



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO. D8171/2019

In the matter between:

VISHAM PANDAY

Applicant

and

**UNIVERSITY OF KWAZULU-NATAL
THE INFORMATION OFFICER:**

First Respondent

UNIVERSITY OF KWAZULU-NATAL

Second Respondent

THE VICE-CHANCELLOR AND PRINCIPAL:

UNIVERSITY OF KWAZULU-NATAL

Third Respondent

This judgment was handed down electronically by circulation to the parties' representatives by email, and released to SAFLII. The date and time for hand down is deemed to be 09h30 on 8 January 2021.

ORDER

The following order is made:

(a) The first and second respondents are hereby ordered, within 30 days of the service of this order upon them, to furnish to the applicant, care of Vasu Naidoo Attorneys (vasunaidooattorneys@gmail.com), the following information:

- (i) the period for which a safe house and the provision of bodyguards has been provided by the first respondent to Ms Avril Sahadew;
 - (ii) the total costs to date in the provision of the safe house and protection services in (i) above;
 - (iii) any documentation, including invoices, representing the costs incurred by first respondent to date in the provision of a safe house and protection services in (i) above, with necessary redaction to withhold the location of the safe house and the identity of the protection personnel assigned to Ms Avril Sahadew;
 - (iv) the total costs incurred by the first respondent to date in the course of conducting its internal investigation into the illegal offering of placements at the Nelson R Mandela School of Medicine, known as 'Operation Clever'.
- (b) The respondents are directed, jointly and severally, to pay the applicant's costs, the one paying the other to be absolved.

JUDGMENT

Chetty J

[1] The applicant is a businessman resident in Durban and the founder and sole member of an organisation called VP Justice Foundation, which is described as a non-profit organisation dedicated to exposing corruption and seeking out truth and justice. Despite its noble objectives, the applicant has not produced a certificate of registration of the organisation in terms of the Nonprofit Organisations Act 71 of 1997 nor a founding statement of its objectives. In as much as he is the 'sole proprietor' of the organisation, it appears to me that this organisation is the alter ego of the applicant. Nothing however turns on the nature of the organisation or any defects in its purported existence, as the application has been brought by the applicant in his personal capacity and not by the organisation.

[2] The nature of this application stems from a request made by the applicant in terms of the Promotion of Access to Information Act 2 of 2000 ('the Act'). According to him, in April 2018 he became aware of corruption at the university where placements at the Nelson R Mandela School of Medicine were being offered in exchange for bribes. He also claimed to know of the identity of one such person, now a medical practitioner, who secured his placement through such corrupt means. Instead of referring the matter to the police or lodging a criminal complainant, he decided to conduct his own investigation resulting in him liaising with Ms Avril Sahadew, a forensic audit specialist employed by the university who had led the investigation since 2016 into the very same allegations which became the focus of the applicant's concern. According to the university, Ms Sahadew's investigations unearthed certain irregularities which were referred to the police's Directorate for Priority Crimes Investigations. Despite their name, the investigations have dragged on for almost four years without any persons involved being criminally prosecuted or convicted. These investigations are still ongoing, and for reasons not quite apparent, are considered 'sensitive and confidential'. One would have assumed that in the interests of rooting out corruption, which appears to permeate almost every facet of our society, the university would have no hesitation in exposing those involved in the corruption, if for no other reason than to ensure the integrity of the institution and to assure candidates who apply to study at the medical school that their applications are considered on merit alone.

[3] Not to be unfair to the university, they have pursuant to the investigations suspended 21 employees, leading to resignations, disciplinary enquiries and dismissals. A similar fate awaits a further 10 employees. These are all internal procedures. The one individual, Mr R Dayanand, whom the applicant flagged as having benefitted through this corrupt scheme, has however been exonerated by the university in their internal investigation. I point out that in the answering affidavit, the university states that 'it has been confirmed that Dayanand did not qualify as a medical practitioner from the first respondent'. That ought to have been the end of the matter. However, in a supplementary affidavit by the university, it emerges that both the priority crimes section of the police services (the Hawks) and the National Prosecuting Authority are still continuing with their investigation into Mr Dayanand. The university does not explain whether its investigation into Mr Dayanand was

flawed or whether further evidence has since come to light. What is clear is that Mr Dayanand is still a person of interest in the eyes of the State.

[4] The specific details of other individuals involved have not been made public. In its supplementary affidavit, the university discloses that a second set of investigators and a third set of prosecutors have since been assigned to the matter. What led to this is not evident from the papers.

[5] Despite me allowing the introduction of a supplementary affidavit by the university, which was intended to provide an update on the recent progress in the investigations, there is no clear explanation why an investigation, which the university's legal advisor describes as 'serious and high profile', has taken an inordinate time to complete let alone lead to a prosecution, despite it spanning a period of four years.

[6] In pursuing his objective of uncovering allegations of corruption, the applicant appears to have exceeded the bounds of reasonable and legitimate conduct with Ms Sahadew and is alleged to have made defamatory statements towards the university's employees in the process. As a result, the university instituted legal proceedings to interdict the applicant from threatening or abusing its employees. Although the applicant agreed to an interim restraining order which remains in place, the application is yet to be finalised although it was set down to be heard on 26 February 2020. It is not known why the matter was not finalised on that date, although in reality, this application seems to have overtaken the finalisation of the interdict proceedings.

