
# PAIA AND ACCESS TO INFORMATION HELD BY PRIVATE PARTIES IN A DIGITAL CONTEXT

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*ABSTRACT*

This report deals with accessing information held by private companies. Access to information was an unreachable right in the previous Apartheid order. This position has shifted in our post constitutional dispensation. One such change is the inclusion of a clause whereby accessing information held by private companies is now possible. However, this access is on condition that such information is required for the protection or enjoyment of a right. Perusing the case law that focuses on this condition has given birth to different dimensions of understanding. These disparate dimensions of understanding when applied to different types of requesters and information offer valuable insights into a hypothetical request for information made to a private company. This analysis shows that despites glimmers of a generous interpretation of the threshold test, the courts seldomly depart from a restrictive interpretation.

# I INTRODUCTION

'War is peace. Freedom is slavery. Ignorance is strength'
– George Orwell, 1984.' [1]

In March 2018, a sinister plot by Cambridge Analytica unraveled and was brought to the public's attention.[2] This plot was carried out with the help of Facebook, whereby millions upon millions of peoples personal information were harvested by the analytics company.[3] This included creating personality profiles from personality quizzes masquerading as benign.[4] Part of this pernicious scheme was to use these curated personality profiles and viciously attack individuals with campaigns with the allure of posing as usual daily feed.[5] For instance if a user was inclined towards right wing politics, advertisements would pop up for the Trump campaign. This ingenious model, or rather the newly dressed propaganda machine, has helped the likes of the Trump campaign and Brexit.[6] Legal scholars alike have responded to the furore with outrage.[7] Some have expressed concern over the privacy issues [8] , while others have gone as far as requesting to see the information that was used by Facebook as to have a better understanding of the lengths that have been taken by the social media companies.[9]

What this has displayed is that the collection of information is on a rapid rise. Private companies, such as social media companies, are opting to collect information in novel manners. In turn, information is also stored and processed in a variety of ways. This makes access to information all the more relevant in a digital and technological context.

This report is split into three main sections. The first section will critically assess the history and the genesis of the right to access to information and the rights threshold that needs to be

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[1] George Orwell *1984*.
[2]Issie Lapowsky 'How Cambridge Analytica Sparked the Great Privacy Awakening' available at https://www.wired.com/story/cambridge-analytica-facebook-privacy-awakening/, accessed on 21 May 2021.
[3] Ibid.
[4] Ibid.
[5] Ibid.
[6] Ibid.
[7]Christina Criddle 'Facebook Sued Over Cambridge Analytica Data Scandal' available at https://www.bbc.com/news/technology-54722362, accessed on 22 May 2021.
[8] Ibid.
[9]Issie Lapowsky 'One Man's Obsessive Fight to Reclaim His Cambridge Analytica Data, available at https://www.wired.com/story/one-mans-obsessive-fight-to-reclaim-his-cambridge-analytica-data/, accessed on 22 May 2021.

met in order to access information from a private company. The second section deals with the application of the rights threshold through a close analysis of the case law where focus will be placed on the approach of the courts in response to changing factual scenarios. The final section of this report will consider three forms of hypothetical requests made to a private company armed with an understanding of the courts approach in section two.

## II HISTORY OF ACCESS TO INFORMATION

### *a) Pre-Constitutional democracy*

The Apartheid era was marked by smoke and mirrors.[10] Vital decisions were made behind closed doors, and this was allowed due to restrictive forms of legislation.[11] There were also severe forms of control to limit information available to the public, coupled with the threat of a punitive fine.[12] In 1978 a process began to bury swathes of important records under the so-called guise of national security.[13] This resulted in an 'information genocide' and ultimately washed away the heinous crimes committed by the Apartheid government.[14]

### *b) Post–Constitutional dispensation*

South Africa, in the dawn of a new era, took all the necessary steps to lift the veil of secrecy left lurking by the Apartheid government.[15] At the very outset, the constitutional drafters acknowledged the aspirations of accountability and transparency, and what followed was an incremental fleshing out of the right to access to information.[16]

### *c) Interim Constitution*

The negotiators of the interim Constitution inducted two mechanisms that would allow for a more open society.[17] First, section 23 of the interim Constitution, ensured the right to information held by the state. Secondly, principle IX ensured that such a right would

[10] Jonathan Klaaren & Glenn Penfold, 'Access to Information' in Stuart Woolman (ed) Theunis Roux & Michael Bishop *Constitutional Law of South Africa* (2009) 62.3.
[11] Ibid.
[12] Dr. Dale T. McKinley 'The state of access to information in South Africa' (2003) *Centre for the Study of Violence and Reconciliation* 1 at 1 -42.
[13] Ibid at 17.
[14] Ibid.
[15] Sebastian Roling *Transparency & Access to Information in South Africa* (unpublished LLM thesis, University of Cape Town 2007) at 3.
[16] Ibid.
[17] Ibid.

indubitably find its way into the final Constitution.[18] This was a seismic shift to the older regime that treated access to information as more of a privilege rather than a core right.[19] However, it must be noted that the right to access to information held by non-state actors was not yet recognised.[20] In addition, the right to access information from the state was by qualification in so far as such information is "required for the exercise or protection of any of his or her rights "[21]

*d) Final Constitution*

As a nod to its commitment to openness and transparency,[22] the final Constitution of the Republic of South Africa, 1996 [23] enshrined the right to access to information in the widest of terms. Section 32 of the Constitution, states that everyone has the right to access information held by the state. In addition any information held by a private body that is required for the exercise and protection of rights.[24] Notably, the inclusion of a clause that enables accessing information held by a private body is a remarkable departure from the interim Constitution.[25] It is also considered as a highly sophisticated clause in comparison to other legal frameworks in different parts of the world.[26] To give meaning to this right, the state was given three years to usher in the necessary legislation.[27] Such legislation is deemed necessary as it draws the boundaries of such a right and establish the conditions for its enforcement.[28] Parliament, acting on this mandate enacted the Promotion of Access to Information Act in January 2000.[29] I will outline the important prescripts of the PAIA in relation to private companies.

