHERINE MOIRA KENNEDY** and **MURRAY HUNTER**, and the annexures thereto, will be used in support of this application.

BE PLEASED TO TAKE FURTHER NOTICE that the Applicants have appointed **CLIFFE DEKKER HOFMEYR INC** of the address below as the address at which they will accept notice and service of all further process in these proceedings.


BE PLEASED TO TAKE FUTHER NOTICE that:

- (a) Notice of intention to oppose this application must be given within 15 (fifteen) days after receipt hereof and must contain an address within 8 (eight) kilometres of the Court to which this application is brought, where notice and service of documents will be accepted.
- (b) Answering affidavits, if any, must be filed within 15 (fifteen) days after service of the notice of intention to oppose this application.
- (c) In default of your complying with rule 3(5) of the Rules of Procedure for Application to Court in terms of PAIA, the Applicant may request the clerk of

the court or the registrar as the case may be, to place this application before the Court for an order in terms of section 82(b) of PAIA.

- (d) In default of your delivering a notice of intention to oppose, the matter will without further notice, be placed on the roll for hearing after the expiry of the period mentioned in paragraph (a) above, on a date fixed by the clerk of the court or the registrar as the case may be, in terms of rule 3(6) of the Rules of Procedure for Application to Court in terms of PAIA.

DATED at SANDTON on this the 2nd day of SEPTEMBER 2013.



CLIFFE DEKKER HOFMEYR INC

Applicant's Attorneys

1 Protea Place

Sandown

Sandton, 2196

Tel: (011) 562 1162

Fax: (011) 562 1514

Ref: C Jesseman/01949175

TO:

THE REGISTRAR OF THE SOUTH GAUTENG HIGH COURT

JOHANNESBURG

BY HAND

AND TO:

NKOSINATHI ENIMANUEL MTETWA

THE MINISTER OF POLICE

BY SHERIFF

First Respondent

South African Police Service

Wachthuis, 7th Floor,

231 Pretorius Street,

PRETORIA

c/o The State Attorney

SALU Building

316 Thabo Sehume Street

PRETORIA

AND TO:

AMELDA CROOKS

THE NATIONAL DEPUTY INFORMATION OFFICER:

SOUTH AFRICAN POLICE SERVICE

BY SHERIFF

Second Respondent

South African Police Service

Wachthuis, 7th Floor,

231 Pretorius Street,

PRETORIA

c/o The State Attorney

SALU Building

316 Thabo Sehume Street

PRETORIA

AND TO:

NOSIVIWE NOLUTHANDO MAPISA-NQAKULA

MINISTER OF DEFENCE AND MILITARY VETERANS

BY SHERIFF

Third Respondent

Arm Scor Building, Block 5, Level 4

Cnr Delmas Avenue and Nossob Street

Erasmuskloof

PRETORIA

c/o The State Attorney

SALU Building

316 Thabo Sehume Street

PRETORIA

**IN THE SOUTH GAUTENG HIGH COURT OF SOUTH AFRICA
(HELD IN JOHANNESBURG)**

CASE NO:

In the application of:

THE RIGHT2KNOW CAMPAIGN First Applicant

THE SOUTH AFRICAN HISTORY ARCHIVE TRUST Second Applicant

And

THE MINISTER OF POLICE First Respondent

**THE NATIONAL DEPUTY INFORMATION
OFFICER: SOUTH AFRICAN POLICE SERVICE** Second Respondent

**THE MINISTER OF DEFENCE AND MILITARY
VETERANS** Third Respondent

FOUNDING AFFIDAVIT

I, the undersigned,

CATHERINE MOIRA KENNEDY

do hereby make oath and state the following:

- 1 I am an adult female director of the South African History Archive Trust, the second applicant, situated at the Women's Jail, Constitution Hill, 1 Kotze Street, Braamfontein, Johannesburg.

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- 2 I am duly authorised to bring this application on behalf of the second applicant. I attach hereto a copy of a resolution of the Trustees of the South African History Archive Trust dated 11 May 2013, marked "CMK1".
- 3 The National Working Group of the first applicant has also authorised the institution of these proceedings. I attach hereto a copy of the Minutes of the meeting of the Right2Know Campaign's National Working Group dated 07 June 2013 marked "CMK2", and refer the Court to the confirmatory affidavit of Murray Hunter filed herewith.
- 4 I have personal knowledge of the facts in this affidavit, unless I state or imply otherwise, and they are true and correct. Where I make legal submissions, I do so on the basis of advice of the applicants' legal representatives.
- 5 To the extent that I rely on facts that are not within my personal knowledge, I believe them to be true and I rely on the confirmatory affidavit deposed to by Mr Murray Hunter, which accompanies this affidavit.

INTRODUCTION

- 6 This is an application to set aside the first and second respondents' refusal to grant the applicants access to –
- 6.1 records indicating what places or areas have been declared a "National Key Point" or "National Key Points Complex" under section 2 and 2A of the National Key Points Act 102 of 1980 ("National Key Points Act"); and
- 6.2 the bank statements from 2010 to 2012 of the Special Account for the Safeguarding of National Key Points provided for in section 3B of the

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National Key Points Act ("the Special Account").

- 7 Section 2 of the National Key Points Act provides for the Minister of Defence to declare "any place or area"¹ a National Key Point –

"[i]f it appears to the Minister at any time that any place or area is so important that its loss, damage, disruption or immobilization may prejudice the Republic, or whenever he considers it necessary or expedient for the safety of the Republic or in the public interest."

- 8 The Minister of Defence may also declare that a number of National Key Points constitute a 'National Key Points Complex' under section 2A.
- 9 There is no public notice requirement for the declaration of National Key Points under the National Key Points Act. Under section 2(2) of that Act, the Minister of Defence is required only to send written notice to the owner of the place declared a National Key Point. Notwithstanding that criminal offences attach to certain activities committed in respect of National Key Points (under section 10 of the National Key Points Act), it has not been publically disclosed which places or areas have been declared National Key Points by the Minister of Defence.
- 10 Against this background, the second applicant lodged its request for information on behalf of the first applicant in accordance with section 18(1) of the Promotion of Access to Information Act 2 of 2000 ("PAIA"). The second respondent refused the request, which refusal was confirmed by the first respondent on appeal. Accordingly, the internal appeal process provided for

¹ Section 1 defines 'area' to mean "any soil or water surface, whether with a building, installation or structure thereon or not, and includes any place". 'Place' is defined as "any premises, building, installation or industrial complex"

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in section 74 of PAIA has been exhausted, and this application is made in terms of section 78 read with section 82 of PAIA.

