

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 37578/2015

In the matter between

CENTRE FOR APPLIED LEGAL STUDIES

Applicant

and

**ACTING NATIONAL COMMISSIONER: IN THE
DEPARTMENT OF CORRECTIONAL SERVICES**

First Respondent

**THE MINISTER OF JUSTICE AND CORRECTIONAL
SERVICES**

Second Respondent

**G4S CORRECTION SERVICES (BLOEMFONTEIN)
PTY LTD**

Third Respondent

APPLICANT'S WRITTEN SUBMISSIONS

A. INTRODUCTION

1. This is an application for access to documents in terms of section 78 of the Promotion of Access to Information Act, 2 of 2000 ("PAIA").

2. The Centre for Applied Legal Studies (“CALS”) made a request to the Department of Correctional Services (“the DCS”) in terms of section 11 of PAIA which provides a right of access to documents held by public bodies, made in terms of section 18 of PAIA (“the request”).¹

3. The request was for access to:

a. The investigative report conducted by the DCS in the Mangaung Correction Centre following a series of incidents that took place in the Mangaung Correction Centre while that Centre was under the control of Bloemfontein Corrections Contract (“BCC”) and G4S Corrections Services Bloemfontein (“G4S”). These alleged incidents took place in 2013 and preceded the takeover of the Mangaung Correction Centre by the DCS in October 2013; and

b. The response of the Bloemfontein Corrections Contract to the report.²

4. The Mangaung Correctional Centre is a prison privately run by G4S.³ The PAIA request stems from serious allegations against G4S of torture and treatment and punishment that is cruel, inhuman and degrading of inmates under its management.⁴ There are further serious allegations of breach of the DCS-BCC-G4S contracts and

¹ CALS Founding Affidavit at para 5 p 6.

² CALS Founding Affidavit at para 6 pp 6-7.

³ G4S Answering Affidavit at paras 4.1-4.2, 4.7 pp 138-139.

⁴ CALS Founding Affidavit at paras 57-60 pp19-21.

the Correctional Services Act which lead to DCS' investigation and take over from G4S of the running of the prison.⁵

5. The DCS failed to give notice of the decision on the request within 30 days as required by section 25 of PAIA, and is therefore regarded as having refused the request in accordance with section 27.⁶ CALS lodged an internal appeal against the deemed refusal in terms of section 74 of PAIA.⁷ DCS dismissed CALS' internal appeal, relying on sections 44(1)(a)(i) and (b)(i) of PAIA.⁸
6. It is submitted that the dismissal of the internal appeal was unlawful. The DCS did not establish a justification for the refusal in terms of PAIA. Even if any justification can be established, which is denied, there is in any event an overriding public interest in the disclosure of the documents requested in terms of section 46 of PAIA.
7. DCS has failed to file an answering affidavit to date, and apparently no longer persists in its opposition to this application.
8. CALS accordingly seeks an order:
 - a. declaring invalid and setting aside:

⁵ CALS Founding Affidavit at paras 57-64 pp19-22.

⁶ CALS Founding Affidavit at para 7 p 7.

⁷ CALS Founding Affidavit at paras 8-9 p 67.

⁸ CALS Founding Affidavit at para 27 p12.

- i. the deemed refusal of the DCS request by the First Respondent, the National Commissioner of the DCS; and
- ii. the dismissal by the Second Respondent, the Minister of Correctional Services, of CALS' internal appeal against the refusal of the DCS Requests in terms of section 77(2) of PAIA; and

- b. directing the First and Second Respondents to provide it with the requested report within 15 days of the granting of the order sought by CALS.⁹

9. Subsequent to launching this application, G4S intervened as the third respondent. G4S was required by the Court Order obtained by agreement amongst the parties when G4S sought leave to intervene in this matter, to file its answering affidavit by 31 January 2018.¹⁰ However, on 5 February 2018 G4S brought an application for this matter to be heard *in camera*, which was dismissed on 4 January 2019.¹¹ DCS did not participate in that application.

10. Neither DCS nor G4S have provided CALS with any part of the requested record, whether in any redacted form or otherwise. Further, G4S does not seek any relief against DCS to redact any portion of the record prior to providing it to CALS.

11. The following is addressed below:

⁹ Notice of Motion pp 1-2.

¹⁰ CALS Replying Affidavit to G4S para 3 p 179.

¹¹ CALS Replying Affidavit to G4S para 3 p 179.