[18] Ian Currie & Jonathan Klaaren 'An update on Access to Information in South Africa: New directions in transparency' (2003) *107 Freedom of Information Review 72*-77 at 73.
[19] Ibid.
[20] Roling op cit note 15 at 4.
[21] Ibid.
[22] Ibid at 5.
[23] Constitution of the Republic of South Africa, 1996.
[24] Ibid.
[25] Roling op cit note 15 at 6.
[26] Iain Currie & Jonathan Klaaren, *The Promotion of Access to Information Act Commentary* (2002) para 2.6.
[27] Roling op cit note 15 at 6.
[28] Ibid.
[29] Currie & Klaaren op cit 26 note para 1.10.

## III THE PROMOTION OF ACCESS TO INFORMATION ACT

### *a) Objects of the Act: private parties*

The purpose of extending the obligation to private parties is inextricably bound up to a private party's responsibility to foster a culture of human rights and social justice.[30] In addition, it is in general coherence with the horizontal application of the Bill of Rights that bind private parties.[31] There is also an implicit recognition that information required to exercise or protects one's rights might just happen to be in private hands. Following from such a wide scope as per the constitutional provision, the PAIA duly follows suit.[32] It is framed in such a manner that treats the right as presumed and any withholding of information as an exception.[33] Nonetheless, the wider scope is narrowed for private parties as shown in the threshold test below.

### *b) 'Record'*

The term 'record' applies to both public and private bodies and it is considered any recorded information that may take up any shape or form. Furthermore, this record must be under the 'control' of such a body. Finally, it is not mandatory that this record be made by the body, private or public, in question.[34]

The definition of a record is welcomed in the electronic age as it moves away from document-based systems to one that digitally records information.[35] In fact, some jurisdictions expressly deal with raw data contained in a database.[36] This is illustrated in the Canadian Access to Information Act.[37] Here, the act allows for a request to be made for raw data that can easily be translated to a record through the prompting of database software.[38] Although not explicitly mentioned, PAIA allows for a similar request of raw material sitting in a database.[39] PAIA forbids a party from expecting a public or private body to play the role of a researcher. The role of researcher is best understood as searching for information that may not be readily available to the record holder.[40] Raw material sitting in a database cannot be said to impose a researcher's role but one that is a 'routine function' of database software.[41]

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[30] Ibid para 2.7.
[31] Constitution of the Republic of South Africa, s8(1).
[32] Roling op cit note 15 at 13.
[33] Currie & Klaaren op cit note 26 para 2.10.
[34] Ibid.
[35] Currie & Klaaren op cit note 26 para 4.1.
[36] Ibid para 4.2.
[37] Ibid.
[38] Ibid.
[39] Ibid.
[40] Ibid.
[41] Ibid.

*c) A private body*

PAIA defines a private body as any natural person and partnership that operates a trade, business, or profession.[42] It also applies to juristic persons. As can be seen, the Act provides for a wide scope of private parties.

*d) General distinction between a private and public body*

PAIA makes a clear distinction between a private body and a public one.[43] Accessing information held by a private body is only granted when such information is 'required for the exercise or the protection of any right'.[44] The request of information from a private party connotes a 'need to know basis.[45] Conversely, a request made to a public body has no such qualification in the form of a threshold test.[46] Hence, it can be understood along the lines of a 'right to know' basis.[47]

The qualification 'required for the exercise or the protection of any right' present in the clause is symbiotic with the constitutional provision relating to information held by private bodies.[48] Practically speaking, the qualification also serves as an obstacle to parties that may want to access information for vexatious reasons in order to frustrate the smooth functioning of a private company.[49] Plainly, the qualification does not blanketly impose the same obligations or standards of a public body on a private party[50] while at the same time recognises that in certain instances - a private party may cause harms to rights and should be forced to disclose information if and when such is the case. It also caters for a situation where the harm may be caused by someone other than the private party, but it so happens that the private party holds the applicable record.[51]

*e) Rights threshold and dimensions of understanding*

This distinction between a public and private body comes into sharp focus when considering the threshold requirement 'required for the protection or exercise of the right'. Taken at surface value, there are two dimensions of understanding to the qualification.

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[42] Promotion of Access to Information Act s1.
[43] Currie & Klaaren op cit note 26 para 2.8-2.9.
[44] Ibid.
[45] Ibid.
[46] Ibid.
[47] Ibid.
[48] Ibid.
[49] Ibid.
[50] Ibid.
[51] Ibid.

The first dimension of understanding, seen through a restrictive lens, the term 'required' means essential.[52] As such, without the information the right cannot be exercised or protected.[53] The second dimension of understanding, seen through a less restrictive lens, speaks to the notion that the threshold should be one set at relevance to the protection or exercise of the impugned right.[54]

## IV THE RIGHTS THREHSOLD THROUGH CASE LAW

Despite the lofty purpose of the constitutional right to access to information, the use of PAIA has hardly been used by the ordinary South African - save for civil society organisations.[55] The South African Humans Rights Commission has attributed this to lack of awareness and resources – both human and financial.[56] More particularly, public bodies, senior management have not bought into the PAIA, in turn, their employees fear that sharing information carries a risk for their employer.[57] Singing the same chorus of concern, the National Development Commission claims that there is a widescale under appreciation of the right to access information.[58] It must be borne in mind that the courts play a significant role in adjudicating where certain provisions come under its watchful eye.[59] The question suggest itself on whether the courts have interpreted PAIA as to give it more virility in light of criticism? Or rather are the courts partially responsible for its severe impotence?

To answer this, the next part will consider the interpretative modes used by the courts in relation to the rights threshold, and whether this has contributed to the adequacy of PAIA in providing for access to information held by private companies. In doing so, I will explore the different dimensions of the rights threshold and how the courts have moved between them.

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[52] Ibid para 5.11
[53] Ibid.
[54] Ibid.
[55] Wilhelm Peekhaus 'South Africa's Promotion of Access to Information Act: An Analysis of Relevant Jurisprudence' (2014) 4 *Journal of Information Policy* 570- 596 at 572.
[56] Ibid.
[57] Ibid.
[58] Ibid.
[59] Ibid.