11 I emphasise that, in bringing this application, the applicants do not concede the constitutionality of the National Key Points Act, or any provision thereof.

12 In this affidavit, I address the following issues in turn:

12.1 The parties and *locus standi*;

12.2 Jurisdiction;

12.3 Factual background;

12.4 The grounds of refusal; and

12.5 The public interest override under section 46 of PAIA.

THE PARTIES

13 The first applicant is **THE RIGHT2KNOW CAMPAIGN** ("R2K"), a non-profit organisation constituted as a voluntary association in terms of the laws of South Africa.

13.1 R2K was established in August 2010 to advance the public interest through the protection and advancement of "*the right to know, which includes the right to transparency, accountability, a free and diverse media, effective governance affecting both public and private bodies, and the promotion of a human rights culture*". I attach hereto a copy of R2K's Constitution marked "**CMK3**", and refer the Court to the

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preamble of the Constitution.

- 13.2 R2K advances its objectives through public awareness campaigns and by participating in parliamentary and other public processes. Its campaigns have focused *inter alia* on the Protection of State Information Bill, state secrecy over National Key Points, media freedom and diversity, the protection of whistle-blowers, and the protection and advancement of the right of access to information, particularly in relation to the basic needs and services of communities.
- 13.3 R2K's campaigns have attracted the support and participation of thousands of South Africans from across the country, and have been endorsed by hundreds of supporting non-profit organisations. R2K first gained prominence for opposing the Protection of State Information Bill. R2K's public statement of opposition against this Bill was endorsed by over 400 organisations, made up of approximately 30 000 individuals. I attach as annexure "CMK4" a list of the R2K supporting organisations as of July 2013.
- 13.4 The R2K's National Key Points campaign was launched on 4 October 2012 with the aim of exposing the National Key Points Act as an excessive, apartheid-era secrecy law that undermines political rights and the rights of access to information, freedom of expression and freedom of association. In February 2013, R2K published a report titled *Secret State of the Nation 2013*, a copy of which is attached hereto as Annexure "CMK5". This report notes that, according to the SAPS Annual Performance Plan, 2012/13, the number of National Key Points had increased by more than 50% in the past five years. The



R2K's National Key Points campaign is motivated by R2K's belief that a culture of secrecy exists and has been fostered around National Key Points which creates an environment for abuse of power.

13.5 In addition to the PAIA request for information regarding which sites have been declared National Key Points, R2K's campaign has included public articles and press statements aimed at raising awareness of the National Key Points Act and how Government's reliance on it has, and threatens to, undermine constitutional and democratic rights. After the access to information request was refused and the internal-appeal mechanism was exhausted, R2K invited members of the public to help to identify National Key Points across South Africa using evidence in the public domain – including news articles, records of Parliament, and annual reports and public signs outside National Key Points. The campaign has yielded a substantial list of submissions from the public to date, a list of which is attached as annexure "CMK6".

13.6 The second applicant is **THE SOUTH AFRICAN HISTORY ARCHIVE TRUST ("SAHA")**, a non-governmental organisation ("NGO") constituted as a trust in terms of the laws of South Africa.

13.7 SAHA's founding objectives are to collect, preserve and catalogue materials of historic, contemporary, political, social, economic and cultural significance, and to promote the accessibility of such materials to the general public. I attach hereto a copy of SAHA's trust deed marked "CMK7".

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- 13.8 SAHA is an independent NGO dedicated to documenting and providing access to archival holdings that relate to past and contemporary struggles for justice in South Africa. Established by anti-apartheid activists in the late 1980s, its founding mission was to promote the recapturing of South Africa's lost and neglected history and to record history in the making. Further, SAHA aims to document, support and promote awareness of past and contemporary struggles for justice through archival practices and outreach, and the utilisation of access to information laws.
- 13.9 In 2001 SAHA launched the Freedom of Information Programme dedicated to using PAIA in order to test and extend the boundaries of freedom of information in South Africa. This programme seeks to create awareness of, compliance with and use of PAIA.
- 13.10 In seeking to achieve its objectives, SAHA has made over 1800 requests for information from various government departments since 2001. It has brought numerous applications in the High Court arising out of refusals of these requests and has intervened as *amicus curiae* in a number of PAIA applications.
- 13.11 Over the last few years, SAHA has developed a comprehensive capacity training programme for NGOs and community based organisations on using PAIA, including the development of resource kits, workshop guides, PAIA case study DVDs, and a dedicated online management system for the submissions and monitoring of PAIA requests made by the general public. It has further trained hundreds of activists, students, community members, NGO members, attorneys

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and paralegals in the use of PAIA.

14 In bringing this application, the first and second applicants act –

14.1 in their own interests, to further the achievement of their own objectives (section 38(a) of the Constitution of the Republic of South Africa (“**the Constitution**”));

14.2 in the interests of their members (section 38(e) of the Constitution);
and

14.3 in the public interest (section 38(d) of the Constitution).

15 The first respondent is **THE MINISTER OF POLICE** in the national government, who is cited in his official capacity as head of the Ministry of Police in the national government, whose address is Wachthuis, 7th Floor, 231 Pretorius Street, Pretoria. The first respondent is cited care of the State Attorney, Pretoria, whose address is SALU Building, 316 Thabo Sehume Street, Pretoria. The first respondent is a member of the National Executive and is responsible for the South African Police Service (“**SAPS**”) and the management of the SAPS’ records.