- a. the legal framework and the requirements for access to information under PAIA;
- b. the PAIA request to the DCS, its deemed refusal thereof and subsequent dismissal of the internal appeal;
- c. G4S's intervention and claims of confidential information contained in the record;
- d. justification for the relief sought and the test for legitimate grounds of refusal; and
- e. costs.

B. ACCESS TO INFORMATION UNDER PAIA

12. The purpose of PAIA is to give effect to the constitutional right of access to information.

It establishes a regulatory framework in which the default position is disclosure and transparency.

13. The constitutional right of access to information is governed by section 32 of the Constitution, which provides, in relevant part:

*“(1) Everyone has the right of access to—
(a) any information held by the state”.*

14. Section 11 of PAIA gives effect to this constitutional right, and provides:

“(1) 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. [...]

(3) A requester’s right of access contemplated in subsection (1) is, subject to this Act, not affected by—

(a) any reasons the requester gives for requesting access; or

(b) the information officer’s belief as to what the requester’s reasons are for requesting access.”

15. In ***Brümmer v Minister for Social Development and Others***,¹² the Constitutional Court explained the importance of the constitutional right of access to information held by the state as follows:

“The importance of this right . . . in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the State. Indeed one of the basic values and principles governing public administration is transparency. And the Constitution demands that

¹² 2009 (6) SA 323 (CC).

*transparency ‘must be fostered by providing the public with timely, accessible and accurate information’.*¹³

16. In ***President of the Republic of South Africa v M&G Media***¹⁴ the Constitutional Court explained that PAIA was enacted:

“[t]o give effect to the constitutional right of access to any information held by the State’. And the formulation of section 11 casts the exercise of this right in peremptory terms – the requester ‘must’ be given access to the report so long as the request complies with the procedures outlined in the Act and the record requested is not protected from disclosure by one of the exemptions set forth therein. Under our law, therefore, the disclosure of information is the rule and exemption from disclosure is the exception...

*The constitutional guarantee of the right of access to information held by the state gives effect to “accountability, responsiveness and openness” as founding values of our constitutional democracy. It is impossible to hold accountable a government that operates in secrecy. The right of access to information is also crucial to the realisation of other rights in the Bill of Rights...*¹⁵

17. Court proceedings under PAIA are governed by sections 78 to 82. Section 81 provides that proceedings under PAIA are civil proceedings and the rules of evidence applicable in civil proceedings apply. The burden of establishing that the refusal of access to information is justified under the provisions of PAIA rests on the state or any other party refusing access. Section 81 provides:

¹³ At paras 62-3.

¹⁴ 2012 (2) SA 50 (CC).

¹⁵ At paras 9-10.

“(1) For the purposes of this Chapter proceedings on application in terms of section 78 are civil proceedings.

(2) The rules of evidence applicable in civil proceedings apply to proceedings on application in terms of section 78.

(3) The burden of establishing that—

(a) the refusal of a request for access; or

(b) any decision taken in terms of section 22, 26(1), 29(3), 54, 57(1) or 60, complies with the provisions of this Act rests on the party claiming that it so complies.”

18. The evidentiary burden to justify non-disclosure rests with the holder of information and not with the requester. The Constitutional Court has considered this standard as:

- a. 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.
- b. The proper approach to the question whether the state has discharged its burden under section 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
- c. The recitation of the statutory language of the exemptions claimed is not sufficient for the state to show that the record in question falls within the exemptions claimed. Nor are mere *ipse dixit* affidavits proffered by the state

- d. 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.
- e. The refusal of access to information held by the state must be reasonable
- f. This is consistent with the importance placed in the Constitution on the right of access to information, as well as with the scheme of PAIA, according to which disclosure is the rule and exemptions from disclosure are the exception.¹⁶

C. DCS GROUNDS FOR REFUSAL

19. CALS' PAIA request is to DCS, an organ of state. DCS has failed to provide CALS with the requested record.

20. The relief sought in this application is against DCS.

21. DCS filed a notice to oppose this application, but despite various undertakings, and the court order obliging it to do so by 31 January 2018, it has not filed an answering affidavit to date. Accordingly, if it is persisting in its opposition, it has provided no basis

¹⁶ President of the Republic of South Africa at paras 22-25.

for doing so or opposing the relief sought against it. It has failed to discharge its burden under section 81(3) of PAIA to establish the grounds of refusal for CALS' request.

22. The relief sought against DCS should accordingly be granted.

The PAIA request to DCS

23. CALS' request for documents from the DCS is brought in terms of section 11 of PAIA.

In terms of this section, CALS has a right of access to information without regard to the purposes for which it wants to use such information.