*a) Van Niekerk v Pretoria City Council*

As a departure point, it must be noted that this decision dealt with the framing of the threshold test in relation to state bodies.[60] As noted above, under the interim Constitution, a state body was obliged to provide access to information only where that information was needed for the protection or exercise of a right. The clause bore a striking similarity to the final Constitution's qualification in respect to private parties.[61]

The facts appeared as follows. The applicants home electrical equipment was irrevocably damaged due to a power surge that lasted two days.[62] Two weeks after the incident, an investigator compiled a report, wherein he investigated any forms of negligence present that might have contributed to the result of such a power surge.[63] The applicant sought access to this report and claimed that it was required for the protection of his rights.[64] The respondent refused access claiming that such a report would form part of evidence and could be claimed through the rules of discovery.[65] The respondent went further to say that another report prepared by an electrician at the applicant's disposal, attached to the court's papers, would suffice in helping the applicant in developing a cause of action.[66]

The court started off with explaining that the meaning of 'rights' is wide enough to cover an assortment of rights including both common law and constitutional rights.[67] The court adopted a liberal and broad approach to interpreting the term rights.[68] Borrowing principles from other cases such as *Khala*,[69] the court reemphasised the overarching and generous interpretation that is associated with an enquiry to determine whether the information was required.[70] In addition, the court alluded to the case of *Nortje* in that 'required' should mean 'reasonably required'.[71] The court rejected the argument put forth by the respondents that another report would suffice.[72] The nub of the reasoning is that such a report only explained the technical reasons for the fault without explaining who was responsible for the fault.[73] In the same vein, the court

[60] *Van Niekerk v Pretoria City Council* 1997 (3) SA 839 (T).
[61] Ibid.
[62] Ibid at 842.
[63] Ibid.
[64] Ibid.
[65] Ibid.
[66] Ibid.
[67] Ibid at 844.
[68] Ibid.
[69] *Khala v Minister of Safety and Security* 1994 (4) SA 218 (W).
[70] *Van Niekerk* supra note 60 at 847.
[71] Ibid.
[72] Ibid at 848.
[73] Ibid.

also rejected the argument that the rules of discovery could have been used.[74] The court held that previously this contention was already put to bed. Deftly citing an earlier case in *Khala* whereby the court dispelled the notion that section 23 should not be used in tandem with the rules of discovery.[75] It is evident, by the courts reasoning, that the rule of discovery should not be conflated with access to information.[76]

Weaved in through its analysis, it appeared that the court displayed a staunch unwillingness to 'conscript' the right to access to information.[77] In addition, when making reference to the report the court opted to use the words 'assist' when deliberating on whether the report was required.[78] Importantly, the court argued that this assistance would come in a variety of non - exhaustive ways.[79] First, it could help in deciding whether to proceed with a claim or not.[80] Secondly, it could help further the applicants claim.[81] Finally, it could lead to an early settlement instead of litigation.[82] Significantly, when referring to the so - called assistance of the impugned information, the court avoided asking whether the report can only help the client shape a cause of action. This lowers the bar on the information being essential or indispensable.

It appears, in the rights threshold's infancy, this court acts as a vessel for the second dimension of the rights threshold. One that favors a less restrictive lens of interpretation and is founded on relevance compared to necessity. Perhaps the reason for such a liberal approach was because the threshold test was used in relation to a public body and a horizontal application would render a stricter approach. Hence, the tune of the courts changes shortly thereafter, once PAIA is enacted. Let us explore this in more detail below.

*b) Clutchco v Davis*

*Clutchco (Pty) Ltd v Davis* [83] presented a sound illustration of how the courts consider access to information when the information is not related to some form of envisioned litigation.[84] It also set an ominous tone for what was to come post PAIA.[85] In this matter, the appellant was a family business where seventy percent of the shareholding belonged to Gordon Davis and thirty

[74] Ibid.
[75] Ibid.
[76] Ibid.
[77] Ibid.
[78] Ibid.
[79] Ibid.
[80] Ibid.
[81] Ibid.
[82] Ibid.
[83] *Clutchco (Pty) Ltd v Davis* 2005 (3) SA 486 (SCA).
[84] Ibid.
[85] Ibid.

percent of the shareholding belonged to Andrew Davis, the respondent.[86] A family fall out ensued which resulted in the respondent being stripped of his director and workshop manager title.[87] Regardless of this ousting, the respondent retained his thirty percent shareholding.[88] In an effort to sell his shares the respondent required information relating to the family business as to garner the true value of his shares.[89] The appellant accepted this request and provided information in the form of an audited financial statement.[90] Dissatisfied with this information, the respondent probed and prodded for more information, such as the books of prime entry of the business. [91] The appellant vehemently refused claiming that revealing such sensitive information could harm the commercial and financial interests of the firm.[92] The respondent however claimed that such information was necessary as it provided him with a realistic indication on what his shares were worth.[93] The respondent also claimed that the information provided was of a substandard as it did not fully delineate all the transactions in the family business.[94]

The court started out by listing and explaining all of the cases that have set the foundation for such a threshold exercise.[95] In brief, the court brought attention to cases such as *Cape Metropolitan* and *Van Niekerk* where the court makes use of the word ‘assistance’ in relation to the exercise and protection of a right.[96] The court goes further and explained that the 'reasonably required' formulation is as ‘precise’ as can be.[97] The court also claimed that the precise nature of the test is precise only insofar as it denotes an element of ‘substantial advantage or an element of need’.[98]

The court vigorously argued that the PAIA does not allow for open and uninhibited access to records of a company simply because an individual might get a ‘whiff’ of foul play.[99] More specifically, the respondent failed to show the element of need on account of the request because he could have relied upon the audit financial statements to decide whether he had a

[86] Ibid para 2-10.
[87] Ibid.
[88] Ibid.
[89] Ibid.
[90] Ibid.
[91] Ibid.
[92] Ibid.
[93] Ibid.
[94] Ibid.
[95] Ibid para 12.
[96] Ibid para 12.
[97] Ibid para 13.
[98] Ibid.
[99] Ibid para 17.

claim and need not go beyond them by insisting on the books of first entry.[100] The court also opined that not enough expert evidence was presented to prove that the books of prime entry could be reconstructed to garner the true and proper value of the shares.