[7] Not satisfied that his efforts to obtain information from the university were met with an interdict, the applicant resorted to an application for 'information' in in terms of regulation 10¹ read with section 53(1) of the Act, submitted via his attorney on 20 May 2019. The application was brought by the applicant asserting his right of access to information for 'public benefit'. As to the particulars of the record to which access was sought, the applicant provided the following in section D of the relevant form:

¹ Regulations regarding the Promotion of Access to Information, GN R187, GG 23119, 15 February 2002.

- (a) Documentary proof of the investigation into Mr Reshal Dayanand;
- (b) Documentary proof of the cost to the University of KwaZulu-Natal in respect of bodyguards for Ms Avril Sahadew;
- (c) Documentary proof of the costs in providing a 'safe house' for Ms Avril Sahadew and her family;
- (d) Copies of the report by Colonel Moloi with regard to the arrest of the perpetrators identified in 'Operation Clever'.

In addition to the above, the applicant also sought financial statements in respect of the costs of Operation Clever from inception to the date of the request. This request for information was withdrawn by the applicant after he ascertained that the university was in fact a public body and not a private body as contemplated in the Act.²

[8] In July 2019, through his attorney, the applicant delivered a second request for information to the university, having complied with all the procedural formalities contemplated in the Act. The applicant described his request for a record in the following terms :

- '(a) my client is aware that there has been an ongoing internal investigation (referred to as Operation Clever) by the University of KwaZulu-Natal into allegations that one Reshal Dayanand had fraudulently been awarded a medical degree and that on the strength of that degree he practised as a medical doctor. My client seeks to be furnished with the following in this regard:
 - (i) what is the outcome of the aforesaid internal investigation?
 - (ii) If the outcome of the investigation is contained in a written report, my client requests to be furnished a copy of such report;
 - (iii) my client is aware that an employee of the University of KwaZulu-Natal, Avril Sahadew, has been taking part in the aforesaid investigations and that she and her immediate family have been provided with a safe house. My client requires to be informed for how long a period has the safe house been so provided and

² Our courts have considered different tests to establish whether a body is public or private. See *Mittalsteel South Africa Ltd (Formerly Iscor Ltd) v Hlatshwayo* 2007 (1) SA 66 (SCA) and *M&G Media Ltd & others v 2010 FIFA World Cup Organising Committee South Africa Ltd & another* 2011 (5) SA 163 (GSJ). In *Khadi v University of Venda & others* [2015] JOL 32942 (LT) the court found that the university was a public body.

what are the total costs involved. My client seeks to be provided with documentary proof reflecting the total costs of providing the safe house to the said Sahadew.

- (iv) My client is aware that the University of KwaZulu-Natal has been providing bodyguards for the protection of the said Avril Sahadew. My client seeks to be informed as to the total cost thus far of providing the said bodyguards and that documentary proof be provided reflecting the said expenditure.
- (v) My client wishes to be furnished with the total cost of conducting Operation Clever from inception to date hereof, such to be accommodated by financial statements or similar documentation that reflect the said total costs.'

[9] In response, the university's attorneys, for reasons that are not quite apparent nor advanced by counsel during the course of argument, denied that the university was a public body and refused to supply the records requested, relying on sections 36-38, 40, 44(1)(a), 44(2) and 45 of the Act. The refusal prompted the launching of this application in which the applicant contends that the information sought from the university does not constitute commercial or confidential information, does not infringe or impede the safety of individuals and is not protected by any form of legal privilege.

[10] In opposing the request for information, the university contends that the applicant has failed to show a connection to the first respondent in that he is neither a student nor a staff member, has no immediate family who are students or members of the university staff and has accordingly not shown a legal basis for his claim to the information sought. Furthermore, even if such right was established, the university contends that the information sought is highly confidential, sensitive and he has failed to show that he requires the information in order to defend or assert a lawful right. In any event, the university contends that a disclosure of such information will compromise its ongoing investigation and place the persons involved in those investigations at risk. In light of its prior history with the applicant and the interdict proceedings referred to earlier, it regards his motives as being opportunistic and doubts his *bona fides*. It also contended that complying with the request would entail a diversion of substantial resources. I will deal with each of the grounds below. It is also necessary to point out that the applicant, in his replying affidavit, sought to

place much more information before the court in substantiation of his request, when compared to his rather skeletal founding affidavit. It is well established that a party cannot seek to make out a case in reply, and the applicant must stand or fall by the averments set out in his founding affidavit.

