
ANNEXURE "X" - COMPLAINT IN TERMS OF SECTION 77A

1. The Organisation Undoing Tax Abuse ("OUTA") hereby lodges a complaint in terms of section 77A of the Promotion of Access to Information Act, 2000 ("PAIA") against South African National Roads Agency SOC Ltd ("SANRAL") for refusing to grant OUTA access to the records it requested in terms of a request for access to information, and partially refusing its internal appeal.

2. For ease of reference, the chronology of OUTA's request for access to information is follows:
 - 2.1. **23 June 2023** – OUTA submitted its request for access to information (Form 2). A copy of OUTA's request is attached hereto and marked "**Annexure A1**".

 - 2.2. The 30 ("thirty") day period set out in section 25(1) of the Promotion of Access to Information Act, 2000 ("PAIA") lapsed and no response was received by OUTA from SANRAL.

 - 2.3. **01 August 2023** – OUTA wrote a courtesy letter to SANRAL informing it that its failure to respond to OUTA's request has been deemed as a refusal in accordance with section 27 of PAIA. However, in the spirit of collegiality OUTA gave SANRAL a further 7 ("seven") days to respond to its request before proceeding with an internal appeal. A copy of OUTA's letter is attached hereto and marked "**Annexure B1**".

 - 2.4. **01 August 2023** – SANRAL's information officer, Mr Reginald Demana, responded to OUTA's letter via email. He advised that they somehow missed OUTA's request and his legal colleagues would attend to it. A copy of SANRAL's email is attached hereto marked "**Annexure B2**".

 - 2.5. The 7 ("seven") day extension given by OUTA to SANRAL lapsed and no further response had been received from SANRAL.



- 2.6. **25 August 2023** - OUTA submitted an internal appeal to SANRAL on the basis of a deemed refusal. A copy of OUTA's internal appeal is attached hereto marked "**Annexure C1**"
- 2.7. **26 September 2023** – SANRAL's information officer responded and advised that the legal team will attend to OUTA's internal appeal and revert. A copy of SANRAL's email is attached hereto marked "**Annexure C2**".
- 2.8. **26 September 2023** – OUTA responded to SANRAL and advised that the 26 September 2023 was the last day for SANRAL to notify OUTA of its decision, however, in the spirit of collegiality, OUTA granted SANRAL an extension of 7 ("seven") days. A copy of OUTA's email is attached hereto marked "**Annexure C3**".
- 2.9. **02 October 2023** – SANRAL requested a further extension of 14 ("fourteen") days from OUTA, on the basis that they were engaging with stakeholders who custodians of the information requested by OUTA. OUTA granted SANRAL's request. Copies of the emails are attached hereto marked "**Annexures D1 and D2**" respectively.
- 2.10. **16 October 2023** – SANRAL requested a further extension until 20 October 2023 and the request was granted by OUTA. Copies of the emails are attached hereto marked "**Annexure D3 and D4**" respectively.
- 2.11. **20 October 2023** – SANRAL partially granted OUTA's request, in that they granted access to some documents and refused access to the rest of the documents on the basis that they needed consent from the third parties who were affected by the information requested by OUTA. Furthermore, SANRAL relied on sections 36(1) and 37(1) and submitted that the information requested by OUTA is commercially sensitive and would compromise the trade secrets of the third parties involved. A copy of SANRAL's letter is attached hereto marked "**Annexure E1**".
- 2.12. **24 November 2023** – OUTA wrote to SANRAL and sought clarity on whether SANRAL had notified the third parties of OUTA's request because refusing the request on the basis that they require consent from third parties without actually taking steps to inform the third parties as set out on section 47 of PAIA was invalid. A copy of OUTA's letter is attached hereto marked "**Annexure E2**".



- 2.13. No response was received from SANRAL.
- 2.14. **05 December 2023** – OUTA sent a follow up email to SANRAL requesting a response to the letter dated 24 November 2023. A copy of the email is attached hereto marked “**Annexure E3**”.
- 2.15. **05 December 2023** – SANRAL responded to OUTA and advised that the person who was handling OUTA’s request had resigned and it would be handed over to someone else who will furnish OUTA with a response. A copy of the email is attached hereto marked “**Annexure E4**”.
- 2.16. **06 December 2023** – SANRAL sent an email to OUTA advising of its intention to notify the third parties affected by OUTA’s request and they further requested that the matter be postponed until 06 February 2024 to allow SANRAL to attend to third party notices. This request was granted by OUTA. Copies of the correspondence are attached hereto marked “**Annexures E5 and E6**”.
- 2.17. **31 January 2024** – SANRAL’s Chief Legal, Risk and Compliance Officer, Mr Kaiser Khoza made a phone call to OUTA’s Ms Asavela Kakaza and requested a further extension to the “end of February 2024” as they could foresee that they would not be able to meet the 06 February 2024 deadline. This request was granted.
- 2.18. **28 February 2024** – OUTA sent a courtesy email to SANRAL advising them that 29 February 2024 was the last day for them to respond to OUTA’s internal appeal. SANRAL responded to OUTA and advised that, as much they would like to respond to OUTA on time, they had not received a response from the third party involved and they are required in terms of PAIA to take reasonable steps to inform the third party. A copy of SANRAL’s email is attached hereto marked “**Annexure E7**”.
- 2.19. **29 February 2024** – OUTA advised SANRAL that as much as they are required to take reasonable steps, those steps need to be taken within the confines of the time limits as set out in PAIA. OUTA proceeded to give SANRAL 7 (“seven”) days to provide OUTA with a proper response to its internal appeal, failing which, OUTA would take further steps. SANRAL responded to OUTA and advised that it was important for them to take reasonable steps to notify the third parties as required by

PAIA and that is what they intend to do. Copies of the correspondence are attached hereto marked “**Annexures E8 and E9**” respectively.