The thrust of the reasoning used by the court in this matter closely embodies the restrictive dimension of the threshold test. Overall, the courts analysis poses some challenges. By placing an expectation on the applicant of such information to rein in expert evidence to show that a claim of access can be made are all constraints to the right that the court warned about in *Van Niekerk*.[101] How is an applicant expected to show, through expert evidence, that information may be required before even getting their hands on the information that might prove this?[102] In this matter specifically, it would be difficult for the applicant to show proof that the books of prime entry would be better suited to working out the true value of his share amount, compared to the financial statements available to him. This is nothing but a catch twenty-two styled chokehold. However, what is more resoundingly clear from this case is that the court by setting such an unreachable threshold propagates a David and Goliath narrative whereby strong firms tenaciously protect the information they harbor, and weak individuals can only forlornly and 'nervously' punch above their weight in trying to access such information.[103]

As seen, I have delineated two cases that each represent two dimensions, respectively. One, in *Niekerk* gravitates towards a less restrictive dimension of understanding. The other, in *Clutcho* gravitates to a more Kafkaesque dimension of understanding. Below, I will explore the case of *Unitas* that in some way affirms the position set by the *Clutcho* case explained above.

*c) Unitas*

In *Unitas*,[104] the applicant claimed that her husband had died due to negligence by the hospital.[105] In order to support this claim, the applicant requested a report from the hospital written by one of the doctors on the condition of nursing in the hospital.[106] The applicant contended that the report was necessary to establish the hospitals negligence which led to her husband's death.[107] The respondents claimed that such access could not be granted because the report related to the general conditions of nursing at the hospital and did not delve into her

[100] Ibid para 18.
[101] *Van Niekerk* supra note 60 at 848.
[102] Iain Currie & Johan De Waal *The Bill of Rights Handbook* 6 ed (2012) 704.
[103] Peekhaus op cit note 55 at 580.
[104] *Unitas Hospital v Van Wyk and Another* 2006 (4) SA 436 (SCA).
[105] Ibid para 8.
[106] Ibid para 12.
[107] Ibid.

husband's death.[108] In addition, the respondents argued that the applicant had at her disposal information that was provided by the hospital that would have helped her in her potential claim against the hospital.[109] The applicant retorted that although the report was general and wide, it would have helped in determining the general negligence of the staff and by virtue have a bearing on the alleged negligence in the context of her husband's death.[110]

The High Court decided that the right to pre-action discovery should be granted in this instance.[111] The reason employed was that the access could give the party a chance to decide whether litigation was a worthwhile venture.[112] According to the High Court, this was enhanced by the risky nature of litigation.[113]

The SCA displayed a disinclination to closely formulate a positively defined test for the qualification of required.[114] The court carefully followed the *Clutcho* reasoning.[115] In that mere assistance shall not suffice and a substantial need or advantage needs to be shown.[116]As a result, in turning to the facts of the case, the court unflinchingly expressed that the applicant has not shown that the report was 'required' to establish a cause of action against the hospital.[117] Moreover, the court explains that once the applicant institutes action, she would be able to use the discovery rules to obtain the report that she was looking for.[118] This is illustrated by section 7 of PAIA that forbids the use of the act when legal proceedings have already taken place.[119] The court displays a stronghanded stance that section 50 of the PAIA should not be used for fishing expeditions and that section 7 of the PAIA was not by accident but part of an intentional design.[120] However, the court explained that they are apprised to the fact that section 50 does have its use and it is not automatically discarded due to the rules of discovery.[121] Nonetheless, its use must be an exception and not the rule.[122]

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[108] Ibid para 13.
[109] Ibid para 12.
[110] Ibid para 13.
[111] Ibid para 14
[112] Ibid.
[113] Ibid.
[114] Ibid para 18
[115] Ibid para 17.
[116] Ibid.
[117] Ibid para 19.
[118] Ibid.
[119] Ibid.
[120] Ibid para 21.
[121] Ibid para 22.
[122] Ibid.

Cameron JA, in the minority judgment claimed that even though the report would not be of vital importance in relation to the specific acts that led to her husband's death[123] it would still be considered required. This is because it spoke to the general conditions of nursing, which went directly towards what the applicant was claiming: the overall functioning of the hospital or, lack thereof, is what led to the death of her husband.[124] Cameron JA also mentioned the purpose of the PAIA as it promoted openness, transparency, and accountability.[125] While duly noting that these goals are somewhat linked to a public body, Cameron JA also claimed that these still apply as the hospital was providing an essential service that made it somewhat resemble a public body.[126] Finally, Cameron JA contends that the report will not only assist the applicant in future pursuits of litigation but also help determine whether litigation was a viable option at all.[127]

As can be seen, the *Unitas* case not only cemented the restrictive approach as set out in *Clutcho* but added a restraint in the form where applicants are forbidden to use PAIA when there is other information at the applicants disposal to take an informed decision on whether to litigate or not. This approach was dutifully followed in the majority judgment s in *Harmony Gold.*[128] But like the *Unitas* case, concerns were present in the minority judgment s as to the restrictive approach. Perhaps a token of a change in the air regarding access to information from a private company.

*d) Harmony Gold*

In general, this case involved one of the very first class-action suits in South Africa.[129] Mineworkers working at a mine owned by Harmony Gold contracted silicosis while working underground.[130] Part of this class action necessitated a certification process, where a class is described, and members have to fall within that class.[131] Accordingly, this class was described as all the mineworkers who worked at a collection of mines that contracted scoliosis.[132] Hence,

[123] *Unitas* supra note 104 para 35.
[124] Ibid
[125] Ibid para 40.
[126] Ibid para 42.
[127] Ibid para 48.
[128] *Mahaeeane and Another v Anglogold Ashanti Limited* [2017] 3 All SA 458 (SCA).
[129] Ibid.
[130] Ibid para 1.
[131] Ibid
[132] Ibid.

the two applicants fell within this class however they were not named as applicants in the class action proceedings which had commenced.[133]