16 The second respondent is **THE NATIONAL DEPUTY INFORMATION OFFICER OF THE SAPS**, whose address is Wachthuis, 7th Floor, 231 Pretorius Street, Pretoria. She is cited in her official capacity, as the officer who deliberates upon and decides whether requests for access to information, directed to the SAPS in terms of PAIA, should be granted or refused. The second respondent is cited care of the State Attorney, Pretoria,



whose address is SALU Building, 316 Thabo Sehume Street, Pretoria.

17 For the sake of convenience, I refer in this affidavit to the first and second respondents as follows:

17.1 I refer to the first respondent as “**the Minister**”;

17.2 I refer to the second respondent as “**the Information Officer**”; and

17.3 I refer to the first and second respondents collectively as “**the respondents**”.

18 The third respondent is **THE MINISTER OF DEFENCE AND MILITARY VETERANS**, who is cited in her official capacity as head of the Department of Defence in the national government, whose address is Armscor Building, Block 5, Level 4, Corner Delmas Avenue and Nossob Street, Erasmuskloof, Pretoria. The third respondent is cited care of the State Attorney, Pretoria, whose address is SALU Building, 316 Thabo Sehume Street, Pretoria. The third respondent is a member of the National Executive and is responsible for the administration of the National Key Points Act and the declaration of National Key Points under the Act.

JURISDICTION

19 I am advised and submit that this Honourable Court has jurisdiction to hear this application in that SAHA, the “requester” as defined under section 1 of PAIA, has its offices within this Court’s area of jurisdiction.

- 20 Section 1 of PAIA defines "court" to include a High Court within whose area of jurisdiction "*the requester or third party concerned is ordinarily resident or domiciled*" (subparagraph (b)(i)(cc)). SAHA is "ordinarily resident" in Braamfontein, Johannesburg as required to establish this Court's jurisdiction.

FACTUAL BACKGROUND

The PAIA request and its refusal

- 21 On 4 October 2012, SAHA submitted a request for access to information on behalf of R2K in terms of section 18(1) of PAIA. I attach a copy of the request (Form A) as annexure "CMK8".

- 22 The request sought the following information:

"1. Records indicating any place or area declared as a National Key Point in accordance with section 2 of the National Key Points Act;

2. Records indicating any place or area declared as a National Key Points Complex in accordance with section 2A of the National Key Points Act;

3. Bank statements of the Special Account for the Safeguarding of National Key Points established in terms of section 3B of the National Key Points Act for the period 2010 to 2012."

- 23 The Information Officer refused this request by way of an e-mail dated 16 November 2012, attached as annexure "CMK9".

23.1 The e-mail was sent under the subject-line "*PROMOTION OF ACCESS TO INFORMATION ACT, 2000 (ACT NO 2 OF 2000): RE PROPERTY NKANDLA*".

23.2 The Information Officer stated that the request was refused in terms of

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sections 38(a) and 38(b)(i)(aa) of PAIA, which concern the mandatory protection of safety of individuals and protection of private property.

These provisions read as follows:

“Mandatory protection of safety of individuals, and protection of property

38 *The information officer of a public body –*

(a) must refuse a request for access to a record of the body if its disclosure could reasonably be expected to endanger the life or physical safety of an individual; or

(b) may refuse a request for access to a record of the body if its disclosure would likely prejudice or impair –

(i) the security of –

(aa) a building structure or system, including, but not limited to, a computer or communication system”.

23.3 In the email, the Information Officer explained the basis for the SAPS’s reliance on the above grounds of refusal as follows:

“To provide access to the requested records will impact negatively on and jeopardize the operational strategy and tactics used to ensure security at the relevant property or safety of an individual (eg if a person plans, intends [sic] or tries to harm the relevant individual or to prejudice or impair the security of the building, access to this information may prejudice the effectiveness of those methods, techniques or procedures used to ensure the safety of such individuals and/or the building – a person who intends to harm the relevant individual may with ease harm the individual if he or she has access to such information, or he or she may with ease determine the strategies and tactics used for such protection and then use the information to do such harm.”

23.4 Access to all the requested records was refused – a blanket refusal – without reference to any attempt to excise any requested information that would not fall foul of sections 38(a) and (b)(i)(aa) of PAIA.

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The internal appeal

24 On 18 December 2012, SAHA submitted a notice of internal appeal to the Information Officer on behalf of R2K. This appeal (Form B) is attached as annexure "CMK10".

25 The appeal was brought on the following grounds:

25.1 The refusal of the record was premised on the incorrect assumption that the request for information concerned Nkandla, which it did not. This error was evident in the subject-line of the e-mail containing the refusal, which read "*PROMOTION OF ACCESS TO INFORMATION ACT, 2000 (ACT NO 2 OF 2000): RE PROPERTY NKANDLA*". The Information Officer therefore misdirected herself and made her decision in relation to records not requested (Annexure "CMK9" paragraphs 3 to 8).

25.2 The Information Officer did not apply her mind to the actual request for records (paragraph 9).

25.3 The requested information did not fall within the category of information exempted from disclosure in terms of section 38(a) and (b)(i)(aa), in particular in that SAHA did not request information concerning the security in relation to National Key Points or Complexes, but only a list of places or areas declared as National Key Points and certain bank statements of the Special Account (paragraph 10).

25.4 The Information Officer failed to exercise the discretion granted to the

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information officer under section 38(b)(i)(aa) of PAIA (paragraph 11).

