

Complaint Ref No: CI 138/24; CI 187/24 & CI 242/24



**INFORMATION
REGULATOR
(SOUTH AFRICA)**

*Ensuring protection of your personal information
and effective access to information*

INVESTIGATION REPORT OF THE INFORMATION REGULATOR

Report Number: 08 of 2025

Promotion of Access to Information Act 2 of 2000

“SAITHPA-HPCSA”

The Information Regulator's Report on an investigation into a complaint lodged by Adv Dhankumarie Govender on behalf of members of the South African Internationally Trained Health Professionals Association (SAITHPA) against the Health Professions Council of South Africa (“HPCSA”), for the alleged refusal of access to the records in terms of section 29(3) of the Promotion of Access to Information Act 2 of 2000 (PAIA).

08/09/2025

CONTENTS

GLOSSARY	3
1. EXECUTIVE SUMMARY	4
1.12 PRELIMINARY FINDINGS AND RECOMMENDATIONS TO THE ENFORCEMENT COMMITTEE	6
2. INTRODUCTION.....	9
3. THE COMPLAINANT.....	10
4. THE PUBLIC BODY.....	11
5. THE REQUEST FOR ACCESS TO RECORDS.....	11
6. THE COMPLAINT	12
7. INVESTIGATIVE POWERS OF THE INFORMATION REGULATOR.....	13
8. JURISDICTION OF THE INFORMATION REGULATOR TO INVESTIGATE THE COMPLAINT	16
9. THE INVESTIGATION.....	17
10. ANALYSIS OF THE ISSUES UNDER INVESTIGATION, IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND RELEVANT PRESCRIPTS.....	25
11. PRELIMINARY FINDINGS AND RECOMMENDATIONS TO THE ENFORCEMENT COMMITTEE	37
12 COMPLIANCE MONITORING WITH THE IMPLEMENTATION OF THE ENFORCEMENT NOTICE	40
13 REVIEW OF THE DECISION OF THE INFORMATION REGULATOR.....	41

GLOSSARY

Item	Term	Definition
1.	Constitution	The Constitution of the Republic of South Africa, Act 108 of 1996
2.	Copyright Act	the Copyright Act 98 of 1978
3.	DIO	The delegated Deputy Information Officer of the HPCSA
4.	HPCSA	The Health Professions Council of South Africa
5.	IO	Information Officer of the HPCSA
6.	MOA	Agreement between HPCSA and UKZN, entered on 18 September 2024, for the Administration of Medical Board Examinations Services.
7.	PAIA	Promotion of Access to Information Act 2 of 2000, as amended
8.	PAIA Regulations	Regulations Relating to the Promotion of Access to Information, 2021
9.	POPIA	Protection of Personal Information Act 4 of 2013, as amended
10.	Regulator	The Information Regulator of South Africa
11.	Requesters	Members of SAITHPA on behalf of whom the complaint was lodged
12.	SAITHPA	The South African Internationally Trained Health Professionals Association
13.	UKZN	University of KwaZulu-Natal

1. EXECUTIVE SUMMARY

- 1.1 This is the Investigation Report of the Information Regulator (“the Regulator”) after receipt of a complaint made in terms of section 77A of the Promotion of Access to Information, Act 2 of 2000 (“PAIA”) and following an investigation conducted in terms of section 77C (1)(a) of PAIA.
- 1.2 The report communicates the Regulator’s preliminary findings and preliminary recommendations to the Enforcement Committee, regarding the alleged refusal of access to records held by the Health Professions Council of South Africa (“HPCSA”), in the form the requesters indicated in their requests, in terms of section 29(3) of the Promotion of Access to Information Act 2 of 2000 (PAIA).
- 1.3 This Investigation Report relates to the complaint lodged by Adv Dhankumarie Govender on behalf of SAITHPA (“the complainant”) against the Health Professions Council of South Africa (“HPCSA”/ “public body”).
- 1.4 The Requesters submitted various PAIA requests to the public body between the period April and June 2024.
- 1.5 The Requesters requested access to the following records:
- 1.5.1 Exam record;
 - 1.5.2 Answer sheet / memorandum of the exam written; and
 - 1.5.3 video recordings (Where applicable).
- 1.6 Access to the requested records was refused in the format requested, in terms of section 29(3) of PAIA, which provides that *“If a requester has requested access in a particular form, access must, subject to section 28, be given in that form, unless to do so would –*
- a) interfere unreasonably with the effective administration of the public body concerned.*
 - b) be detrimental to the preservation of the record; or*
 - c) amount to an infringement of copyright not owned by the State or the public body concerned”.*