24. CALS complied with the requirements of PAIA:

- a. CALS lodged an application on 26 August 2014 in terms of section 11 of PAIA which provides a right of access to documents held by public bodies, made in terms of section 18 of PAIA ("the request").
- b. The DCS failed to give notice of the decision on the request within 30 days as required by section 25 of PAIA, and is therefore regarded as having refused the request in accordance with section 27.
- c. CALS lodged an internal appeal on 22 October 2014 against the deemed refusal in terms of section 74 of PAIA.

- d. On 25 November 2014, the DCS dismissed CALS' internal appeal, relying on sections 44(1)(a)(i) and (b)(i) of PAIA.¹⁷

25. The decision dismissing the internal appeal stated that:

“Section 44(1)(a)(i) of PAIA states that the public body may refuse a request if the record contains an opinion, advice, report or recommendation obtained or prepared for the purpose of assisting to formulate a policy or take a decision in the exercise of a power or performance of a duty conferred or imposed by law. The law referred to here is both the Constitutional (sic) as well as the Correctional Services Act.

Section 44(1)(b)(i) of the Act further provides that access may be refused if the disclosure of the record could reasonably be expected to frustrate the deliberative process in a public body.

This is particularly so as we are still in discussion with G4S to formulate a final report. Certain questions have been raised in G4S' response that needs to be further dealt with. The report requested is therefore not regarded as a final report.”¹⁸

26. DCS did not discharge its onus in dismissing the internal appeal:

- a. It failed to identify how each of the two documents requested meet the requirements of section 44.

¹⁷ Founding Affidavit paras 5-9, 19-25, pp 6-7, 10-12.

¹⁸ The decision is attached to the founding affidavit as annexure “FA 4” at pp 36-37.

- b. It failed to adduce evidence of all the facts, peculiar to it, upon which it alleged that the requested record falls within the category of justifiable non-disclosure.
- c. It did not indicate why each of the requested items falls within the scope and ambit of section 44 or put forward any evidence that supports reasons as to why both items requested fall within the scope and ambit of section 44. It is accordingly not clear in what way the items requested contain an opinion, advice, report or recommendation obtained or prepared for the purpose of assisting to formulate policy or take a decision in the exercise of power or performance of a duty conferred or imposed by law, nor so in either the Constitution or the Correctional Services Act.
- d. It is also not clear in what way the items requested could reasonably be expected to frustrate the deliberative process in a public body. This is disputed.¹⁹

No Legitimate Grounds of Refusal

27. Chapter 4 of PAIA sets out the grounds upon which an application for access to information of a public body can justifiably be refused. The DCS relies on Section 44: Operation of public bodies. Specifically, Section 44(1)(a)(i) and 44(1)(b)(i) of PAIA. Section 44 must be interpreted in line with the section 32 of the Constitution, and the

¹⁹ Founding Affidavit paras 43-46 pp 17-18.

purpose of PAIA so as to promote transparency, accountability and good governance and in favour of disclosure.

28. In the DCS attempt to justify its refusal and / or dismissal, it records that the report could not be released as the Department is still in discussion with G4S to formulate a final report, certain questions have been raised in G4S' response that need to be further dealt with, and the report requested is therefore not regarded as a final report.²⁰ It is apparent from this response that the requested records do exist. G4S confirms that it provided BCC with responses to the concerns raised, and that BCC submitted its responses to DCS, and that these responses by BCC (which would incorporate G4S responses to BCC), form part of the requested record.²¹ There is an interim report, as requested; and further there is a response from BCC (and G4S) to the report.

29. CALS refutes that the record contains "*an opinion, advice, report or recommendation obtained or prepared for the purpose of assisting to formulate a policy or take a decision,*" and that the disclosure of the interim report "*could reasonably be expected to frustrate the deliberative process in a public body*".²² In a media statement by the DCS dated 1 August 2014, prior to DCS' refusal and dismissal of CALS' PAIA request, the Acting National Commissioner of Correctional Services stated that the Department will start withdrawing from Mangaung Correctional Centre by the end of July 2014.²³

²⁰ The DCS decision, annexure "FA 4" at pp 36-37.

²¹ G4S Answering Affidavit at paras 5.4-5.6 p 140. It is Bloemfontein Corrections Contract (BCC) who provided a response to DCS. Despite threatening to do so, BCC has not intervened in this application.

²² Founding Affidavit paras 37-38 p15.

²³ The media statement is attached as annexure "FA 7" at p 45.