[11] In dealing with the contention that the applicant does not establish a right to the information sought, it is correctly pointed out that he provides no factual history of his affiliation to the university or the purpose for which he requires the information. I am not persuaded by the university's refusal based on its prior interaction with the applicant that it doubts his motives for seeking the information. I agree that he is not a member of the South African Police Services and has no lawful grounds to conduct investigations or to demand information from third parties, nor has he been delegated any authority by the university to conduct such an investigation. To the extent that the applicant himself has garnered certain information into the corrupt practice of awarding of placements to students at the medical school, he would be obliged to bring such irregularities to the attention of the police. The contention of the applicant is that this matter has been referred to the police to investigate as a 'priority crime'. Despite a passage of four years, there has not been a single arrest or prosecution. While I agree that the applicant cannot don the mantle of a lawfully appointed corruption buster, as a private citizen he nonetheless is entitled to hold the view that little or nothing appears to be done to prosecute those involved in the scandal. The lack of accountability and non-responsiveness by public institutions, when called upon to act, sows seeds of doubt and suspicion in the minds of ordinary, right thinking members of society. It is in this context that this court must determine whether the university was justified in refusing to furnish the applicant with the records and information sought in terms of the Act.

[12] Despite maintaining the position that it is not a 'public body' as defined in the Act, the university does not dispute that it is a public body for the purposes of this application. In light of that concession, it is not necessary for the applicant to demonstrate that the information or records he has requested are sought for the purposes of exercising or protecting a right. The only basis on which the applicant's request for information may be refused is if a valid ground of refusal is advanced.

Section 11(1) of the Act sets out the requirements for a right of access to public records:

'A requester must be given access to a record of a public body if —

- (a) that requester complies with all the procedural requirements in this Act relating to a request for access to that record; and
- (b) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part.'

[13] In this regard, the court in *De Lange & another v Eskom Holdings Ltd & others*³ stated:

'... For public bodies, which include Eskom, the requester does not need to explain why it seeks the information, let alone why it requires it for the exercise of its rights. In terms of s 11(1) of PAIA a requester of information is entitled to the information requested from a public body as long as it has complied with the procedural requirements set in that Act and *as long as none of the grounds of refusal are applicable*. Those grounds of refusal are set out in Ch 4 of Part 2 of the Act.

[35] Consequently the importance of access to information held by the State or public or State entity as a means to secure accountability and transparency justifies the approach adopted in s 32(1)(a) of the Bill of Rights and in PAIA, namely that, unless one of the specially enumerated grounds of refusal obtains, citizens are entitled to information held by the State or public entity as a matter of right. This is so regardless of the reasons for which access is sought and regardless of what the organ of State believes those reasons to be.'

[14] The court in *M&G Media Ltd & others v 2010 FIFA World Cup Organising Committee South Africa Ltd & another*⁴ explained the importance of distinguishing between a public body and a private body:

'[145] Following the dualistic scheme in s 32(1)(a) and (b) of the Constitution, PAIA provides that if access is sought to a record held by a public body, access must be provided as a matter of right, unless a valid ground of refusal is advanced.

[146] By contrast, if access is sought to a record held by a *private* body, the requester must establish that he or she requires access to the record in order to exercise or protect a right. Once this has been shown, the requester has a right of access to the records, which may be defeated by a valid ground of refusal.

³ *De Lange & another v Eskom Holdings Ltd & others* 2012 (1) SA 280 (GSJ) paras 34-35.

⁴ *M&G Media Ltd & others v 2010 FIFA World Cup Organising Committee South Africa Ltd & another* 2011 (5) SA 163 (GSJ) paras 145-147.

[147] In any given case it is therefore critical to establish whether the records to which access is sought are held by a public or a private body.’ (Footnotes omitted.)

[15] In *Competition Commission of South Africa v Standard Bank of South Africa Limited*⁵ the Constitutional Court traced the history and importance of the provisions of the Act:

‘[10] Against the backdrop of secrecy that epitomised the apartheid state, section 32 of the Constitution constitutes an essential element of the constitutional guarantee of an open and democratic society which requires that the exercise of public power be transparent and justified. The preamble to PAIA notes:

“[T]he 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.”

[11] In *Brümmer*, this Court noted, in respect of the right to access information, that:

“The importance of this right [in section 32], in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the State. Indeed one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency ‘must be fostered by providing the public with timely, accessible and accurate information’.”

[12] In contrast to its predecessor in the interim Constitution, the ambit of the right of access to information held by the State in section 32(1)(a) is wide. Section 32(1)(a) provides that everyone has the right of access to *any* information held by the State. Unlike the section 32(1)(b) right to access information held by private parties, there is no stipulation in section 32(1)(a) that the information held by the State be “required for the exercise or protection of any rights.” The right in section 32(1)(a) can only be limited in terms of section 36 of the Constitution.

[13] PAIA, as the legislation envisaged in section 32(2) of the Constitution, was passed to give effect to the rights in section 32(1). It provides that if the body in question is public, then an applicant need not show that the record sought is required for the exercise or protection of any right. If the procedural requirements in PAIA are complied with, the request must be granted unless the public body refuses access to the record in terms of a valid ground of refusal contemplated in Chapter 4 of PAIA. In addition, PAIA provides that a requester’s right

⁵ *Competition Commission of South Africa v Standard Bank of South Africa Limited* [2020] 2 ZACC; 2020 JDR 0685 (CC) paras 10-13.

of access to information held by a public body is not affected by any reasons given by or imputed to the requestor for the request. As this Court recently held in *Helen Suzman*:

“PAIA affords any person the right of access to any information held by the State. The person seeking the information need not give any explanation whatsoever as to why [they] require the information. The person could be the classic busybody who wants access to information held by the State for the sake of it.” (My emphasis, and footnotes omitted.)