- 25.5 The Information Officer did not provide adequate reasons for refusing access to the requested information, as required under section 25(3)(a) of PAIA (paragraph 12).
- 25.6 The Information Officer failed to apply her mind to whether any of part of the records sought could be disclosed upon severance from those parts of the record that could not be disclosed, as required under section 28 of PAIA (paragraphs 13 and 14).
- 26 The Information Officer requested an extension of 30 (thirty) days to finalise the internal appeal process. This request was made by e-mail dated 17 January 2013, attached as annexure "CMK11". In this e-mail, the Information Officer advised the applicants that the reference to "PROPERTY NKANDLA" was merely a "typing error", and that she had copied and pasted the subject line from a previous e-mail.
- 27 On 28 February 2013, the first respondent confirmed the refusal to disclose the requested records on appeal. A copy of the letter is attached as annexure "CMK12". This decision was received by e-mail on 7 March 2013, attached as annexure "CMK13".
- 28 The Minister confirmed the refusal to provide access to the requested records on the following grounds:
- 28.1 The Information Officer did apply her mind to the request, and the reference to "PROPERTY NKANDLA" was a mere typing error

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(Annexure "CMK12" paragraph 1);

- 28.2 The request for information relating to the list of all the places or areas which had been declared National Key Points or Complexes was properly refused in terms of sections 38(a) and (b)(i)(aa) of PAIA (paragraph 2);
- 28.3 The refusal to disclose the identity of the National Key Points and Complexes was also justified under section 45(b) of PAIA. I note that the Minister repeatedly refers to section 45(1)(b) in the letter of dismissal, but the relevant section on which the Minister relies is in fact section 45(b).
- 28.4 The request for the bank statements of the Special Account or the Safeguarding of the National Key Points was properly refused as the SAPS does not have such an account (paragraph 3).
- 29 The Minister provided the following explanation for his decision:

- 29.1 The Minister repeated the reasons given by the Information Officer in her refusal of the request to justify the reliance on section 38(a) and 38(b)(i)(aa) (as quoted in paragraph 19.3 above), and added the following in this regard:

"The National Key Points include different places or areas which are extremely important and its loss, damage, disruption or immobilization may prejudice the Republic or its safety and it is in the public's interest that they be secured and that such declaration as a National Key Point not be publically advertised. Such 'critical' places or areas are very likely to become 'soft spots or targets' for the enemy or a person that intends to harm the Republic or endanger the life or physical safety of an individual at or from such place or area. Knowledge of exactly which places or areas are

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declared as such points [is] highly likely to prejudice or impair the security of such places or areas when such knowledge is used by persons who intend to do such harm to such building, structure or system". (Paragraph 5 of Annexure "CMK12", emphasis added.)

29.2 The Minister described the categories of places or areas which constitute National Key Points as including: banks; munitions industries; petro chemical industries; water supply; electricity; communications; transport air; government institutions; data processing; research; or technology information systems.

29.3 The Minister stated further that many of the 200 (two hundred) National Key Points are privately owned and that, as a result, revealing the addresses of such National Key Points would entail disclosing the "personal information" of a third party, which is defined in section 1 of PAIA to include "the address of the individual". The Minister reasoned that to protect the privacy of third parties in accordance with section 34(1) of PAIA, the SAPS information officer would have to comply with the notification process provided for in section 47 of PAIA in order to process the applicants' request for information. This would substantially and unreasonably divert the resources of the SAPS, and the request could therefore be refused in terms of section 45(b) of PAIA (Annexure "CMK12" paragraphs 6 to 9).

29.4 The SAPS does not have a special account as contemplated in terms of section 3B of the National Key Points Act. The Minister explained that, in general, employees of the SAPS are not used to secure the National Key Points, although the SAPS' VIP Protection Unit does safeguard VIPs who "are mostly at some of these National Key

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Points". In providing these services, the VIP Protection Unit does not use a separate budget or account (paragraph 11).

- 30 For the reasons given below, I deny that the respondents' reasons justify the refusal to provide the requested information. Further, I submit that both the refusal of the Information Officer and the confirmation of such refusal by the Minister are unlawful in that none of the grounds of refusal for access to the information held by a public body contemplated in PAIA are met in respect of the information sought. It follows that the applicants are entitled to the information sought in this application.

GROUND OF REFUSAL

- 31 I am advised that in terms of the Constitution and PAIA, access to information held by an organ of state or a public body must be granted unless one of the specified grounds enumerated in Chapter 4 of PAIA are present. The default position with respect to information held by the state is that access should be granted, unless one of the enumerated grounds of refusal is present. This follows from:

31.1 section 32(1)(a) of the Constitution, which confers a right on every person to "any information held by the State"; and

31.2 section 11 of PAIA, which provides that a requester must be given access to a record of a public body if the requester complies with the procedural requirements in PAIA for access and no ground for refusal of access under PAIA exists.

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- 32 It is therefore crucial to determine whether any of the grounds of refusal contemplated in Chapter 4 of PAIA apply to this case. If they do not, that is the end of the matter and the information sought must be disclosed. In that event, the decision by the first respondent and Information Officer to refuse the applicants' PAIA request must be reviewed and set aside.
- 33 I am further advised that where a party relies on a ground of refusal under PAIA, it must adduce evidence to show that the harm contemplated will or might happen if the information sought is disclosed. It does not suffice to merely repeat the provisions of PAIA and assert harm in a vague and unparticularised manner, as the respondents have done.
- 34 I wish to record the applicants' concern with the respondents' blanket refusal of the applicants' request for information, and the careless attitude with which the Information Officer dealt with the request – as epitomised in the erroneous subject-line in the Information Officer's email advising of the refusal.
- 35 The respondents' approach to this PAIA request is indicative of a harmful culture of secrecy that exists in South African public bodies, which has manifested itself in repeated and unjustified blanket refusals to PAIA requests. As I have already noted, SAHA has considerable experience in bringing PAIA applications, having submitted 1297 requests to public bodies between 2001 and 2011. Of those requests, 79 received refusals with reasons relating to the content of the requested records, of which 16 were initially refused in full or in part on grounds relating to national security.



Accordingly, security concerns were invoked to refuse access in over 20 per cent of all requests actively refused during this period for reasons relating to content. SAHA appealed against seven of the 16 refusals. Of these, one refusal was overturned on internal appeal; documents were released in three out of court settlements; and SAHA is awaiting judgment in one of the matters.


- 36 The applicants are also concerned about state officials' over-ready reliance on the security exemptions under PAIA and apartheid-era security legislation, which includes the National Key Points Act, to withhold information from the general public. The overhasty and misplaced reliance on 'security' concerns to resist disclosure seriously undermines the culture of transparency and accountability in governance that the Constitution mandates, and is fundamentally at odds with the objects of PAIA.
- 37 These concerns have been fully articulated and substantiated in an affidavit filed by SAHA in support of its application to be admitted as *amicus curiae* in another pending PAIA application. I have attached a copy of this affidavit as annexure "CMK14", and request that its contents be read as incorporated herein insofar as it is relevant to this application.
- 38 I turn now to address the grounds of refusal relied upon by the respondents in turn.