This negates that the report requested could still be part of any deliberative process at the time of the refusal, as a decision had already been made to hand control of Mangaung Prison back to G4S and Bloemfontein Corrections Contract.

30. As section 44 of PAIA limits the Constitutional right of access to information, it must be restrictively interpreted, in at least the following three respects:

- a. Firstly, section 44 only protects pre-decision, and not post-decision, documents. A post-decision document cannot be 'for the purpose of assisting' in formulating policy or taking a decision. Thus, a pre-decision document which is adopted or incorporated in an administrative decision should lose its protection.
- b. Secondly, this ground should not ordinarily protect internal secret law or administrative guidelines as such documents would constitute a policy or decision in themselves.
- c. Thirdly, this provision should ordinarily be limited to documents containing opinion and not those which set out facts.

31. These restrictive interpretations of the grounds of non-disclosure are justified by the fact that the records contemplated in this ground goes to the heart of open government and democratic functioning.

32. DCS, in seeking to justify non-disclosure of information, bears the onus of proving that the information falls within a ground of refusal under PAIA. The onus of justification comprises two parts:

- a. Firstly, the burden of justification demands that the party seeking to justify non-disclosure must allege sufficient facts which, if proven true, could justify it.
- b. Secondly, the true onus of proof requires that if any of the facts alleged in justification are disputed by the requester, the dispute of fact must be resolved on a balance of probabilities by ordinary evidentiary processes, with the party refusing disclosure bearing an onus.²⁴

33. DCS has not in its response to the PAIA request discharged this onus. DCS failed to identify how each of the two documents requested meet the requirements of section 44. DCS has further failed to adduce evidence of all the facts, peculiar to it, upon which it alleges that the requested record falls within the category of justifiable non-disclosure.

34. DCS has not indicated why each of the requested items falls within the scope and ambit of section 44 or put forward any evidence that supports reasons as to why both items requested fall within the scope and ambit of section 44. Where discretionary grounds of refusal are relied on by the decision maker, reasons must be given justifying the unfavorable exercise of the discretion. Section 44 must be applied restrictively because it is a curtailment of the fundamental right of access to information. The limitation cannot take place when such reasons are not supported by evidence.

²⁴ President of the Republic of South Africa at paras 15, 23-27.

35. Section 44 of PAIA aims to prevent the premature disclosure of policy and protect the integrity of the decision-making process. The disclosure of records after a decision has been taken cannot reasonably be expected to frustrate the deliberate process in a public body. It is submitted that section 44 of PAIA cannot be used to deny access to draft reports or policies or opinions, advice or recommendations where a final report or policy has been adopted or a final decision taken.

36. DCS accordingly did not discharge its onus of proving that the information requested falls within the scope of section 44 as a ground of refusal listed in Chapter 4 of PAIA.

37. It is accordingly submitted that it is manifest that DCS has not interpreted the provisions of PAIA purposively and with a view to promoting transparency and accountability as it required to do in terms of PAIA and the Constitution.

D. G4S' OPPOSITION TO THIS APPLICATION

G4S's Intervention in these proceedings

38. Following a number of unmet undertakings by DCS to file an answering affidavit, on the eve of CALS seeking an unopposed order against DCS in the application set down for 15 December 2017, on 14 December 2017 G4S launched an application to intervene.²⁵ G4S did so more than two years after DCS informed CALS, on 15

²⁵ CALS Replying Affidavit to G4S para 8 pp 180-181.

September 2015, that DCS had addressed correspondence to G4S in terms of section 47 of PAIA, purportedly giving G4S 'third party notice' of CALS' PAIA request.²⁶

39. G4S has never provided any account of its position in response to the DCS' 'third party notice', nor why it delayed until December 2017 to seek to intervene in this matter. Neither DCS nor G4S have set out their respective positions in relation to each other, in response to the PAIA request which CALS made to DCS (not G4S), as an organ of state.²⁷

40. CALS did not oppose G4S' application to intervene, and on 15 December 2017, an order was granted by this Court, and by agreement amongst the parties, admitting G4S as the third respondent, and ordering all the respondents to file their answering affidavits by 31 January 2018.²⁸

41. The respondents did not file, and G4S launched an interlocutory application for these proceedings to be heard *in camera*. G4S' application was dismissed on the basis that it was premature for G4S to seek to invoke *in camera* proceedings without first filing an answering affidavit setting out the basis of its opposition to CALS' application; that the correct approach [in serving the spirit and purport of the Constitution and PAIA] is to lay a basis under oath for the court to consider the contested reports by means of

²⁶ CALS Replying Affidavit to G4S para 8 p 181.