[16] The opposition of the university to furnishing the applicant with the information based on their distrust of the applicant; that he is not a member of the SAPS; that he has failed to establish the purpose for which he requires the information, and whether he needs it in order to exercise any right, are irrelevant. As the Constitutional Court pointed out, even the proverbial ‘busybody’ would be entitled to information held by the State. The enquiry must therefore be whether the remaining grounds of refusal are proper in terms of the Act. The scope of enquiry was considered in *Transnet Ltd & another v SA Metal Machinery Co (Pty) Ltd*⁶ where the SCA held:

‘. . . It contended that in an application under s 78 the relevant material on which a court had to make its decision was limited to such material as was before the information officer when access was refused. That cannot be right. A court application under the Act is not the kind of limited review provided for, for example under the Promotion of Administrative Justice Act 3 of 2000. It is much more extensive. It is a civil proceeding like any motion matter, in the course of which both sides (and the third party, if appropriate) are at liberty to present evidence to support their respective cases for access and refusal. As the present matter serves to illustrate, the parties’ respective cases in such an application will no doubt in most instances travel beyond the limited material before the information officer. That conclusion is reinforced by the Legislature’s having catered for the presentation of evidence and the resolution of disputes of fact by reference to an *onus* of proof. . . .’ (Footnotes omitted.)

[17] In *President of the Republic of South Africa & others v M & G Media Ltd*⁷ Ngcobo CJ writing for the majority, said the following about s 81 with regards to the evidential burden:

‘[14] In proceedings under PAIA, a court is not limited to reviewing the decisions of the information officer or the officer who undertook the internal appeal. It decides the claim of

⁶ *Transnet Ltd & another v SA Metal Machinery Co (Pty) Ltd* 2006 (6) SA 285 (SCA) para 24.

⁷ *President of the Republic of South Africa & others v M & G Media Ltd* 2012 (2) SA 50 (CC) paras 14-15.

exemption from disclosure afresh, engaging in a *de novo* reconsideration of the merits. The evidentiary burden borne by the State pursuant to s 81(3) must be discharged, as in any civil proceedings, on a balance of probabilities.

[15] The imposition of the evidentiary burden of showing that a record is exempt from disclosure on the holder of information is understandable. To place the burden of showing that a record is not exempt from disclosure on the requesting party would be manifestly unfair and contrary to the spirit of PAIA read in the light of s 32 of the Constitution. This is because the requester of information has no access to the contents of the record sought and is therefore unable to establish that it is not exempt from disclosure under the Act. By contrast, the holder of information has access to the contents of the record sought and is able to establish whether or not it is protected from disclosure under one or more of the exemptions contained in Ch 4. Hence s 81(3) provides that the evidentiary burden rests with the holder of information and not with the requester.' (Footnotes omitted.)

[18] The applicant's request requires that the university provide details of the outcome of its internal investigation (Operation Clever), a copy of the report as well as details of the duration for which the university's forensic auditor has been relocated to a safe house and documentary proof of the cost thereof. In addition, the applicant seeks the costs of the protection services allocated to the forensic investigator, as well as the overall costs associated with the investigation. In relation to the last two requests, the applicant seeks not only the amounts expended by the university, but also documentary proof in support of such expenditure. I assume that what this would entail copies of invoices from the entity responsible for the provision of the safe house, as well as the company providing the protection services.

[19] The university does not dispute that the investigator, Ms Sahadew, has been provided with a safe house as well as bodyguards because of threats to her safety. On this basis, the university contends that to comply with the request to provide information to the applicant would entail it compromising and prejudicing the safety of the investigator. However, it does not go further to explain why this would be so, and in what respects compliance with the request would expose the investigator to harm, even where the location of the safe house and names of the body guards were to be withheld. In so far as the request to provide a copy of the report of its investigation, the university contends that the provision of such information would cause it to divulge the identities of the persons who are implicated in the

investigation as well as any involvement of possible syndicates. Any information released concerning the costs of the safe house and the costs of the bodyguards would entail compromising the safety of the investigator, as the information sought by the applicant would require the university to divulge the location of the safe house, the service provider, the identity of the bodyguards, any safety features, the number of personnel involved in the provision of the security, all of which militate against compliance with the request for information. To the extent that the investigation is still ongoing (as set out in the supplementary affidavit of the university's legal advisor), the request for information could entail that the university would have to disclose the names of likely suspects. This would jeopardise the prospects of successful criminal prosecutions or internal disciplinary enquiries. In so far as the release of information pertaining to internal disciplinary enquiries, it was submitted that this could entail the disclosure of privileged information, possibly implicating third parties who may be witnesses at such enquiries or in the course of criminal prosecutions. On these grounds, the university contends that the information sought would infringe the protections set out in section 40 of the Act.

[20] In *De Lange v Eskom supra* at paras 118-119, the court stated:

'[118] In cases of this kind the public body bears the burden of proving that secrecy is justified. This burden of proof casts an evidential burden on the public body to allege sufficient facts that will justify the refusal.