Mandatory protection of safety of individuals and property

- 39 In terms of section 38 of PAIA, the information officer of a public body –

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- 39.1 must refuse a request for access to a record if its disclosure could reasonably be expected to endanger the life or physical safety of an individual (section 38(a)); and
- 39.2 may refuse a request for access to a record of the body if its disclosure would likely prejudice or impair, *inter alia*, the security of a building structure or system, including, but not limited to, a computer or communication system (section 38(b)(i)(aa)). (Emphasis added.)
- 40 The applicants recognise that National Key Points are designated as such by the Minister of Defence on the basis that, in the opinion of the Minister, that place or area is “*so important that its loss, damage, disruption or immobilization may prejudice the Republic*” or that its designation as is “*necessary or expedient for the safety of the Republic or in the public interest*”. This discretion must be exercised reasonably and in accordance with the objects of the National Key Points Act, read with the Constitution and prevailing constitutional legislation including PAIA.
- 41 Even if it is accepted that the 200 places declared as National Key Points have been properly declared as such (which is not accepted by the applicants), the applicants dispute the respondents’ contention that the disclosure of the mere fact that a place or area has been designated a National Key Point could reasonably be expected to endanger the life or physical safety of an individual, nor likely prejudice or impair the security of a building, structure or system.
- 42 This is particularly the case where the National Key Point is a public place,



whose existence and strategic importance for the Republic is widely known. It cannot reasonably be contended, for instance, that the mere disclosure of the fact that O.R. Tambo International Airport is a National Key Point itself poses any threat to security.

- 43 In respect of other places, whose existence and strategic importance may not be known, the applicants contend that the mere disclosure of the name of the place and its designation as a National Key Point, without more, could not reasonably be expected to endanger the life or physical safety of an individual, nor likely prejudice or impair the security of a building, structure or system. What is fundamental to the security of the place, and thus the public interest, is that the location of such National Key Points remains undisclosed. The applicants did not request this information.
- 44 The respondents have provided no evidence to show that the harm contemplated under section 38(a) could reasonably be expected to eventuate on disclosure of the National Key Points, or that the harm contemplated in s 38(b)(i)(aa) would be likely to eventuate. I emphasise that, under s 38(b)(i)(aa) the respondents must show that harm to property "*is likely*" as result of the disclosure of the National Key Points.
- 45 The respondents have simply made vague and bald allegations that the harm under section 38 would result from disclosure, and relied solely on their assertions in this regard. This does not meet the standard of "adequate reasons" as required under section 25(3) of PAIA.
- 46 Further, the respondents have not shown that they considered:

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46.1 whether there is an overriding public interest in disclosure of the records, as they are obliged to have done under section 46 of PAIA; nor

46.2 whether certain of the requested records can be disclosed and severed from those the records whose non-disclosure is justified under PAIA.

47 For these reasons, the respondents' refusal on the basis of s 38 of PAIA falls to be set aside.

Unduly onerous request

48 In confirming the Information Officer's refusal to disclose records indicating the places declared as National Key Points or Complexes, the Minister invoked section 45(b) of PAIA as an additional ground of refusal. This provides:

"45. The information officer of a public body may refuse a request for access to a record of the body if –

..

(b) the work involved in processing the request would substantially and unreasonably divert the resources of the public body."

49 The Minister reasoned that disclosure of the places or areas declared as National Key Points would impose unreasonable demands on the SAPS in that –

"[T]he majority of these places or areas is not government owned and therefore there are [sic] personal information (i.e. the name of the place

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or area qualifies as 'the address of the individual' or that he or she is the owner of such place or area) of numerous third parties involved in the request. The fact that a place or area is the property of a certain person qualifies as personal information of such person.

. . . In order for the Service to adhere to the provisions of section 47 of the Act (ie the work involved in processing and notifying third parties of the request of access to a record contemplated in section 34(1) of the Act, and afford them 21 days to grant or refuse such access with reasons), will substantially and unreasonably divert the resources of the Service." (Annexure "CMK12", paragraph 6)

50 I deny that the Minister's reliance on s 45(b) is valid for at least three reasons.

51 First, I deny that affording notice to the third party owners of the private properties declared National Key Points would "substantially and unreasonably divert the resources of the Services". The SAPS has a designated information officer to attend to the requisite PAIA notices; there can be no question of "diverting" the resources of the Service. Further, and in any event, I deny that the number of the private places declared as National Key Points is such as would require a diversion of any resources – let alone substantial resources – from the SAPS.

52 I invite the respondents to indicate in their answer precisely how many of the 200 National Key Points are owned by private bodies, as opposed to departments and organs of state.

53 Second, I deny that the applicants' request for records "*indicating any place or area declared as a National Key Point or Complex*" requires the disclosure of personal information of the owner, including "the address of the individual".

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The applicants do not seek the disclosure of the location or addresses of the National Key Points; they require only information that identifies those places or areas. Plainly, the identity of the places declared National Key Points can be disclosed without disclosure of their addresses or precise location. As a hypothetical example, should former President Mbeki's residence be designated as a National Key Point, an adequate response to the applicants' request would be "The residence of former President Mbeki in Johannesburg".

- 54 The respondents' contention that disclosure of the requested records requires the disclosure of addresses demonstrates that the respondents have misunderstood the nature of the applicants' PAIA request, and have not applied their minds to the disclosure of the records actually sought.
- 55 Third, even if the addresses of the National Key Points situated on private property were disclosed, I deny that the disclosure of the addresses alone – and without any indication of who the third party owner is – would constitute disclosure of "personal information" as contemplated under section 1 of PAIA. It is only when an address is associated with the individual concerned, that it could reasonably be described as "personal information". This is made clear in the definition of "personal information" under section 1 of PAIA, which states that:

"Personal information means information about an identifiable individual, including but not limited to –

...

(d) the address . . . of the individual". (Emphasis added.)