The applicants requested access to records pertaining to the conduct of the mine and relative compliance with regulation at the time of their employment.[134] In doing so, the applicant relied upon section 50(1) of PAIA.[135] The applicants also argued that access to these records would be instrumental in determining whether the mine had breached its statutory duty of care.[136] The applicants disputed their involvement in the class action proceedings as they were unnamed in the application.[137] Yet, the applicants claimed that they needed such access to decide whether or not to opt out of the class action. The respondents argued the applicants were forbidden from doing so as proceedings have already started,[138] and PAIA may not be used for pre action discovery in line with section 7 of PAIA.[139] Furthermore, the respondents claimed that the applicants did not fulfill the rights threshold according to section 50(1) as there was a mismatch between the records requested and the right warranting such protection.[140] It was left up to the SCA to decide whether section 50(1) could successfully be invoked and then determine whether section 7 had any bearing on the matter at hand.[141]

The SCA duly followed the approach espoused in *Unitas* and claimed that a mere minimum threshold of assistance will not suffice, and the threshold enquiry is proved on the facts at hand.[142] In applying the facts of the matter, the SCA decided that an established connection between the information and the exercising of a right had not been fulfilled.[143] The court held that there was an 'implicit' test used in *Unitas* where the information should act as a tool to formulate a claim.[144] Accordingly, the information in this instance was not strictly necessary to formulate a claim and other alternative and available forms of records could have assisted in this regard, such as the extensive particulars of claim.[145] The SCA emphatically stated that PAIA shall not be used for an 'unwelcome spectre of applications' prior to discovery.[146] As

[133] Ibid.
[134] Ibid para 2-3.
[135] Ibid para 6.
[136] Ibid para 5.
[137] Ibid para 9.
[138] Ibid para 7- 8.
[139] Ibid.
[140] Ibid.
[141] Ibid para 10.
[142] Ibid para 13.
[143] Ibid para 17.
[144] Ibid para 20.
[145] Ibid para 19.
[146] Ibid para 20.

touched on above, by refusing access in this instance was akin to undermining the objects of PAIA. Again, the court treated access as an exception and not a general rule.

The next pressing issue the court had to dispose of was the invocation of section 7 of PAIA.[147] Section 7 of PAIA prohibits "access to a record sought for the purpose of criminal or civil proceedings; (b) requested after the commencement of such proceedings; and (c) where the production or access to that record is provided for in any other law."[148] Turning to the particular facts at hand, the SCA held that the certification process could not be separated from the start of proceedings.[149] As such, once a certification process ensues, legal proceedings have commenced.[150] The distinct feature of a class action is the opt out mechanism.[151] This means that an applicant naturally forms part of a class if they present all the characteristics of the class unless they decide to opt out.[152] The applicants had not chosen to opt out, as yet, and therefore the proceedings had commenced for them.[153] Thus, section 7 was invoked in this matter.[154]

In a similar fashion to the minority judgment in *Unitas*, Mbhata J set the scene with the broad scope and purpose of PAIA and how these should inform the interpretation of PAIA.[155] Moreover, the interpretive modes are founded upon openness and transparency.[156] Mbahata J then zeroes in on the threshold test and displays a preference for the outlook that every matter deserves its own flexible understanding of whether the information is required for the exercise or protection of rights.[157] Mbhata J argues that in this instance it was clear that the threshold test hurdle had been crossed.[158] This is because the appellants were dismissed from their employment after contracting silicosis indicating that the extent of their claim was serious enough to determine its cause. Also, access to the respondent's records was relevant and necessary as it would enable the appellants to protect or exercise their rights.[159] Mbahata J also takes task with the framing of a certification process as one that is part of proceedings claiming that they are 'sui generis' in nature.[160]

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[147] Ibid para 10.
[148] Promotion of Access to Information Act 2 of 2000 s7.
[149] *Harmony Gold* supra note 128 para 23-24.
[150] Ibid.
[151] Ibid para 25.
[152] Ibid.
[153] Ibid.
[154] Ibid para 26.
[155] Ibid para 37-38.
[156] Ibid.
[157] Ibid para 41.
[158] Ibid para 64-73.
[159] Ibid para 43.
[160] Ibid para 64-73.

The two cases above in *Unitas* and *Harmony Gold* advocating for a restrictive approach, focused on the importance of section 7 and hence implicitly entrenched the precedent that when litigation is either pending or looming access to information may be restricted. However, by incessantly testing whether the information is required for the protection of a right in relation to litigation, the court loses sight of all the other ways a right may be protected. In no way can the term required only mean 'needed for litigation'[161] as they are multiple contexts where information may be needed. It could very well be that an applicant is intending for an internal appeal, a simple lodging of a rights violation to the Human Rights Commission or - quite aptly - the decision not to litigate. By lumping all access to information claims to litigation it is no surprise that the court becomes over reliant on section 7 to insist that once litigation commences, information will be made available through the rules of discovery. But if the court showed an appreciation that not all matters are grounded in litigation and in some cases, litigation is merely contemplated, the use of section 7 will not play such a major role in helping to decide whether access to information should be granted or not.

Based on the expansive framing of access to information by PAIA and the Constitution I submit that when there is a striking account of a rights violation and a severe form of harm then a prima facie case of establishing a need for information can be made more easily.[162] As seen above, allusion has already been made to a variable form of test in *Unitas* when Cameron JA proposed a less heavy-handed approach to access from private institutions that are public in nature. Along those same lines, my submission is that a variable approach should be used in situations when a serious right is at stake, or a violation of a right has already occurred. A reasonable standard is usually context and factor dependent in the discipline of administrative law.[163] Similarly, the use of the term 'reasonably required' in the threshold test should be also considered a flexible test. As a result, I see no reason why a factor of a serious account of a rights violation cannot play into the reasonableness of the threshold test and towards the ultimate pursuit of access to information.

Against that backdrop, there is a more moderate approach used by the courts in two separate instances. This approach does not only consider the protection of rights but deliberates on the enjoyment of those rights. The first case planted the seeds of a more moderate approach while

[161] *Uni Windows CC v East London* Municipality 1995 (8) BCLR 1091 (E).
[162] Jean Claude Ashukem 'Revisiting the interpretation of section 50 of the Promotion of Access to Information Act Mahaeeane and Motlajsi Thakaso v Anglogold Ashanti Limited (85/2016) [2017] ZASCA 090' (2019) *Obiter* 363-382 at 347.
[163] Cara Hoexter & Glenn Penfold *Administrative Law* 3 ed (2021) 495.

the second deepens the roots of the more moderate approach. I will explore this in more detail below.