²⁷ CALS Replying Affidavit to G4S para 9 p 181.

²⁸ CALS Replying Affidavit to G4S para 12 p 182.

judicial peek and not *in camera* proceedings [where a court cannot otherwise make a determination].²⁹ DCS did not participate in those proceedings.

42. That G4S now alleges that it “*is merely joined in these proceedings as an interested party as it had a hand in the drafting of the response to the DCSs initial report*”³⁰, is disingenuous and misrepresents the position G4S has actively taken in seeking to frustrate CALS’ application for the requested record, from DCS.³¹ It was G4S that intervened on the eve of CALS seeking an unopposed order against DCS, and on threat of seeking a punitive cost order against CALS, despite having been made aware of CALS’ application more than two years prior.

43. G4S alleges that is “*bound by the decision of the First and Second Respondents not to give the report, however if directed to do so, the Third Respondent will oblige*”³², yet CALS has never sought any relief against G4S, nor has CALS sought the requested record from G4S, but from DCS.

G4S asserts the record contains confidential information

44. G4S was require to file its answering affidavit by 31 January 2018. However, on 5 February 2018 G4S brought an application for this matter to be heard *in camera*. That application was dismissed on 4 January 2019. G4S has failed to provide any explanation for its failure to file its answering affidavit since 4 January up to 18 June

²⁹ CALS Replying Affidavit to G4S para 18 p 183.

³⁰ G4S Answering affidavit at para 2.6 p135.

³¹ CALS Replying Affidavit to G4S para 13 p 182.

³² G4S Answering affidavit at para 3.8 p137.

2019. G4S has neither sought condonation for its non-compliance with an order of court. CALS opposes the admission of G4S' answering affidavit.³³

45. G4S seeks to invoke confidentiality provisions of a private body. This is not legally permissible. G4S is performing a public function in so far as it has entered into and is performing in terms of a private public partnership agreement between Bloemfontein Correctional Contracts (Pty) Ltd ("BCC") and DCS for the management of the Mangaung Correctional Centre. G4S falls within the definition of "public body" as provided for in section 1 of PAIA. The provisions of section 8 of PAIA are therefore applicable, and in relation to the records requested, G4S is a public body in terms of section 8 of PAIA. In as much as the DCS cannot divorce itself from its constitutional obligations in respect of a privately-run prison, G4S too has acquired constitutional obligations, under section 8(1) of the Constitution as an organ of state, in terms of its contract with BCC.³⁴

46. Subsequent to G4S' intervention as a party, it ought to have set out the grounds on which it alleges that DCS should refuse the request. It would then be incumbent on DCS to file its answering affidavit either:

- a. Setting out its grounds of refusal to CALS based on the grounds G4S alleges ought to justify a refusal; or

³³ CALS Replying Affidavit to G4S para 3 p 179.

³⁴ See for example *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2)* 2014 (4) SA 179 (CC) at paras 52-60 "*an organ of state is, amongst other things, an entity that performs a public function in terms of national legislation ...*"

- b. State that it seeks to disclose the record to CALS, but for G4S' opposition, in which case the *lis* again remains between DCS and G4S, and it falls to G4S to seek to interdict DCS from disclosing the record to CALS.

47. In any event, the onus rests on G4S seeking to persuade DCS to rely on a ground of refusal, to identify the ground in PAIA, and to provide an explanation of why it is necessary for DCS to rely on such a ground. G4S has not done so.

48. G4S has indicated that it will provide a redacted (part of) the record for the Court,³⁵ yet it has failed to lay an adequate justification in seeking to prevent DCS providing the requested record. The procedure set out in section 80(1) of PAIA for 'judicial peak' pertains to where a ground of refusal can only be dealt with in such general terms that the party refusing access to the record would be unable to discharge its burden, then a court could use section 80 in order to examine the record and make an order in terms of section 80(3). G4S does so merely quoting sections of PAIA which it submits are applicable to justify a refusal, without engaging why those provisions are applicable. Further, section 80(1) expressly provides that no record may be withheld from the court on any grounds: there is no basis in law to provide a redacted record to the court.

49. G4S has set out an adequate basis for alleging that certain portions are confidential, it merely makes vague references to:

³⁵ G4S Answering affidavit at para 8 p 150.