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- 56 In his explanation, the Minister again appears to misconceive the nature of the applicants' request for information. The Minister explains that, "*The fact that a place or area is the property of a certain person qualifies as personal information of such person*". However, the applicants did not request disclosure of any facts pertaining to ownership of the places or areas declared as National Key Points. They only sought disclosure of which places or areas have been declared National Key Points or Complexes.
- 57 For all these reasons, the Minister's reliance on section 45(b) of PAIA to refuse disclosure of the requested records is unfounded and unlawful.

Refusal to disclose the requested bank statements

- 58 In response to the applicants' request for certain bank statements of the Special Account, I note that the respondents do not aver that such an account does not exist, nor do they aver that the bank statements are not in their possession.

58.1 The Information Officer did not address this part of the request at all in her email advising the applicants of the refusal of their request (Annexure "CMK9");

58.2 In the decision on appeal, the Minister stated only that the SAPS does not have or use such an account. I refer the Court to paragraph 11 of Annexure "CMK12" in this regard.

- 59 The applicants point out that the Special Account is established by operation of law under section 3B, which reads as follows:

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"3B Special Account for the Safeguarding of National Key Points

- (1) *There is hereby established an account to be known as the Special Account for the Safeguarding of National Key Points (hereinafter referred to as the account), into which shall be paid-*
 - (a) *moneys appropriated by Parliament for the account;*
 - (b) *moneys appropriated by Parliament by an Appropriation Act or any other Act for the requirements of a State department and which the Minister who administers that department, with the concurrence of the Minister of Finance directs to be utilized for the security of a particular Key Point or Key Points Complex;*
 - (c) *moneys recovered or received from the owner of a Key Point in terms of this Act;*
 - (d) *moneys received by way of a refund of expenditure incurred on the account;*
 - (e) *interest derived from the investment of moneys standing to the credit of the account; and*
 - (f) *moneys which accrue to the account from any other source;*
- (2) *The moneys in the account shall be utilised to-*
 - (a) *render at the discretion of and on the conditions determined by the Minister financial assistance, including loans at the interest rate contemplated in section 26 of the Exchequer and Audit Act, 1975 (Act 66 of 1975), to an owner in connection with steps taken or to be taken by such owner in respect of the security of a Key Point in terms of this Act;*
 - (b) *take or cause to be taken the steps contemplated in sections 3 (3) (b), 3 (5) (b) and 3A; and*
 - (c) *defray expenditure in connection with the safeguarding of Key Points.*
- (3) *Notwithstanding anything to the contrary in any other law contained, the Minister, with the concurrence of the Minister of Finance, shall designate a person in the service of the State who shall be deemed to be the accounting officer for the account for the purposes of section 15 of the Exchequer and Audit Act, 1975 (Act 66 of 1975).*
- (4) *A bank account shall be kept for the account at the South African Reserve Bank.*
- (5) *Moneys standing to the credit of the account which are not required for immediate use or as a reasonable working balance,*



may be invested in such manner as the Minister may determine with the concurrence of the Minister of Finance.

- (6) *Any unexpended balance in the account at the close of any financial year, including accrued interest on investment balances and other receipts, shall be carried forward as a credit in the account to the following financial year.*
- (7) *The account shall be audited by the Auditor-General."*

60 The applicants invite the respondents to indicate whether they are indeed in possession and control of the requested bank statements. If not, the applicants invite the respondents to advise them as to which public body has possession and/or control of the bank statements.

61 The applicants emphasise that under section 20 of PAIA, the information officer of a public body is obliged to transfer a request for access to a record which is not in the possession or control of that public body to another public body whose functions are more closely connected to the subject-matter of the record, alternatively to the public body by or for which the record was created or first received.

62 The respondents have failed to comply with this obligation in addressing the applicants' request for the bank statements of the Special Account. Their refusal of these records is accordingly unlawful.

THE PUBLIC INTEREST OVERRIDE UNDER SECTION 46 OF PAIA

63 Section 46 of PAIA provides for the mandatory disclosure of records by a public body in the public interest. It stipulates that:

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“Despite any other provision of this Chapter, the information officer of a public body must grant a request for access to a record of the body contemplated in section 34(1), . . . 38(a) or (b) . . . or 45, if –

- (a) the disclosure of the record would reveal evidence of –*
 - (i) a substantial contravention of, or failure to comply with, the law; or*
 - (ii) an imminent and serious public safety or environmental risk; and*
- (b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question.”*

64 In the first place, I point out that there is no evidence that the respondents weighed the harm contemplated under section 38 or the prejudice under section 45 of PAIA against the public interest in disclosure, as they were obliged to do under section 46 of PAIA. On this ground alone, their refusal to disclose the requested records falls to be set aside.

65 Further, the applicants contend that the disclosure of the requested records is required in the public interest as the disclosure of the record is necessary to reveal evidence of a substantial contravention of, or failure to comply with, the law, which public interest outweighs the harm contemplated in section 38(a), 38(b)(i)(aa) and s 45(b). In particular, the disclosure of the requested records is required to determine:

65.1 Whether the Minister has abused his discretion in declaring places or areas National Key Points or Complexes under sections 2 and 2A of the National Key Points Act;

65.2 Whether there has been compliance with the financial obligations that the National Key Points Act imposes on the Minister and the private


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owners of places or areas declared National Key Points or Complexes. Sections 3 and 3A require owners of National Key Points to take certain security measures at their own cost, alternatively for the Minister to take the necessary steps and thereafter recover the costs from the owner; and

- 65.3 Whether members of the SAPS and/or government officials have unlawfully invoked the National Key Points Act in respect of premises falsely alleged to be National Key Points in order to conceal or justify unlawful conduct on their part.
- 66 For the sake of convenience, I reproduce the provisions of sections 3 and 3A in full:

"3 Duties of owner in relation to Key Point or Key Points Complex

- (1) *On receipt of a notice mentioned in section 2 (2), the owner of the National Key Point concerned shall after consultation with the Minister at his own expense take steps to the satisfaction of the Minister in respect of the security of the said Key Point.*
- (2) *If the said owner fails to take the said steps, the Minister may by written notice order him to take, within a period specified in the notice and at his own expense, such steps in respect of the security of the said Key Point as may be specified in the notice.*
- (3) (a) *If the said owner without reasonable cause refuses or fails to take the steps specified in the said notice within the period specified therein he shall be guilty of an offence and liable on conviction to a fine not exceeding R20 000 or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.*
- (b) *If the said owner refuses or fails to take the steps specified in the said notice within the period specified therein, the Minister may take or cause to be taken the said steps irrespective of whether the refusal or failure took place with or without reasonable cause and irrespective of whether the owner was charged or convicted in connection with that refusal or failure, and the Minister may recover the cost thereof from that owner to such extent as the Minister may determine.*

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- (4) (a) *The Minister may after consultation with the owners of Key Points included in a Key Points Complex order them by written notice to take, within a period specified in the notice and at their expense, such joint steps in respect of the security of that Key Points Complex as may be specified in the notice, and to determine within a period specified in the notice on the proportion in which each shall be responsible for the cost thereof.*
- (b) *If the owners are unable to determine within the period specified the said proportion, the Minister may determine that proportion.*
- (5) *If an owner referred to in subsection (4) without reasonable cause refuses or fails to take the steps for which he is responsible within the period specified in the notice, or delays, frustrates or renders them impossible, irrespective of whether any other owner with or without reasonable cause refuses or fails to take the steps for which he is responsible within the period concerned, or delays, frustrates or renders them impossible-*
- (a) *the first-mentioned owner shall be guilty of an offence and liable on conviction to a fine not exceeding R20 000 or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment;*
- (b) *the Minister may take or cause to be taken those steps, as well as the steps which any other owner was unable to take as a result of the first-mentioned owner's refusal or failure to take the said steps, irrespective of whether the owner has been charged or convicted in connection with that refusal or failure, and the Minister may recover the cost of those steps from all the owners on whose behalf they were taken in the proportion in which they were responsible for the cost or to such extent as he may determine.*
- (6) *The Minister may at any time amend any period or steps in terms of a notice under this section, and the owner or owners concerned shall forthwith be notified thereof by written notice.*

3A Power of Minister to take over duties of owners

- (1) *The Minister may at any time, on behalf of and with the consent of the owner of a National Key Point or the owners of National Key Points included in a National Key Points Complex, take or cause to be taken any or all of the steps which in his opinion are or may become necessary in respect of the security of that Key Point or Key Points Complex, and the owner or owners shall be liable for the cost thereof to such extent as the Minister may determine.*
- (2) *When the Minister takes or causes to be taken steps under subsection (1) of this section or section 3 (3) (b) or 3 (5) (b), he may take over the obligations of the owner or owners concerned arising from any contract or contracts with a third party or third parties, with the consent of that third party or those third parties, if*



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in the opinion of the Minister the fulfilment of the contract or contracts will contribute to the security of the Key Point or Key Points Complex concerned."

67 The contents of the records sought are of profound public interest and importance, as they concern:

67.1 The exercise of Ministerial discretion that has the effect of restricting various activities – including media reportage and political protest – and imposing obligations upon private persons at the threat of criminal sanction; and

67.2 The propriety and priority of public spending in a country with limited funds to meet the considerable demands of a developing economy.

68 The manifest public interest in the contents of the records is heightened by the fact that the non-disclosure of National Key Points has generated, and continues to generate widespread speculation that:

68.1 The Minister of Defence has abused her powers to declare certain places and areas National Key Points or Complexes; and

68.2 There has been public spending on places declared to be National Key Points that is in contravention of sections 3 and 3A of the National Key Points Act.

69 This has harmed, and continues to harm, public confidence in the state and in the members of Cabinet.

70 The magnitude of the public concern relating to the identity and public

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expenditure on National Key Points is reflected in news reports on the President's Nkandla Estate, as well as the investigations by the national Department of Public Works and the Public Protector into the public expenditure on "security upgrades" at the Nkandla Estate. I attach hereto a selection of the media reports marked "CMK15", which address the status of Nkandla Estate as a National Key Point; the restrictions that this designation has imposed on the media and political activity in respect of Nkandla Estate; and the allegations of the misappropriation of public funds for expenditure on (amongst other things) security upgrading at Nkandla Estate. Specifically, the following articles are attached:

- 70.1 **'Zuma's costly home expansion', *The Witness*, 10 July 2010:** This article cites the spokesperson for the national Public Works Department invoking the National Key Points Act to refuse to answer any questions pertaining to the escalating costs, at tax-payer expense, of the expansion of President Zuma's Nkandla estate from an estimated R56 million to R200 million.
- 70.2 **'Security law: State wields apartheid's big stick', *Mail & Guardian*, 16 November 2012:** This article (written by members of R2K) explains that the Government's reliance on the National Key Points Act in response to public queries over state expenditure at Nkandla Estate is part of a pattern of reliance on the Act by public officials to conceal public expenditure on presidential residences and to restrict political protest.
- 70.3 **'Zuma's Nkandla declared a national keypoint' *Independent Online news*, 27 January 2013:** This article reports a public statement


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by Minister of Public Works, Thulas Nxesi that government spent a total of R206 million on security upgrades, operational improvements and consultants for President Zuma's Nkandla Estate, with R71 million allocated to actual security upgrades and security consultants. The article also reports that irregularities were uncovered in an investigation conducted by the Department of Public Works into the upgrade of Nkandla Estate, relating to the appointment of the 15 service providers and consultants that worked on the project. It also records the Department of Public Works' refusal to disclose its report to the public on the basis that "*security features at national key points were protected in terms of the National Key Points Act*".

70.4 **'National Key Points Act a repressive relic', *Independent Online news*, 22 February 2013:** This article reports on the concerns expressed by leading politicians, including Deputy Public Works Minister Jeremy Cronin and Democratic Alliance parliamentary leader, Lindiwe Mazibuko, and the debates in the National Assembly, over the Government's reliance on the National Key Points Act to withhold information on expenditure at President Zuma's Nkandla Estate.