*e) Claase*

This matter involved an agreement between SAA and a former SAA airline pilot.[164] The agreement was that as part of the applicant's retirement package, he would be entitled to two free international flights yearly.[165] Taking up this opportunity, the applicant tried booking a ticket from New York to Johannesburg as part of his two free flights.[166] To his surprise, this request was refused on account of the plane not having enough business class tickets.[167] Hence, the applicant was suing for breach contract and requested the records of SAA to be able to verify whether there were in fact no seats available on the day.[168]

The High Court ruled that such a request was baseless.[169] First, the applicant had a right to two free international tickets, but this did not give him the right to obtain a seat without prior reservation.[170] Secondly, the High Court argued that information in the form of telling the applicant that no such seat was available was sufficient in helping to establish his claim.[171]

The SCA reiterated that the test of the term required denoted a substantial advantage.[172] Accordingly, the test had been met as the information would afford the applicant the ability to decide whether he had a claim or not.[173] In addition, the SCA repudiated the contention that the information provided was sufficient to establish the claim.[174] The SCA stated that this did not matter as the PAIA specifically speaks to any record held by a private company.[175] The thread of reasoning present throughout this judgment is that the PAIA was introduced to provide the necessary information as to prevent litigation.

In my view, there are two monumental shifts in reasoning present in this matter. Sharing in sentiment from the two minority judgments of *Unitas* and *Harmony Gold*, the SCA, right off the bat, explains that the purpose of PAIA is to foster transparency.[176] Unlike the majority

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[164] *Claase v Information Officer of South African Airways (Pty) Ltd*. [2006] ZASCA 134.
[165] Ibid para 2-4.
[166] Ibid.
[167] Ibid.
[168] Ibid.
[169] Ibid para 5.
[170] Ibid.
[171] Ibid.
[172] Ibid para 9.
[173] Ibid.
[174] Ibid para 11.
[175] Ibid.
[176] Ibid para 1.

judgment in *Unitas* and *Harmony Gold*, the SCA does not fixate itself on the information already available. Instead of determining whether information that was present was worthy enough to shape a cause of action, the SCA correctly focused on the record that was requested. Unlike in *Unitas* and *Harmony Gold* the SCA does not bog itself down in whether this information was necessary to institute an action even though the applicant was contemplating litigation. But rather the SCA focused on whether the records were necessary as to grease the wheels of justice as to place the applicant at a vantage point where he could decide whether litigation was necessary at all. It is also important to note that no mention of section 7 of PAIA was mentioned in this matter. Yet litigation seemed to loom as in *Unitas* and *Harmony Gold*? This proves the supposition made earlier that when the courts do not focus solely on litigation, it gives them the room to better engage with the prescripts of PAIA and most importantly it allows them to embody a culture of openness and transparency.

*f) 2010 World Cup*

To follow in this theme, I will now explore the *2010 FIFA World Cup*[177] case. In this matter, the applicant, Adriaan Basson, working under the auspices of the Mail and Guardian, requested certain records from the LOC, the 2010 World Cup Committee.[178] More specifically, Basson requested records relating to tender procurement processes pertaining to the Confederations Cup.[179] The applicant claimed that the records were necessary to write an article and to exercise his right to freedom of expression.[180] The respondents outrightly refused such access stating that they are not positioned to disclose names of any preferred suppliers as it would damage their commercial interests.[181]

The High Court in a long-winded judgment discussed whether such records should be made available to the applicant.[182] While the judgment dealt primarily with whether the LOC was a private or a public entity,[183] this contribution focuses more on how the court deliberated on the threshold enquiry. The High Court reiterated the tests espoused in *Unitas* and *Cluthco* and explained that a link should be established between the information sought and the right.[184] Importantly, The High Court also acknowledged that it is challenging for an applicant to

[177] *M & G Media Ltd and Others v 2010 FIFA World Cup Organising Committee South Africa Ltd. and Another* 2011 (5) SA 163 (GSJ).
[178]Ibid para 1.
[179] Ibid para 6.
[180] Ibid para 8.
[181] Ibid para 18.
[182] Ibid para 366.
[183] Ibid para 141.
[184] Ibid para 351-352.

display such a link when the applicant has no prior information as to what the information is and is therefore not expected to establish such a link with certitude.[185] In the view of the foregoing, the High Court, on that face of it, prefers the test whereby the link should be shown to 'enhance' the protection of the right in question.[186] Hence, the court held, looking at the importance of the record in publishing the story and the constitutional guarantee to the right of freedom of the press and media, such access should be granted.[187]

Again, the reasoning of the court differs markedly from prior engagements with PAIA. First, there is, the first of its kind, an outward appreciation of the potential absurdity in expecting an applicant to establish a link when no prior engagements with the record have been made. Also, the court seems to show a less heavy-handed approach to requests when that requests are made for the enjoyment of a right instead of protecting such a right. This can be seen in the comprehensive analysis of the importance to freedom of the press and the freedom of expression. Interestingly enough, in comparison, no such feat is done by previous courts when dealing with the protection of a right. Can it be correct to claim that a right is more or less important when it comes to enjoyment or 'exercise' rather than its protection?