- 1.7 The HPCSA submitted that the intellectual property of the information requested is owned by the University of KwaZulu Natal (UKZN) as appointed by the HPCSA and that providing access in a printed and electronic format would impede the effectiveness of the examination system.
- 1.8 Following the refusal of access to the records held by the HPCSA, the requesters each lodged an internal appeal against the decision of the IO to refuse access to the requested record. In response to the appeals, the IO maintained its position to protect the intellectual property of the service provider, that being UKZN.
- 1.9 Subsequent to the unsuccessful appeal applications, the complainant lodged three complaints on behalf of the Requesters. The complaints were given the following reference numbers: **CI 138/24; CI 187/24; and CI 242/24**. For purposes of expediency, the complaints have been consolidated and were dealt with as one complaint.
- 1.10 The investigation of this complaint was preceded by an assessment of the prescribed pre-requisites for acceptance of a complaint, and all such pre-requisites were met.
- 1.11 The investigation focused on the following issues:
- 1.11.1 Whether the complainant complied with the procedural requirements prescribed in PAIA, relating to a request for access to the record held by the public body;
 - 1.11.2 Whether access to the record is refused in terms of any ground for refusal contemplated in Chapter 4 of Part 2 of PAIA;
 - 1.11.3 Whether the disclosure of the record would reveal evidence of, a substantial contravention of, or failure to comply with, the law or an imminent and serious public safety or environmental risk, and whether the public interest in the disclosure of the record clearly outweighs the harm contemplated in the grounds of refusal; and
 - 1.11.4 Whether access to the requested records must be given in the applicable forms as the requester indicated in the request.

1.12 PRELIMINARY FINDINGS AND RECOMMENDATIONS TO THE ENFORCEMENT COMMITTEE

After having investigated, in terms of section 77C(1)(a) of PAIA, and having regard to all circumstances of the case, the Regulator has made the following preliminary findings and recommendations:

1.12.1 Preliminary Findings

1.12.1.1 Whether the complainant complied with the procedural requirements prescribed in PAIA, relating to a request for access to that record.

1.12.1.1.1 The investigation of this complaint was preceded by an assessment of the prescribed pre-requisites, as prescribed in the PAIA Regulations, and the complaint met all the following prescribed pre-requisites: -

- a) the applicable PAIA request forms, Form 2, were duly submitted to the IO, in accordance with section 18(1) of PAIA;
- b) access to records was refused by the IO;
- c) the complainant did not apply to court for appropriate relief regarding access to the records which is the subject matter under investigation;
- d) the complaint was lodged with the Regulator on the prescribed form, Form 5 of Annexure A to the PAIA Regulations; and
- e) the complaint was lodged with the Regulator within the prescribed period of 180 days.

1.12.1.1.2 Accordingly, the complainant has complied with the procedural requirements, as prescribed in PAIA, relating to the request for access to the record held by the HPCSA.

1.12.1.2 Whether access to the records is refused in terms of any ground for refusal contemplated in Chapter 4 of Part 2 of PAIA

1.12.1.2.1 Access to the record held by the public body was not refused in terms of any ground for refusal contemplated in Chapter 4 of Part 2 of PAIA.

1.12.1.2.2 The IO refused access in the form indicated by the requesters in their request forms in terms of section 29(3) of PAIA.

1.12.1.2.3 Accordingly, the IO failed to discharge his burden of justifying a limitation of the constitutional right of access to information, as contained in section 32(1)(b) of the Constitution.

1.12.1.2.4 As a result, access to the records held by the public body was not refused in terms of any ground for refusal contemplated in Chapter 4 of Part 2 of PAIA.

1.12.1.3 Whether the disclosure of the record would reveal evidence of a substantial contravention of, or failure to comply with, the law and the public interest in the disclosure of the record clearly outweighs the harm contemplated in the grounds of refusal.