[119] As held in the *President of RSA v M&G Media* case in para 15, true disputes of fact will seldom arise because the material facts will generally be within the peculiar knowledge of the public body. However, if a genuine dispute of fact does occur the court must scrutinise the affidavits put up by the public body with particular care ..."

[21] After engaging in a comparative analysis with similar statutes to the Act in the United States, Canada and Australia, Ngcobo CJ in *President of the Republic of South Africa supra*, at para 22-25, said the following:

'[22] It is apparent from this comparative analysis of the standards applied by courts in other jurisdictions with legislation comparable to PAIA that the State may discharge its evidentiary burden *only when it has shown that the record withheld falls within the exemptions claimed*. Exemptions are construed narrowly, and neither the mere *ipse dixit* of the information officer nor his or her recitation of the words of the statute is sufficient to discharge the burden borne by the State. . . .

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

[24] . . . The affidavits for the State must provide sufficient information to bring the record within the exemption claimed. This recognises that access to information held by the State is important to promoting transparent and accountable government, and people's enjoyment of their rights under the Bill of Rights depends on such transparent and accountable government.

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

[22] The university broadly relies on sections 36,⁸ 37, 38, 40 and 44 of the Act to justify its refusal to produce the requested information. These sections deal respectively with the protection of commercial information of a third party (s 36), protection of certain confidential information of a third party (s 37), protection of the safety of individuals (s 38), protection of records privileged from production in legal proceedings (s 40) and protection of operations of public bodies relating inter alia to reports and recommendations for the purposes of taking a decision or performing a duty imposed by law (s 44). In *De Lange & another v Eskom Holdings Ltd & others supra* para 37, the court stated that:

'The grounds of refusal relied on must be understood within the legislative scheme which seeks to balance the rights of the requester to have access to information, and a third party's

⁸ This appears to be an error as the founding affidavit appears to be directed to an opposition in terms of s 34(1) which provides that an 'information officer of a public body must refuse a request for access to a record of the body if its disclosure would involve the unreasonable disclosure of personal information about a third party, including a deceased individual.'

rights to privacy and to protect its commercial interests in a manner which is constitutionally defensible in terms of the limitations clause.'

[23] To the extent that the university relies on section 34⁹ which is aimed at the protection of privacy of a third party who is a natural person in the context of its ongoing investigations and the likely disciplinary enquiries which would entail scrutiny of personnel files and personal information, this section must be read with s 47(1) which provides that:

'The information officer of a public body considering a request for access to a record that might be a record contemplated in section 34 (1), 35 (1), 36 (1), 37 (1) or 43 (1) must take all reasonable steps to inform a third party to whom or which the record relates of the request.'

[24] The facts in this matter are not dissimilar to that in *Centre for Social Accountability v Secretary of Parliament & others*¹⁰ which concerned an application in terms of section 78(2) read with section 82 of the Act, where the Speaker of Parliament refused a request to grant the applicant, an independent body dedicated to ensuring accountability of public resources, access to information. The request pertained to the alleged abuse of the parliamentary travel voucher system which in fact became known as the 'Travelgate' scandal. In considering whether the disclosure of information would amount to an 'unreasonable disclosure of personal information', as contemplated in s 34, the court in para 72 explained this as a 'two-part test':

'It is a two-part test. The first part is that the objector must establish a subjective expectation of privacy. In this regard I venture to suggest that the objector must first establish that the nature of the information is covered by the freedom of identity principle, ie that subjectively viewed it is part of the inner sanctum of the private and personal life of the individual. The second part is that, objectively assessed, society must recognise such expectation as reasonable.'

The court elaborated on this test in para 74:

'... The first step is to ask if the information said to be 'personal' is covered by the principle of freedom of identity. If so, does the individual subjectively harbour a legitimate and reasonable expectation that such information will be protected by the right to privacy? If both

⁹ The respondent incorrectly attributes this ground of opposition to s 36(1) in para 22 of its answering affidavit.

¹⁰ *Centre for Social Accountability v Secretary of Parliament & others* 2011 (5) SA 279 (ECG).

questions are answered in the affirmative, then the enquiry proceeds to the second stage by determining whether or not society has a legitimate and reasonable expectation, objectively, that such information is protectable. If so, then the disclosure of the information will be 'unreasonable' within the meaning of that expression in s 34(1). This is so because personal information which may be reasonably disclosed is not recognised by society as personal, and no longer enjoys the protection of the right to privacy under s 14 of the Constitution. In this sense, such information falls outside the scope of protectable information, notwithstanding that such information may be personal in nature.'

[25] In applying the two-stage test to the facts before it, the court reasoned as follows:

'[77] . . . Does the information contained in the schedules relate to the inner sanctum of privacy of a person covered by the principle of freedom of identity? The answer is 'No'.

[78] The inner sanctum of a person which is shielded from public scrutiny concerns his/her intimate family life, sexual preference, ethnic or social origin, colour, physical or mental health, religion, conscience, belief and culture, and all those other categories mentioned in the definition of 'personal information' under s 1 of PAIA.

[79] It is information about and concerning the person of an 'identifiable individual' as stated in both the definition section and in s 34(2) of the Act. It is, in essence, personal information, protected by the principle of freedom of identity . . . In *Deutschmann NO* supra the court held that the concept of privacy does not extend to a person's business affairs.