*g) Manuel*

In this matter Trevor Manuel's right to privacy was at stake.[188] This stemmed from a few articles that the Guptas were constantly spying on his private life.[189] This included a schedule of his international travel times and documents containing his identification number [190]. Manuel requested records from the CEO of Sahara in order to confirm his suspicions that information was collected regarding his private life.[191] He claimed that information has been shared without his consent and thus such records were necessary to protect his rights to privacy.[192]

The respondents submit that such records may not be given access to as it amounts to pre litigation discovery which is impermissible.[193] Furthermore, Manuel has failed to discharge the onus in proving that the records were necessary for the exercise or the protection of his right to privacy.[194] Owing to the fact that Manuel has not shown a strong enough connection between

[185] Ibid para 354.
[186] Ibid para 355.
[187] Ibid para 415-419.
[188] *Manuel v Sahara Computers (Pty) Ltd and Another* 2020 (2) SA 269 (GP) para 1.
[189] Ibid para 5.
[190] Ibid.
[191] Ibid para 18.
[192] Ibid para 19.
[193] Ibid para 27.
[194] Ibid para 28.

the records and his right to privacy, nor has he has shown how the information may assist him in a potential claim.[195] Manuel retorted, explaining that such information is necessary as it would give him the ability to identify the parties involved and formulate his cause of action.[196]

The High Court held that there was a clear distinction between the facts in this matter and the factual scenario in *Unitas* and *Harmony Gold.*[197] In *Harmony Gold* and *Unitas,* the applicant requested certain records while already having enough information at their disposal to identify the defendant and formulate their claim.[198] Unlike, in this situation, Manuel requires the records, and has no access to any other information, that may help him formulate his claim.[199]

In relation to section 7 of PAIA, the High Court found that it would not be triggered as it was clear Manuel had not commenced litigation proceedings as yet.[200] If he were to use PAIA to assess his prospects of success, then section 7 would come under inspection however this was not the case.[201]

The High Court followed a similar tune to that set out in the *2010 World Cup* matter. Again, there is an explicit recognition that an applicant cannot be expected to establish a link between the information and the right when the record is the only way to determine the cause of action. One could also argue that perhaps the court showed such an unrestrained manner in providing access to the records, since the constant surveillance had a bearing on Manuel's ability to exercise or enjoy his right to privacy.

## V SPECTRUM OF INFORMATION AND TYPES OF REQUESTERS

### *a) Introduction*

Now that I have traversed the way the courts have interpreted the threshold enquiry, this report follows with an analysis on a would-be requester requesting information from a private company. Before any detailed discussions take place in relation to the application of the threshold test or whether information sought satisfies the definition of a record, it is important to define the poles of the following. The spectrum of types of information that may be requested

[195] Ibid.
[196] Ibid para 31.
[197] Ibid para 38- 39.
[198] Ibid.
[199] Ibid.
[200] Ibid para 44.
[201] Ibid.

and the types of requests that can be made. Once this has been achieved, I will apply these poles to the two disparate dimensions of understating as framed above and the definition of records in order to determine whether such forms of requests can potentially be made.

*b) Spectrum of information*

For the sake of clarity, I have demarcated two main groups of information collected by private companies. To help understand the contours of the information that is collected by private companies as records, I have applied this spectrum of information to a Social Media company. By doing this, I hope to capture the variety in forms and shape of the ambit of records in the digital age.

The first is information that is gathered when an individual signs up and creates an account.[202] This type of information, coined as 'plain records consist of a person's name, email address, phone number and date of birth.[203] Plain records also consists of how the primary user has interacted with other users, how they have engaged with content, and the advertisements that they have clicked on.[204] In the realm of the Information Technology world this is also commonly referred to as 'static' information.

The second category of information, that attracts more of this reports attention is also information collected while an individual actively uses social media.[205] But as a testament to its so called 'enigmatic' form, this kind of information is not only collected through any particular human endeavor, but also through the use of sophisticated artificial intelligence.[206] It uses plain records to categories a user into a specific persuasion or personality. This makes use of a tool known as 'sentiment analyses.[207] This is a process of studying text (or tweets) as to quantify and monitor an individual's opinion.[208]

*c) Spectrum of information in terms of the definition of a record*

This aspect focuses on whether 'plain records' and 'enigmatic records' sought can satisfy the definition of a record as per PAIA. Plain records neatly fit the classification of a record. Quite

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[202] Nicholas Scott Rodgers 'Understanding personal data in the world of social media' (2020) *Undergraduate Honors Capstone Projects 476*.
[203] Ibid.
[204] Ibid.
[205] Ibid.
[206] Ibid.
[207] 'What is Sentiment Analysis? Examples, Best Practices, & More' available at https://callminer.com/blog/sentiment-analysis-examples-best-practices, accessed on 15 June 2021.
[208] Ibid.

simply, this is because this information is stored by the social media company and is easily accessible by the social media company.

On the other hand, ‘enigmatic records’ pose a few thorny challenges. The first potential problem is that AI technology processes information and learns from itself without the need for human intervention. For instance, storing a users like on Facebook is one thing, using that like to place the user into a specific box or category is another. Usually, the second stage is done through fast paced AI technology. Back to the Cambridge Analytica saga, the personality quizzes itself to gauge the amiability of a user appeared to be harmless, the real issue arose through the categorising those personalities before targeting them. Another area of concern is retrieving information. If a user’s interactions on social media is stored in a database every time they engage with their digital worlds, such information would be easy to retrieve. However, the collation of each interaction and sizing users up - happens at the whim of a software process and functions almost instantaneously.

Such a concern is not exclusive to the social media space. Many systems are transporting to novel modes of collecting and processing information. And like social media, these also use the sophisticated prowess of AI technology. Therefore, looking ahead, despite its generous ambit, it would serve PAIA well to include a more in-depth provision of what a record may or may not be as we continue to rely more on digital systems.

As it stands, PAIA, as touched on above, recognises the use of databases in storing records. But enigmatic records do not resemble a database styled record. This is because as stated, the information is collected and acted upon almost instantaneously. Second, the way of using sentiment analysis, does not constitute a record per say, but rather a specific set of instructions that would be difficult to retrieve. For instance, retrieving how an AI software program perceives and boxes a user in a social media context appears difficult to retrieve.

*d) Types of requesters*

Like the dizzying array of the types of records, the types of potential requesters of information from private companies are in itself multitudinous. Due to this, I have demarcated three categories of would-be requesters of information from private companies. The first, coined as an ‘officious’ individual is someone who is merely making a request for information to satiate their curiosity. There is no claim that such record has been used and abused by the private company that possess it. Furthermore, there is not even a sliver of concern that this record is for the protection or enjoyment of a right from this individual. Litigation is the furthest route

from their mind. The second induvial coined as a 'dubious' individual is someone who has not been able to establish a strong link between the information required and the rights that they would like to protect or enjoy. Regardless, there is a legitimate concern that such information may give rise to a budding claim. Litigation is a potential option and so is other routes such an internal appeal, of course, bearing on the information sought. The final category, coined as an 'individual at the crossroads' is an individual who harbors a significant amount of information to make a claim. However, this individual wants more information as to make an even more informed decision as to whether they would like to litigate or not. Unlike the 'dubious individual', this individual has his sights on litigation and not any other forms of relief.