1.12.1.3.1 Having found that access to the records held by the public body was not refused in terms of the listed grounds for refusal, as contemplated in PAIA, there is no need for the Regulator to determine the public interest override.

1.12.1.3.2 As a result of the above, the mandatory disclosure in the public's interest, in terms of section 46 of PAIA, is not relevant and/or applicable under the circumstances.

1.12.1.4 Whether access to the requested records must be given in the applicable forms as the requester indicated in the request

1.12.1.4.1 The DIO has not advanced any submission that relates to the conduct they seek to prevent by not disclosing the requesters' exam scripts, memoranda and/or video recordings in the form requested, and thus has failed to adduce sufficient evidence upon which the Regulator can be satisfied that access to the requested records in the form requested would amount to copyright infringement as set out in section 29(3) of PAIA.

1.12.1.4.2 It is the Regulator's view that the DIO failed, on a balance of probabilities, to discharge the burden of justifying a limitation of the right to access to information in the form requested, as contained in section 29(3) of PAIA.

1.12.1.4.3 Therefore, our investigation has found that access to the records held by the public body must be granted in the form requested, as the limitations set out in section 29(3) of PAIA are not applicable to the records requested.

1.12.2 Preliminary Recommendations

1.12.2.1 Having considered the nature of the record requested, and the above-mentioned preliminary findings, the following enforcement action is hereby recommended for consideration by the Enforcement Committee:

1.12.2.1.1 The decision of the DIO of the HPCSA to refuse access to the requested records in the form indicated in the requests is hereby set aside in terms of section 77J(1)(a) of PAIA; and

1.12.2.1.2 The IO is directed, in terms of section 77J(1)(b) of PAIA, to-

- (a) Grant to the requesters access to copies of:
 - (i) the examination record of the examination written;
 - (ii) answer sheet/ memorandum; and
 - (iii) Video recording (Where applicable),
in the form indicated in each request form; and
- (b) disclose the said records to the complainant, within thirty (30) days of issuing an Enforcement Notice.

REGULATOR'S REPORT ON THE INVESTIGATION INTO A COMPLAINT LODGED BY ADV DHANKUMARIE GOVENDER, FOR THE ALLEGED REFUSAL OF ACCESS TO RECORDS HELD BY THE HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA ("HPCSA"), IN THE PARTICULAR FORM REQUESTED, ON THE BASIS THAT THE INTELLECTUAL PROPERTY OF THE INFORMATION REQUESTED IS OWNED BY A THIRD PARTY AS PROVIDED FOR IN SECTION 29(3) OF THE PROMOTION OF ACCESS TO INFORMATION ACT 2 OF 2000.

2. INTRODUCTION

2.1 Before South Africa became a constitutional democracy with an enforceable Bill of Rights, the system of Government in South Africa amongst others, resulted in a secretive and unresponsive culture in both public and private bodies which often led to the abuse of power and human rights violations.

2.2 The Constitution of the Republic of South Africa, ("the Constitution") was adopted as the supreme law, in part, to lay the foundations for a democratic and open society. Section 1 of the Constitution provides that the country is founded on various values,

including human dignity, the advancement of human rights and freedoms and a multi-party system of democratic government, to ensure accountability, responsiveness, and openness.

- 2.3 The right of access to any information held by a public body is contained in section 32(1)(a) of the Constitution. Section 32(2) of the Constitution in turn provides for the enactment of national legislation that will give effect to this right, by respecting, protecting, promoting, and fulfilling this right.
- 2.4 The Promotion of Access to Information Act 2 of 2000 ("PAIA") is the national legislation that was enacted in accordance with section 32 (2) of the Constitution. PAIA was amended by POPIA effectively from 30 June 2021, in terms of which the Regulator is empowered to investigate, and where there is a violation, take appropriate enforcement action to redress the violation of the right of access to information. One of the objectives of PAIA, in terms of section 9(e)(i) thereof, is, generally, to promote transparency, accountability, and effective governance of all public and private bodies.
- 2.5 When exercising its constitutional obligation to protect, promote, and ensure fulfilment of the right of access to any information held by the body, the Regulator shall, in line with the purposive interpretation of the constitutional right of access to information, advance the objectives of PAIA.
- 2.6 In pursuit of the above-mentioned objectives, the Regulator's primary mandate, under PAIA, is to regulate the promotion of access to information in a manner that promotes the provision of reasonable access to information or records of public and private bodies *swiftly, inexpensively, and effortlessly*.
- 2.7 Whilst the Regulator shall remain *independent* and *impartial* when conducting its investigation, it is required to perform its functions and exercise its powers without *fear, favour, or prejudice*.