- a. Medical records of inmates and other sensitive information of current and former inmates³⁶ (despite CALS have stated since January 2018 that such identifying information of inmates – only – ought to be redacted);³⁷
- b. The names and other personal details of persons in the employ of G4S and its service providers stationed at the prison:³⁸ This does not constitute confidential information under PAIA. Section 34(1) deals with *unreasonable* disclosure. G4S has not engaged at all with what this information comprises of or why it would not be reasonable to disclose. Further section 34(2)(f) provides that a record may not be refused in regard to individuals who are or were officials of a public body relating to their positions or functions of that public body, which is directly applicable to G4S;
- c. Information relating to certain policies and processes.³⁹ No particularity is given nor does G4S establish any basis on why any permissible ground of refusal is applicable;
- d. Registers relating to processes in respect of maintaining safety and security.⁴⁰ No particularity is given nor does G4S establish any basis on why any permissible ground of refusal is applicable;

³⁶ G4S Answering affidavit at para 6.2.1 p 141.

³⁷ G4S Answering Affidavit para 6.5 p142; Replying Affidavit to G4S para 15.1.3 p 183.

³⁸ G4S Answering affidavit at para 6.2.2 p 141.

³⁹ G4S Answering affidavit at para 6.2.3 p 141.

⁴⁰ G4S Answering affidavit at para 6.2.4 p 141.

- e. Details of design elements:⁴¹ No particularity is given nor does G4S establish any basis on why any permissible ground of refusal is applicable; and
- f. Commercially sensitive information:⁴² No particularity is given nor does G4S establish any basis on why any permissible ground of refusal is applicable.

50. G4S fails to canvas the reasons why it submits that the record ought to be redacted (or why DCS ought to refuse access to the record). G4S is required to provide full details of the confidential nature of the sections of the record they seek to inhibit. Their vague list does not trigger the need for section 80(1) to be applied by the Court.

- a. It is submitted that where a court is unable to make a determination following a *bona fide* attempt by a party seeking to limit access to record, and following a court's consideration of the reasons for refusal, the court may apply section 80(1).
- b. G4S makes no such *bona fide* attempt.
- c. Should G4S genuinely deem any part of the requested record to be confidential, it bears the onus to *detail* which parts confidential, and to provide an explanation for why it alleges so.

⁴¹ G4S Answering affidavit at para 6.2.5 p 141.

⁴² G4S Answering affidavit at para 6.2.6 p 141.

51. G4S merely quotes sections of PAIA which it purports to rely on, without engaging why those provisions are applicable.

- a. PAIA specifically provides for the mandatory disclosure of the names and personal details of person in the employ of GS and its service providers stationed at the prison, in serving the function as a public body;
- b. The policies and processes followed by G4S and its service providers in the operation and maintenance of the prison fall squarely with the public's right of access to information. Such policies and processes are directly applicable to any evidence of harm that may be contained in the requested record, and subject to the public interest override. Labelling this information 'confidential', without more, can never be a justification to inhibit disclosure;
- c. The above applies with even greater weight to registers relating to processes followed by G4S for maintaining safety and security at the prison. G4S cannot hide behind a bald label of 'confidential' information, most notably where there are serious allegations of wrongdoing against G4S;
- d. G4S has failed to substantiate what sensitive information of its business dealings and operations might cause harm to its commercial and financial interests and on that basis alone there is no merit in its contention;

- e. G4S has failed to substantiate in any manner how ‘certain design elements of the prisons’ could ‘endanger the security of the prison as a building’ be confidential,⁴³ and on that basis alone there is no merit in its contention;
- f. There is no basis whatsoever to G4S’ reliance on section 39 of PAIA nor its bland suggestion that ‘disclosing police dockets in bail proceedings and protection of law enforcement and legal proceedings’ ‘might assist and/or facilitate the commission of a contravention of the law and give opportunity and / or rise to an attempt to escape from lawful detention.’⁴⁴ There is not even any suggestion by G4S that the requested record contains police dockets and legal proceedings, and on that basis alone there is no merit in its contention;
- g. None of G4S’ contentions are sufficient to found a refusal by DCS for access to the requested record, or to justify invoking section 80(1).

E. JUSTIFICATION FOR THE RELIEF SOUGHT AND THE TEST FOR LEGITIMATE GROUNDS OF REFUSAL

Section 34: Mandatory Protection of Privacy of Third Party who is a Natural Person

52. There are two classes of persons whose privacy G4S is purportedly concerned with: that of inmates, and that of G4S employees stationed at the prison.

⁴³ G4S Answering Affidavit para 7.5 pp 147-148.

⁴⁴ G4S Answering Affidavit para 7.6 pp 149-150.