70.5 **'The trouble with South Africa's national key points', *ISS Today*, 12 June 2013:** This news report from the Institute of Security Studies explains the public interest in the disclosure of National Key Points to prevent the abuse of public funds. It further describes the protracted legislative process of amending the National Key Points Act, which commenced in 2007 but is yet to be completed.

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71 In addition, I attach the following three news articles as Annexure "CMK16", which demonstrate that there has been excessive and improper reliance on the National Key Points Act by public officials beyond the case of Nkandla:

71.1 "Cape refugees arrested", *Independent Online news*, 5 August 2008;

71.2 "Xstrata miners arrested", *Independent Online news*, 15 November 2012; and

71.3 "Prison officials cannot destroy evidence", *Eye Witness News*, 21 January 2013.

72 The first two articles describe two alleged instances of reliance by members of the SAPS on the National Key Points Act to arrest persons for gathering and protesting outside public buildings. The third article describes how the Chair of the Parliamentary Portfolio Committee on Correctional Services invoked the Act in January 2013 to justify the destruction of photographic evidence of prison-warders assaulting a prisoner at Groenpunt Prison.

73 The above news reports plainly demonstrate the public interest in the disclosure of the national key points as an essential step in revealing evidence of serious unlawful conduct, and in stemming the abuse of public power and public funds in the name of national security.

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The Court's discretion to examine the record under section 80 of PAIA

74 I point out that the Court has the power to examine the requested records, without disclosure to the applicants, in order to determine whether the respondents have discharged the statutory burden imposed upon them by section 81(3) of PAIA to establish that their refusal of the request for access complied with the provisions of PAIA.

75 I am advised that the Court will exercise this discretion sparingly when it is in the interests of justice to do so – specifically, where the Court is lacking the material necessary to responsibly determine whether the record falls within the exemptions claimed. I am further advised that this approach was adopted by the North Gauteng High Court, Pretoria in *Mail & Guardian v The President of the Republic of South Africa and Others (1242/09) [2013] ZAGPPHC 35 (14 February 2013)*, after the Constitutional Court remitted the matter to the High Court with an instruction that it examine the record in terms of section 80 of PAIA (*President of the Republic of South Africa and Others v Mail & Guardian Media Ltd 2012 (2) SA 50 (CC)*).

76 I respectfully submit that this Honourable Court has sufficient evidence to responsibly decide that, on the probabilities, the records requested by the applicants are not protected under sections 38(a), 38(b)(i)(aa) or 45(b).

77 However, if there is any doubt on this score, I submit that it would be appropriate for the Court to take a judicial peek at these records to determine whether the respondents' refusal to grant access thereto is justified. In particular, it would be appropriate for this Court to exercise this discretion to

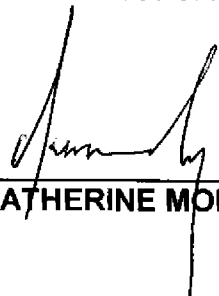
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determine whether the respondents' blanket refusal of the request is justified, or whether there are parts of the requested records that are not protected and which can reasonably be severed and disclosed under section 28 of PAIA.

78 I submit that there is no reason why the respondents should not tender to make the records available to this Honourable Court under section 80 of PAIA, should the Court deem this appropriate.

CONCLUSION

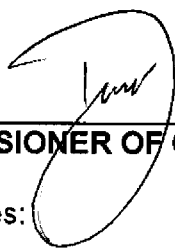
79 In the premises, I pray for an order in terms of the Notice of Motion.



 CATHERINE MOIRA KENNEDY

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of her knowledge both true and correct. This affidavit was signed and sworn to before me at *Braamfontein* on this the *02* day of *September* 2013, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended, have been complied with.





 COMMISSIONER OF OATHS
 Full names:
 Address:
 Capacity:

Delano Louw

 KOMMISSARIS VAN EDE
 COMMISSIONER OF OATHS EX OFFICIO

 AMP/RANK *Snr Registrar's Clerk*

 CONSTITUTIONAL COURT (KONSTITUSIONELE HOF S.A.)
 1 HOSPITAL STREET
 CONSTITUTIONAL HILL
 BRAAMFONTEIN 2017

**IN THE SOUTH GAUTENG HIGH COURT OF SOUTH AFRICA
(HELD IN JOHANNESBURG)**

CASE NO:

In the application of:

THE RIGHT2KNOW CAMPAIGN First Applicant

THE SOUTH AFRICAN HISTORY ARCHIVE TRUST Second Applicant

And

THE MINISTER OF POLICE First Respondent

**THE NATIONAL DEPUTY INFORMATION
OFFICER: SOUTH AFRICAN POLICE SERVICE** Second Respondent

**THE MINISTER OF DEFENCE AND MILITARY
VETERANS** Third Respondent

CONFIRMATORY AFFIDAVIT

I, the undersigned,

MURRAY HUNTER

do hereby make oath and state the following:

- 1 I am an adult male and a member of the National Working Group of The Right2Know Campaign ("R2K"), the national head office of which is situated at 107 Community House, 41 Salt River Road, Salt River, Cape Town.


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- 2 I am duly authorised to depose to this affidavit on behalf of R2K. I refer the Court to the Minutes of the R2K National Working Group's meeting of 19 July 2013, attached to the founding affidavit of Catherine Moira Kennedy as annexure "CMK2".
- 3 The facts contained herein are, to the best of my knowledge, true and correct. Unless otherwise stated or indicated by the context, they are within my personal knowledge.
- 4 I confirm the contents of the affidavit of Catherine Moira Kennedy insofar as it relates to R2K.
- 5 On behalf of the first applicant, I pray that relief be granted as set out in the notice of motion to which this affidavit is attached.



 MURRAY HUNTER

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of her knowledge both true and correct. This affidavit was signed and sworn to before me at *CAPE TOWN* on this the ^{2ND} day of *SEPTEMBER* 2013, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended, have been complied with.



 COMMISSIONER OF OATHS

STEVEN ADAMS
 Commissioner of Oaths
 Practising Attorney, R.S.A.
 22 Bree Street, Cape Town

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 Address: *22 BREE STREET CAPE TOWN*
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