3. THE COMPLAINANT

The complainant is the South African Internationally Trained Health Professionals Association (SAITHPA). SAITHPA is a registered non-profit organisation committed to improving the healthcare of all citizens in South Africa. It seeks to work in conjunction with

governmental, non-governmental and associated organisations to improve access of the community to health professionals by providing oversight to the training and registration of internationally qualified professionals to practice in South Africa an employee of the public body, acting in his personal capacity¹.

4. THE PUBLIC BODY

The Health Professions Council of South Africa (HPCSA) was established in terms of section 2 of the Health Professions Act 56 of 1974, to provide for control over the education, training, and registration for practicing of health professions registered under the Health Professions Act. To protect the public and guide the professions, Council ensures that practitioners uphold and maintain professional and ethical standards within the health professions and ensure that the investigation of complaints concerning practitioners is carried out and see to it that disciplinary action is taken against persons who fail to act accordingly².

5. THE REQUEST FOR ACCESS TO RECORDS

5.1 Between the period April and July 2024, the Requesters submitted PAIA requests to the public body, requesting the following records: -

- 5.1.1 Exam record;
- 5.1.2 Answer sheet / memorandum of the exam written; and
- 5.1.3 video recordings.

5.2 Access to the requested records was refused in the format requested, in terms of section 29(3) of PAIA, which provides that *"If a requester has requested access in a particular form, access must, subject to section 28, be given in that form, unless to do so would –*

- a) interfere unreasonably with the effective administration of the public body concerned.*
- b) be detrimental to the preservation of the record; or*
- c) amount to an infringement of copyright not owned by the State or the public body concerned".*

¹ <https://saithpa.org.za/>

² <https://www.hpcsa.co.za/about-us>

- 5.3 The HPCSA stated that the intellectual property of the information requested is owned by the University of KwaZulu Natal (UKZN) as appointed by the HPCSA and that providing access in a printed and electronic format would impede the effectiveness of the examination system.
- 5.4 Aggrieved by the aforesaid decision of the IO, the requesters lodged internal appeals against the decision of the IO to refuse access to the requested records.
- 5.5 With response to the appeals lodged, the IO stated that there are no basis/grounds for the appeals in that access is only denied in the format requested, however records are available through supervised access at the premises of the Service provider University of KwaZulu Natal (UKZN). It was further stated that the HPCSA remains in its position to protect the intellectual property of the service provider UKZN.
- 5.6 It must be mentioned that the public body is exempted from having an internal appeal in terms of section 74 of PAIA because it does not fall within paragraph (a) of the definition of 'public body' in section 1 of the PAIA Definitions. Accordingly, there was no requirement for the requesters to submit internal appeals against the decision of the IO. As a result, the appeal applications and responses thereto, will not be canvassed any further in this investigation report.

6. THE COMPLAINT

- 6.1 Aggrieved by the decision of the IO to refuse access to the requests, the complainant lodged a complaint with the Regulator, on behalf of the Requesters, on 12 June 2024, 17 July 2024, and 28 August 2024, respectively.
- 6.2 In the complaint forms, part F thereof, the complainant submitted that the Requesters requested access in a particular and reasonable form, and such form of access was refused.
- 6.3 In terms of its expected outcome, under Part G of the complaint form, the complainant submitted that the HPCSA must provide applicants with copies of their examination records, and that the HPCSA has been instructed to do so previously by the courts and the Public Protector.

7. INVESTIGATIVE POWERS OF THE INFORMATION REGULATOR

7.1 The following provisions are applicable to the investigative powers of the Regulator:

7.1.1 Section 32(1)(a) of the Constitution, which provides “**everyone** has the right of access to any information that is held by state”.

7.1.2 Section 3(a) of PAIA provides that the said Act applies to a record of a public body **regardless of when the record came into existence**.