[80] The personal life of a member of Parliament, his or her personal preferences and beliefs, how he or she chooses to live his or her personal life, what they do on vacation in the privacy of their holiday homes — even if they travel there on State expense — how they spend their money and how much money they have to spend, all of this is of no concern to the State. It is their business, not that of the State. Such information is covered by the principle of freedom of identity. But how they execute their duties as members of Parliament, under what circumstances they claim payment in respect of travel vouchers, and whether or not they obey the rules of Parliament and act in accordance with the code of conduct which society expects from its members of Parliament — all of this is the business of the State. The State has the right to know, and through the State, the members of society who have elected the members of Parliament in an open and democratic society. The information sought is in relation to claims in respect of travel vouchers issued to members of Parliament in their official capacities as members of a public body. Such information does not concern their private lives and is specifically excluded by s 34(2)(f)(iii).'

[26] In *De Lange v Eskom supra* where a financial journalist requested documents relating to pricing formulas of a transaction which Eskom concluded with another company, the court rejected the refusal and held:

‘[72] . . . It was incumbent on the refuser to lay the basis why it averred that such a disclosure would involve unreasonable disclosure of personal information. In all refusals the holder of the requested information must convince the court why its refusal should be upheld. It must, in its affidavit, furnish cogent grounds why otherwise disclosable data or information should not be disclosed.

. . .

[74] It was submitted on behalf of the respondents that if the particulars of the signatories are disclosed, the latter may be harassed or subjected to public attacks. The above is a bland statement which in my view is not substantiated in any way in the papers.’

[27] In the present matter the applicant is aware of the identity of Ms Sahadew, and her role in the investigation. What he seeks is whether Operation Clever is completed, and if so, the outcome thereof, and a copy of a written report, if one was compiled. The answer to this query is simple. The university states that the investigation is still ongoing, and as such, the request for a written report is, at best, premature. In need not be concerned with any further grounds of refusal. The difficulty with the remainder of the request, in my view, is in relation to details of the safe house and provisions of security protection services to Ms Sahadew.

[28] The university says that to disclose such information will put the life of Ms Sahadew at risk. The applicant appears to recognise this and therefor confines his request for details only to the period for which this safe house has been used and the costs incurred in respect thereof. In so doing, he submits that the university can disclose this information without placing Ms Sahadew or any other persons under protection, at risk. The university relies on s 38 of the Act in refusing to disclose the requested documents. If one has regard to the specific information sought, the applicant requires the duration for which the house has been used, and vouches or documentary proof of such expenses incurred. The request does not entail a disclosure of the identity of any other persons who may be utilising the safe house nor divulging the details of any syndicate involved. As such, there can be no threat to the ongoing investigations being jeopardised. The university, in my view,

misinterprets the request by the applicant. He does not request the disclosure of where the house is located or 'how it is made safe' (whatever that may mean as alleged by the university), nor does he necessarily seek information of the identity of those providing the services, although it does form part of the request. The same can be said of the applicant's request in relation to the bodyguards.

[29] In respect of both the costs of the safe house and the bodyguard protection services, I see no reason why the university cannot provide details of the costs incurred and the duration of the services rendered. To the extent that 'documentary proof' has been sought by the applicant, if this would entail a disclosure of the location of the safe house or the identity of the bodyguards, these details could be redacted. While the university's grounds for refusing to disclose *all* of the information sought have some merit, it has not explained why it cannot redact the sensitive information. In this regard, s 28(1) of the Act provides the following:

'28. Severability.—(1) If a request for access is made to a record of a public body containing information which may or must be refused in terms of any provision of Chapter 4 of this Part, every part of the record which—

(a) does not contain; and

(b) can reasonably be severed from any part that contains,

any such information must, despite any other provision of this Act, be disclosed.'

[30] In *Van der Merwe & another v National Lotteries Board*,¹¹ the court stated:

'... what section 28 of PAIA requires is severance where it is practically reasonable. Severance would be unreasonable if the disclosure of what remains would, *inter alia*, provide clues to the contents of the deleted portions. (Currie and Klaaren *The Promotion of Access to Information Act Commentary* at 91.) The NLB has redacted portions of the minutes apparently in such a way as not to provide such clues, and this ought not to be condemned.' Where the disclosure of information may result in the release of confidential information of third parties, this can be overcome by the university giving prior notice to third parties in terms of section 47 of the Act. The respondents have not explained whether they considered these options.

¹¹ *Van der Merwe and another v National Lotteries Board* [2014] ZAGPPHC 240 para 40.

This process was followed (albeit in a flawed manner) in *Centre for Social Accountability v Secretary of Parliament & others, supra*. However, the court in that matter ultimately found that the provisions of s 34 of the Act were not relevant since there would be 'no unreasonable disclosure of personal information' given that the information disclosed related to the individuals only insofar as their official activities as parliamentarians (and not their personal life) was concerned.