*e) Types of requesters in relation to the threshold enquiry*

*i) An officious individual*

An officious individual will have some serious obstacles to invoke PAIA. This is because this individual has no claim as to why they might need such information. There is no subsequent right that might be under jeopardy, and this would amount to nothing more than a fishing expedition. Remanent of *Clutcho* the claim needs to denote a substantial need or advantage. Seen through this lens this request will reap no reward for a would-be requester. Simply because no conceivable link may be made between the information needed and the protection or enjoyment of a right.

Nonetheless some respite is available to such a requester along two routes only insofar as it relates to their personal information. The first route dresses itself in the form of the Protection of Personal Information Act 4 of 2013.[209] Section 23 allows an individual to obtain information that is processed by a company through a simple request.[210] The second route can be seen through the company themselves. This is seen with companies like Facebook where a user is entitled to download a document that contains all the records the company possess of that users interaction in the online space.[211] Bearing in mind, that this is along the lines of the static information a company collects and not all the more 'enigmatic' forms of records.[212]

[209] Protection of Personal Information Act 4 of 2013.
[210] Protection of Personal Information Act 4 of 2013 s23.
[211] Sara Morrison 'What you need to know about Facebook's latest privacy tool' available at https://www.vox.com/recode/2021/1/12/22221178/facebook-access-your-information-update, accessed on 16 June 2021.
[212] Ibid.

*ii) A dubious individual*

Seen through the dimensions of understanding, the varying levels of success is dependent on two factors. The first factor is the breadth of the information that is already available. The second factor is whether litigation is in the midst or a remote possibility.

If the information already available is extensive, then the restrictive dimension of understanding takes center stage. This is supported by the case of *Harmony Gold* where plenty of information were already present to shape a cause of action, seen through the particulars of claim. If litigation seems inevitable, then the restrictive dimension of understanding also comes into play. This is seen in the case of *Unitas* where the court held that access to information cannot be used when the discovery rules are a viable option to obtain information.

However, if the information available appears scant and insignificant in making a claim then the courts would lean towards a more modest dimension of understanding. This was seen in the case of *Claasen* where the information made available to the applicant that no flights were available was insufficient. In addition, this is seen in *Manuel* that access was granted because the records held by Sahara was the only information available to determine whether Manuels's right to privacy was breeched. Furthermore, if litigation is not inevitable, or if it dealt with more of an enjoyment of a right rather than its protection then the courts would also act along the more moderate dimension of understanding. As is seen in the *2010 World Cup* case, where section 7 of PAIA was not an issue to be dealt with.

*iii) An individual at the crossroads*

This a rather tricky situation that an applicant for information might find itself in: if it does not put up enough information to show a prima facie basis for believing its rights have been infringed, it can't get the information but, on the other hand, if it shows too much the court might say the requested information is not needed as the applicant has enough to bring its application.

Unfortunately, the court have refused access in these circumstances. In *Unitas*, the court refused access because the party had enough information already to formulate a cause of action. Similarly, in *Harmony Gold* the court held that as long as there are other records to formulate the claim, the record asked for is not sufficient enough to satisfy the threshold exercise. Perhaps the most applicable case for such an individual is the *Manuel* case. The High Court unequivocally state that the applicant may not use the records to assess his 'prospect of success' It appears that granting access to records in order to assess your prospect of success and

granting access to records to make an even more informed decision whether to litigate or not are one and the same. After all, an applicant may not want to litigate if they sense that their claim may not hold up in court.

## VI CONCLUSION

Before PAIA and the Constitution, the Apartheid government severely limited access to information. This was in part because of its scheme to stifle the flow of information as to bar any severe undermining of the grand colonial project. After this project came to a screeching halt, the Constitution included a Bill of Rights and one of the included rights is the right to access information. However, like other rights in the Bill of Rights, this right was internally limited for accessing information held by a private party.

The threshold test came under great inspection by the courts and led to somewhat stark notions of its scope and ambit. At the very beginning, in *Van Niekerk*, the court displayed a flexible approach that focused on all the ways information may help a potential litigant to protect their rights. In *Clutcho*, the court applied the limitation in a narrower sense and refused access to the books of a company. However, the real wrestle with the limitation came in the form of *Unitas* and *Harmony Gold*. Herein, the court went to great lengths to bar an applicant from accessing information purely to benefit from pre-action discovery, especially when alternative streams of information could have achieved a similar purpose. Although, the court explained the contents of section 7 quite clearly, they glossed over all the other ways a claimant may protect their rights not rooted in litigation. Furthermore, the court could benefit from extending the bounds of the 'reasonably required' portion of the test for cases where there is a human rights issue at stake. Finally, we see that in the *2010 World Cup* Matter, that the focus cannot always fall squarely on requiring information to protect a right but also to enjoy such a right. When it comes to the enjoyment of a right, the court showed a more generous approach to accessing information.

Once the different dimensions of understanding were fully canvassed, the opportunity arose to consider how different requesters and types of information fend under the current case law. For an applicant who uses the PAIA to satiate their curiosity, the courts will see it as nothing but a fishing expedition. But the closer the applicant gets towards seeking information to protect or enjoy a distinct right, the closer they get to a successful PAIA claim. However, this depends

on whether litigation is on the horizon and whether they have enough information already available.

There is no doubt that the inclusion of the clause that allows access to information from a private company is a 'step unmatched in human rights jurisprudence'.[213] This is especially true to cure the lack of access to information marked by the Apartheid era. Nonetheless, this report has shown that, in practice, the courts have seldomly interpreted the clause generously. This brings into question whether the clause has made a significant difference to the access of information from private companies. However, this assessment is not wholly accurate as the court have shown glimpses of moments where the test was applied generously. This is a positive sign for any future applicant who seeks information held by a private company to either protect or enjoy their rights.

[213] *Clutchco* supra note 83 para 10.

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