7.1.3 Section 9(e)(i) of PAIA, provides that the object of PAIA is generally to promote **transparency, accountability, and effective governance** of all public and private bodies.

7.1.4 Section 11(1) of PAIA provides that a requester must be given access to any record of a public body if-

7.1.4.1 that person complies with the procedural requirements of PAIA, relating to a request for access to that record; and

7.1.4.2 access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of Part 2 of PAIA.

7.1.5 Section 18(1) of PAIA provides that “a request for access must be made in the **prescribed form** to the information officer of the public body concerned at his or her address or fax number or electronic mail address.”

7.1.6 Section 28(1) of PAIA provides that-

“If a request for access is made to a record of a public body containing information which may or must be refused in terms of any provision of Chapter 4 of this Part, every part of the record which-

(a) does not contain; and

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

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

7.1.7 Section 29(1) of PAIA provides that-

“(1) If a requester has been given notice in terms of section 25(1) that his or her request for access has been granted, that requester must, subject to subsections (3) and (9) and section 31—

(a) if an access fee is payable, upon payment of that fee; or

(b) if no access fee is payable, immediately,

be given access in the applicable forms referred to in subsection (2) as the requester indicated in the request, and in the language contemplated in section 31.”

7.1.8 Section 29(3) of PAIA provides that-

“If the requester has requested access in a particular form, access must, subject to section 28, be given in that form, unless to do so would—

(a) interfere unreasonably with the effective administration of the public body concerned;

(b) be detrimental to the preservation of the record; or

(c) amount to an infringement of copyright not owned by the State or the public body concerned.”

7.1.9 Section 29(3) of PAIA provides that-

“If a record is made available in terms of this section to a requester for inspection, viewing or hearing, the requester may make copies of or transcribe the record using the requester's equipment, unless to do so would—

(a) interfere unreasonably with the effective administration of the public body concerned;

(b) be detrimental to the preservation of the record; or

(c) amount to an infringement of copyright not owned by the State or public body concerned.”

7.1.10 Section 46(a)(i) and (b) of PAIA, provides that the information officer of the public body must grant a request for access to a record of the body contemplated on any of the grounds of refusal, if-

7.1.10.1 the disclosure of the record would reveal evidence of –

- a) a substantial contravention of or failure to comply with the law; or
- b) an imminent and serious public safety; or environmental risk; and

7.1.10.2 the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question.

7.1.11 Section 77A(2)(a) of PAIA provides that a requester who has been unsuccessful in an internal appeal to the relevant authority of the public body may lodge a complaint with the Regulator within 180 days of the decision complained against.

7.1.12 In terms of section 77C(1)(a) of PAIA, the Regulator is empowered to investigate the complaint in the prescribed manner. The prescribed manner for investigating is contained in section 77G, read with section 80, of PAIA, section 81 of POPIA, and the PAIA Regulations.

7.1.13 Section 77G of PAIA deals with the investigation proceedings of the Regulator and section 77G(1) thereof provides that the Regulator has powers similar to those of the High Court in terms of section 80 of PAIA when investigating a complaint, to examine any record of a public or private body to which PAIA applies, and no such record may be withheld from the Regulator on any grounds.

7.1.14 Section 77G (2) of PAIA provides that section 81 of POPIA applies to the investigation of the complaints lodged in accordance with section 77A of PAIA.

7.1.15 Section 81(a) of POPIA, provides that *“for the purposes of the investigation of a complaint, the Regulator may summon and enforce the appearance of persons before the Regulator and compel them to give oral or written evidence on oath and to produce any records and things that the Regulator considers necessary to investigate the complaint, in the same manner, and to the same extent as the High Court”*.

7.1.16 The Regulator is also empowered, in terms of section 81(c) of POPIA, *“to receive and accept any evidence and other information, whether on oath, by affidavit or otherwise, that the Regulator sees fit, whether or not it is or would be admissible in a court of law”*.

7.1.17 Lastly, section 77J (1) of PAIA provides that *“the Regulator, after having considered the recommendation of the Enforcement Committee, may serve the information officer of a public body or the head of a private body with an Enforcement Notice -*

7.1.17.1 confirming, amending, or setting aside the decision which is the subject of the complaint; or

7.1.17.2 requiring the said officer or head to take such action or to refrain from taking such action as the Regulator has specified in the notice.”