53. G4S asserts inmates' medical records and other personal sensitive information is confidential. CALS has already indicated to G4S that inmates' names, prison numbers and other identifying information could be redacted. 'Sensitive information' is not defined by G4S. A bare assertion that some sensitive information exists is insufficient to deal with G4S' burden to substantiate this ground of refusal.

54. In respect of G4S employees and service providers, DCS (and G4S) is precluded by PAIA itself from relying on 'mandatory protection of privacy of third party who is a natural person. Section 34(2)(f) of PAIA states:

“ 34 Mandatory protection of privacy of third party who is natural person

(2) A record may not be refused in terms of subsection (1) insofar as it consists of information –

(f) about an individual who is or was an official of a public body and which relates to the position or functions of the individual, including, but not limited to-

(i) the fact that the individual is or was an official of the public body;

(ii) the title, work address, work phone number and other similar particulars of the individual;

(iii) the classification, salary scale, remuneration and responsibilities of the position held or services performed by the individual; and

(iv) *the name of the individual on a record prepared by the individual.”*

55. These provisions apply to G4S as it is exercising public functions under its contract. It therefore has public obligations towards openness and transparency.

Section 36: Mandatory protection of the commercial information of a third party

56. G4S does not specify in its application how or on which subsections of this provision it relies. In order to claim mandatory protection of commercial information, the party seeking to inhibit disclosure must identify the commercial interests sought to be protected and the probability of harm to such interests.

57. While there is an identification of some commercial practices that are contained in the requested record,⁴⁵ G4S does not identify how there would be probable harm to their commercial interests by disclosure. This is insufficient to inhibit disclosure.

Section 37: Mandatory Protection of Certain Confidential Information, and Protection of Certain Other Confidential Information, of Third Party

58. G4S does not identify the nature or character of the information it seeks to avoid DCS disclosing under this section. The state is bound by a constitutional obligation to conduct its operations transparently and accountably. Where commercial agreements are of a public character (such as these which have outsourced the responsibility for state services to private parties), there is an imperative of transparency and

⁴⁵ G4S Answering Affidavit para 7.3 p 145.

accountability, which entitles members of the public to know the details of such agreements.

59. In any event, G4S cannot hide behind confidential information of third parties, where all the parties involved have taken on obligations of an organ of state.

Section 38: Mandatory Protection of Safety of Individuals and Protection of Property

60. It is not clear how G4S seeks to rely on this ground. It has not stated so. It has merely recited wording of the section. G4S does not state what interests could be jeopardised nor how. This is wholly inadequate.

Section 39: Mandatory Protection of Police Dockets in Bail Proceedings and Protection of Law Enforcement and Legal Proceedings

61. It is not clear how G4S seeks to rely on this ground. It has not stated so. It has merely recited wording of the section.

62. G4S has given little more than assertions of the confidential information and have not answered. DCS has not answered or provided grounds for refusal. This is insufficient to trigger the powers that G4S wishes the court to exercise.

63. Should G4S genuinely deem any part of the requested record to be confidential, it bears the onus to detail which parts are confidential and to provide an explanation for why that is so. As does DCS. DCS is nevertheless obliged to disclose the remainder of the requested record that is not severed or redacted.

64. CALS denies that the responses and supporting documentation supplied by G4S to BCC contains confidential information:
- a. CALS has already tendered the redaction of inmates' names and other identifying information from their medical records. 'Personal and sensitive information' is not explained and accordingly cannot be justified by G4S;
 - b. PAIA specifically provides for the mandatory disclosure of the names and personal details of persons in the employ of G4S and its service providers stationed at the prison, in the serving of its function as a public body;
 - c. The policies and processes followed by G4S and its service providers in the operation and maintenance of the prison fall squarely within the public's right of access to information. Such policies and processes are directly applicable to any evidence of harm that may be contained in the requested record, and subject to the public interest override. Labelling this information 'confidential', without more, can never be a justification to inhibit disclosure, or for the relief G4S seeks;
 - d. The above applies with even greater weight to registers relating to processes followed by G4S for maintaining safety and security at the prison. G4S cannot hide behind a bald label of 'confidential' information, most notably where there are serious allegations of wrongdoing against G4S;

- e. G4S has failed to substantiate in any manner how ‘certain design elements of the prison’ could be deemed confidential, and on this basis alone, there is no merit in its contention;
 - f. G4S has failed to substantiate in any manner how the requested record contains ‘commercially sensitive information’ related to it. There is no merit in its contention.
65. Further, none of G4S’ contentions that the information it supplied to DCS and BCC contains confidential information, are sufficient to found a refusal by DCS for access to the requested record.
66. In direct contradiction to G4S’ contention, public policy, the public interest, and the Constitution, demand disclosure of the requested record by DCS to CALS, and by extension the general public.
67. G4S fails to establish a basis for DCS’ non-disclosure of any parts of the record.
68. In any event, even were these requirements complied with, G4S is subject to the public interest override in section 46 of PAIA:

“46. Mandatory disclosure in the public interest

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 [...], 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.”