[31] While the university objects to disclosing the name of the entity providing the security services, I can see no reason why this should be refused. For the same reasons, I cannot find any lawful basis for refusing to disclose the costs of Operation Clever to date. The applicant, as stated earlier, need not show a reason for him wanting this information. However, I think that such disclosure would promote the interests of transparency and accountability, especially in times when students are advocating against the escalating costs of fees and where the university by its own admission in these papers, is operating under strained resources. Disclosure of the amounts spent on this investigation to date and service providers procured by the university would serve to refute any suggestion of nepotism or any other criticism on the selection of the service provider and costs incurred. Once those details are provided, not only the applicant but any interested party may be at liberty to draw conclusions as to whether there has been wasteful expenditure or whether the university acted in accordance with sound governance principles. As stated in *De Lange & another v Eskom (supra)*:

'[39] If grounds of refusal do apply it must still be investigated whether the disclosure of the information is required or justified in terms of s 46 of PAIA, ie where it is in the public interest to so make such a disclosure.

[40] Section 46 of PAIA provides as follows:

'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), 36(1), 37(1)(a) or (b), 38(a) or (b), 39(1)(a) or (b), 40, 41(1)(a) or (b), 42(1) or (3), 43(1) or (2), 44(1) or (2) 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.'

See also *Qoboshiyane NO & others v Avusa Publishing Eastern Cape (Pty) Ltd & others*.¹²

‘... Assuming, as I have done for the purposes of this argument, that the grounds advanced by the MEC constituted grounds upon which he was entitled (‘may’) to refuse access, there was nonetheless an obligation on him to weigh the harm that would arise from disclosure against the public interest in disclosure. It does not appear from the record that he undertook that exercise.’

[32] To the extent that the university refuses to disclose the information requested on the grounds that it is ‘privileged from production in legal proceedings’ as contemplated in section 40 of the Act, neither the answering nor supplementary affidavits make any references to legal proceedings presently underway, although there is a reference to disciplinary enquiries and a criminal investigation. Thus far, no prosecutions have been instituted. I am unable to ascertain how the disclosure of the costs of Operation Clever, that of a safe house and of bodyguard protection services can in any way adversely impact on pending disciplinary enquiries or prosecutions. More still, I am not convinced on the facts before me that section 40 can serve as a blanket ban to prevent the applicant from obtaining some or most of the information requested. In *National Director of Public Prosecutions v King*,¹³ the Supreme Court of Appeal discussed the meaning of ‘privilege’:

‘[1] . . . In our law, following English precedent, the general rule is that one is not entitled to see his adversary’s brief. This is referred to as litigation privilege, something different from attorney and client privilege. However, as the Constitutional Court has held in *Shabalala*, a “blanket” docket privilege in criminal cases conflicts with the fair trial guarantee contained in the Bill of Rights. Accordingly, litigation privilege no longer applies to documents in the police docket that are incriminating, exculpatory or *prima facie* likely to be helpful to the defence. This means that an accused is entitled to the content in the docket “relevant” for the exercise or protection of that right. The entitlement is not restricted to statements of witnesses or exhibits but extends to all documents that might be “important for an accused to properly ‘adduce and challenge evidence’ to ensure a fair trial”.

[2] The blanket privilege has not been replaced by a blanket right to every bit of information in the hands of the prosecution. Litigation privilege does still exist, also in criminal cases, albeit in an attenuated form as a result of these limitations Litigation privilege is in essence

¹² *Qoboshiyane NO & others v Avusa Publishing Eastern Cape (Pty) Ltd & others* 2013 (3) SA 315 (SCA) para 14.

¹³ *National Director of Public Prosecutions v King* 2010 (7) BCLR 656 (SCA) paras 1-2.

concerned with what is sometimes called work product and consists of documents that are by their very nature irrelevant because they do not comprise evidence or information relevant to the prosecution or defence.’ (Footnotes omitted.)

[33] Throughout the respondents’ submissions, reliance has been heavily placed on the contention that the applicant has failed to demonstrate a right to the information sought, or a ‘reasonable motive for acquiring it’. In doing so, the respondents failed to recognise that the Act places no such obligation on a requester who requests information from a public body. It was submitted that the request may be refused on grounds that it is manifestly frivolous or vexatious, and that it would take an inordinate amount of time to respond to a request to provide vouchers and invoices. The latter ground has been rejected as a basis for refusal. In *Paruk & Partners v eThekweni Municipality*,¹⁴ the requester sought information from the municipality that concerned the roster system it used for utilizing the services of certain professionals. The applicant requester was no longer receiving work from the municipality. The court commented that:

‘I think it is in the nature of the Act that the persons from whom information is required or the bodies from whom information is required, will always regard such requests as vexatious because it involves a certain degree of work which would not normally be done. But that, it seems to me, is the very object of having information officers who must deal with this kind of information and should not be astute to regard such requests as being unnecessarily diversive.’¹⁵

The court rejected the refusal to provide the information in terms of s 45 of the Act, stating that there is no requirement in the Act that the requester must give reasons to explain why it seeks the information.

[34] In support of his submission that the applicant lacked *bona fides* and that the request was frivolous and vexatious, the respondent’s counsel relied on *Belwana v MEC for Education, Eastern Cape & another*¹⁶ where the court had to consider whether an aggrieved educator who applied for the post of head of department at a school and who was not shortlisted, should be entitled to the minutes of the shortlisting meeting, the scores of panellists and the recommendations made as to

¹⁴ *Paruk & Partners v eThekweni Municipality* [2005] JOL 16287 (D).