REASONS FOR REFERRING THE COMPLAINT TO THE INFORMATION REGULATOR

3. THIRD PARTY NOTIFICATION PERIOD HAS LAPSED

- 3.1. Section 76(1) of PAIA read together with section 76(2)(a) and (b) requires the relevant authority considering an internal appeal against a refusal of a request for access to a record contemplated in section 34(1), 35(1), 36(1), 37(1) or 43(1) to inform the third party to whom the record relates of the internal appeal and to do so as soon as reasonably possible, but in any event, within 30 (“thirty”) days after the receipt of internal appeal and by the fastest way possible.
- 3.2. It is OUTA’s submission that, although there is an obligation on the information officer of the public body considering a request for information and/ or an internal appeal to notify a third party to whom the record relates, the notification has to be conducted within 30 (“thirty”) days after receipt of the internal appeal.
- 3.3. As it is apparent from the aforesaid chronology, OUTA has granted SANRAL more than the requisite 30 (“thirty”) days to notify the relevant third parties and to date, OUTA has not enjoyed the courtesy of being notified of SANRAL’s decision to its internal appeal.
- 3.4. OUTA would also like to further highlight that it was OUTA that brought the third party proceedings to SANRAL’s attention. SANRAL merely dismissed OUTA’s internal appeal without notifying the relevant third parties, only after OUTA wrote to SANRAL on 20 October 2023 (“Annexure E2”) seeking clarity on whether the dismissal was based on an actual response from the third parties, did SANRAL express its wish to notify the relevant third parties. See Annexure E2.
- 3.5. Furthermore, OUTA submits that notwithstanding the obligation on the information officer of the public body considering a request for information to notify the relevant third parties, SANRAL was expected to act independently and apply itself properly to OUTA’s internal appeal.

ORGANISATION UNDOING TAX ABUSE NPC - Reg No.: 2012/064213/08

Directors: WL Duvenage (CEO), Adv. S Fick, **Non-Executive Directors:** S Ndlovu (Chair), P Majozi, LJJ Pauwen, W Modisapodi, T Skweyiya, Z Mukwevho

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3.6. Section 11(1) of PAIA provides the right of access to records of public bodies. It provides as follows:

“(1) Requester must be given access to a record of a public body if: -

(a) that request that complies with all 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 right to 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 officers' belief as to what the request is reasons are for requesting access.”

3.7. It is without doubt, that section 11 of PAIA imposes a duty on a public body to give access to information when so requested. This approach is further supported by section 32 of the Constitution which ensures the right not to be refused access to information.

3.8. Furthermore, section 11 of PAIA makes it clear that, under our law, disclosure of information is the rule and exemption from disclosure is the exception.

4. NO ADEQUATE REASONS PROVIDED FOR THE REFUSAL

4.1. In paragraphs 4,5 and 6 of Annexure E1, SANRAL quoted sections 36(1) and 37(1) *verbatim* and did not provide adequate reasons for their refusal. OUTA submits that it does not suffice to merely quote the section without producing proper reasons and or evidence to support the basis of the refusal (section 25).

5. OUTA'S PAIA REQUEST FALLS UNDER SECTION 46 OF PAIA



- 5.1. It is the law that if one or more of the requirements set out in section 46 are present, then despite the fact that disclosure could be validly refused in terms of sections 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 of PAIA, the information officer of a public body must still grant a request for access to a record of the body contemplated.
- 5.2. It is OUTA's submission section 46 of PAIA ought to have been considered as well. The requirements for the granting of access under section 46 are the following:
- 5.2.1. If the disclosure of the record would reveal evidence of a substantial breach of the law or an imminent and serious public safety or environmental risk; and
- 5.2.2. Where the public interest in the disclosure clearly outweighs the harm contemplated in the section relied upon to refuse access.
- 5.3. The PAIA request that OUTA submitted to SANRAL pertains to a tender with reference number: N.003-010-2017/9, that SANRAL awarded to Aqua/ EXR Joint Venture for the capacity improvements on National Route 3 Section 1 from Westville Viaduct (KM 11.80) to Paradise Valley Interchange (KM 17.50) for an amount of R4.7 billion.
- 5.4. In September 2022, the directors of Aqua Transport and Plant Hire, a company which forms part of the joint venture, were arrested on charges of fraud, theft and corruption relating to a 2012 tender with the KwaZulu-Natal department of roads and transport.¹
- 5.5. OUTA therefore wishes to evaluate the legality of the abovementioned agreement that is of public interest. However, OUTA will only be able to do so upon the production of the records referred to in its request.
- 5.6. This matter falls rightfully under the provisions of section 46, as the production of the records in question would reveal whether or not SANRAL complied with procurement processes as out in the Public Finance Management Act, 1999 (PFMA).



¹ <https://www.news24.com/fin24/companies/amabhungane-the-family-cashing-in-on-government-dysfunction-20230911>

- 5.7. It is for this reason, that OUTA wishes to be granted access to the records in question, as such records will prove pivotal in determining whether the PFMA and/or other relevant legislation has been contravened.
6. We therefore seek the Information Regulator's reconsideration and guidance in line with Chapter 1A of Part 4 of PAIA (sections 77A to 77K).



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