69. CALS has a reasonable belief that the requested record may reveal some form of contravention and/or a failure to comply with the law. This justifies disclosure in the public interest, or at the very least, judicial peak. CALS submits that it is entitled to the requested record on the basis of sections 11 (1) and section 46 of the PAIA. To the extent that the Court considers that there is any merit in G4S' contentions, CALS submits that section 80 of PAIA finds application. In the circumstances, the honourable court is in any event entitled to access the records. Therefore, should the court not agree with our prayers in the notice of motion, it is entitled to access the records and make a determination on whether any part of the record ought to be redacted in order to permit CALS access to the requested record.

70. CALS submits that the invoking of section 80 would only be appropriate if the court does not find in our favour insofar as CALS's legal basis provided above and in the founding affidavit for access to the requested record.

E. COSTS

71. It is respectfully submitted that the respondents should be directed to pay the costs of this application on the attorney and client scale. The history of this application since

the inception of the court proceedings demonstrates that the conduct and attitude of the respondents has been dilatory and obstructive.

72. At no point has DCS or G4S provided CALS with a redacted record of those portions which they do not object to, rather, and apparently through coordination, both parties have sought to thwart, frustrate and delay this application since or at least November 2017.

73. It is submitted that the only reasonable inference that this Court can draw is bad faith on the part of both DCS and G4S in seeking to obfuscate the scheme of PAIA and frustrate CALS' application to obtain the requested record. This is amplified by the timing of G4S' application to intervene, the subsequent absence of DCS, and the dilatory opposition G4S has placed before this Court since filing its *in camera* application.

74. The general principles relating to costs were usefully summarised by Holmes JA in *Ward v Sulzer* 1973 (3) SA 701 (A) as follows:

"In awarding costs the Court has a discretion, to be exercised judicially upon a consideration of all the facts; and, as between the parties, in essence it is a matter of fairness to both sides.

The same basic principles apply to costs on the attorney and client scale. For example, vexatious, unscrupulous, dilatory or mendacious conduct (this list is not exhaustive) on the part of an unsuccessful litigant may render it unfair for his harassed opponent to be out of pocket in the matter of his own attorney

and client costs. Moreover, in such cases the Court's hand is not shortened in the visitation of its displeasure."⁴⁶

75. The Constitutional Court has held in the case of *South African Liquor Traders' Association* that a court will ordinarily show its displeasure at the manner in which a litigant has conducted himself during litigation by an award of costs on the attorney and client scale.⁴⁷ In that matter, the Constitutional Court granted costs to the applicants on an attorney and client scale because of the 'dilatatory and unhelpful manner'⁴⁸ in which the respondent and its officials had dealt with the litigation.

76. According to the Court, organs of state, (such as all of the respondents for purposes of this application), bear a special obligation to ensure that the work of courts is not impeded.⁴⁹ This obligation derives from section 165(4) of the Constitution which provides that '*organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts*'.⁵⁰

77. In the light of the features of the case, it is submitted that it would be appropriate for this court to order costs on an attorney and client scale against the respondents as a mark of disapproval of the manner in which they have approached this litigation.

⁴⁶ At 706G-707A (internal references omitted).

⁴⁷ *South African Liquor Traders' Association and Others v Chairperson, Gauteng Liquor Board, and Others* 2009 (1) SA 565 (CC) at para 48.

⁴⁸ *South African Liquor Traders' Association* at para 47.

⁴⁹ *South African Liquor Traders' Association* at para 49.

⁵⁰ See, further *Matatiele Municipality and Others v President of the Republic of South Africa and Others* 2006 (5) SA 47 (CC) per Sachs J at para 107.

78. It is submitted that if CALS is not successful, this application falls squarely within the rule established in *Biowatch Trust v Registrar Genetic Resources and Others*, that as a general rule in constitutional litigation an unsuccessful applicant in proceedings against the state ought not to be ordered to pay costs.⁵¹

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16 September 2019

⁵¹ *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC) at paras 23-24.