¹⁵ *Paruk & Partners* at 3.

¹⁶ *Belwana v MEC for Education, Eastern Cape & another* 2017 (6) SA 182 (ECB).

the filling of posts. In considering whether the request was ‘manifestly frivolous and vexatious’ in terms of s 45 of the Act the court concluded that, because the information sought did not relate to the applicant – because it related to ‘interviews from which she was excluded’,¹⁷ the department was entitled to refuse the request. The court stated that it could find ‘no valid reason why the applicant should be entitled to information regarding a process that she was not a part of’.¹⁸ I do not agree with the reasoning in *Belwana* and find that it raises the bar higher than the Constitutional Court’s proverbial ‘busybody’ referred to by Madlanga J in the majority judgment in *Helen Suzman Foundation v Judicial Service Commission*¹⁹, who may seek the information for no particular reason at all.

[35] In any event, the word ‘frivolous’ has been said to convey something with ‘no serious purpose’ and ‘vexatious’ means causing ‘annoyance or distress’ or taking actions ‘purely to cause trouble or annoyance’.²⁰ The court in *CCII Systems* noted that, read together, the terms ‘frivolous or vexatious’ ‘indicate a desire to prevent misuse of the Act, and abuse of the rights granted by the Act for purposes other than the Act seeks to achieve’.²¹ Despite the university submitting that the applicant is not *bona fide* as he has not shown a connection to the university or demonstrated his purpose for wanting the information, I am not persuaded that he can be denuded of his right to request information from a public body. No case has been made out on the papers of an ulterior purpose, malicious or mischievous motive.²² There is equally nothing before me that suggest the applicant has embarked on this process to cause the university financial or other prejudice. The fact that an interdict has been secured against him from harassing or threatening employees of the university alone is insufficient to reach a conclusion that his application was frivolous or vexatious.

¹⁷ *Belwana* para 33.

¹⁸ *Belwana* para 34.

¹⁹ *Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (CC).

²⁰ *CCII Systems (Pty) Limited v MGP Lekota* NO 2005 JDR 0471 (T) para 34.

²¹ *CCII Systems* para 34, citing Currie and J Klaaren *The Promotion of Access to Information Act Commentary*.

²² *Price Waterhouse Coopers Inc & others v National Potato Co-Operative Ltd* 2004 (6) SA 66 (SCA) at 81A-B where the Supreme Court of Appeal held that:

‘Frivolous or vexatious litigation has been held to be an abuse of process . . . and it has been said that “an attempt made to use for ulterior purposes machinery devised for the better administration of justice” would constitute an abuse of the process. . .’.

[36] In the final analysis, the respondents have failed to discharge the evidential burden as explained in *President of the Republic of South Africa & others v M & G Media Ltd*. As I have pointed out, the investigation of the university is still ongoing and so is the investigation by the police. For those reasons, any request for a written report into Operation Clever is premature. As far as the nature of the information sought in Item D, 1(a)(iii), (iv) and (v) is concerned, I am of the view that the request contained therein could have been complied with, with due redaction in order to protect the safety of the investigator and the identity of the bodyguards assigned to protect her. That apart, as I have stated earlier, the disclosure of information by public bodies serves to embolden the crucial threads of accountability and responsiveness, and advances the strength of our democracy. Non-disclosure, without good reason, only serves to undermine the reputation and effectiveness of public bodies and provides fertile ground for rumour and speculation. The order below, consistent with section 82, is considered just and equitable, weighing the interests of the applicant to information held by a public body as against the interest of the university, which is still in the process of an ongoing (and slow) investigation as well as the equally slow steps by the National Prosecution Authority in criminally charging those implicated. In exercising of my discretion, I have granted the applicant access only to such information that does not imperil the ongoing investigations and enquiries.

[37] In the result, the applicant has been substantially successful. The university's grounds for wanting to withhold disclosure of the information were found to be wanting. Although the applicant has been characterised as a 'busybody', he was entitled to bring the application in order to vindicate his rights under the Act. I see no reason why he should not be entitled to his costs of doing so.

[38] I accordingly make the following order:

(a) The first and second respondents are hereby ordered, within 30 days of the service of this order upon them, to furnish to the applicant, care of Vasu Naidoo Attorneys (vasunaidooattorneys@gmail.com), the following information:

(i) the period for which a safe house and the provision of bodyguards has been provided by the first respondent to Ms Avril Sahadew;

- (ii) the total costs to date in the provision of the safe house and protection services in (i) above;
 - (iii) any documentation, including invoices, representing the costs incurred by first respondent to date in the provision of a safe house and protection services in (i) above, with necessary redaction to withhold the location of the safe house and the identity of the protection personnel assigned to Ms Avril Sahadew;
 - (iv) the total costs incurred by the first respondent to date in the course of conducting its internal investigation into the illegal offering of placements at the Nelson R Mandela School of Medicine, known as 'Operation Clever'.
- (b) The respondents are directed, jointly and severally, to pay the applicant's costs, the one paying the other to be absolved.



M R CHETTY

Appearances

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Date reserved:	07 September 2020
Date of delivery:	8 January 2021