7.2 The Regulator is a statutory body empowered to investigate the decision or a failure to take decisions by the information officer of the public body. Therefore, if a decision and the grounds for refusal thereof were given to the complainant, no additional grounds of refusal may be advanced during an investigation of a complaint by the Regulator, although the information officer may provide an explanation to substantiate its decision and the grounds of refusal relied upon.

8. JURISDICTION OF THE INFORMATION REGULATOR TO INVESTIGATE THE COMPLAINT

8.1 The following prescribed prerequisites have been complied with by the complainant:

8.1.1 the applicable PAIA request forms, Form 2, were duly submitted to the IO, in accordance with section 18(1) of PAIA³;

8.1.2 the DIO of the body, duly delegated, relied on the provision in section 29(3) of PAIA, and refused to grant access to the records in the format requested, on the ground that the intellectual property of the information requested is

³ Section 18(1) of PAIA- A request for access must be made in the prescribed form to the IO of the public body concerned at his or her address or fax number or electronic mail address.

owned by the University of KwaZulu Natal (UKZN) as appointed by the HPCSA and that providing access in a printed and electronic format would impede the effectiveness of the examination system;

8.1.3 the complainant did not apply to Court for appropriate relief regarding the matter under investigation;

8.1.4 the complaint was lodged with the Regulator on the prescribed form, Form 5 of Annexure A to the PAIA Regulations; and

8.1.5 the complaint was lodged with the Regulator within the prescribed period of 180 days, in accordance with section 77A(2)(a) of PAIA⁴.

8.2 Accordingly, the Regulator has the appropriate jurisdiction to investigate the complaint against the decision of the DIO of the public body, to refuse access to the records held by the HPCSA.

9. THE INVESTIGATION

9.1 Methodology

9.1.1 In terms of section 77C(1)(a) of PAIA, the Regulator is empowered to investigate the complaint in the prescribed manner. The prescribed manner for investigating is contained in section 77G, read with section 80 of PAIA, section 81 of POPIA; and in the PAIA Regulations.

9.1.2 If it appears from a complaint, or any written response made in relation to a complaint, that the Regulator may, in terms of section 77E of PAIA, read with Regulation 12, and without investigating the complaint, use its best endeavours to secure such a settlement.

9.1.3 In terms of section 81(c) of POPIA, the Regulator is empowered "*to receive and accept any evidence and other information, whether on oath, by affidavit or otherwise, that the Regulator sees fit, whether or not it is or would be admissible in a court of law*".

⁴ A requester that has been unsuccessful in an internal appeal to the relevant authority of a public body may within 180 days of the decision, submit a complaint, alleging that the decision was not in compliance with this Act, to the Information Regulator in the prescribed manner and form for appropriate relief

- 9.1.4 Based on the information provided by the complainant and subsequent responses thereto by the HPCSA, the Regulator decided to investigate.

9.2 Approach to the Investigation

- 9.2.1 On 12 June 2024, 17 July 2024, and 28 August 2024, respectively, the complainant lodged a complaint with the Regulator alleging that the Requesters requested access to records held by the public body, in a particular and reasonable form and such form of access was refused.

- 9.2.2 It was further submitted by the complainant that the reasons provided by the public body for refusal of access were based on section 29(3) of PAIA, which provides that:

“If the requester has requested access in a particular form, access must, subject to section 28, be given in that form, unless to do so would—
(a) interfere unreasonably with the effective administration of the public body concerned;
(b) be detrimental to the preservation of the record; or
(c) amount to an infringement of copyright not owned by the State or the public body concerned.”

- 9.2.3 Upon receipt of a complaint, the complaint was pre-investigated, in terms of section 77E of PAIA, and on 5 August 2024, IO of the HPCSA was requested to respond to the complaint and produce to the Regulator any information, substantiated reasons or grounds for refusal, item, or document, on which his decision to refuse access was based, as provided for in PAIA Regulation 11(2)(c).

- 9.2.4 On 3 October 2024, the IO of the HPCSA responded to the Regulator's letter of 5 August 2024, with the following assertions:

9.2.4.1 *“the allegation of denial to access is incorrect. Indeed, applicants are provided with access, maybe not in the format of their preference. Candidates are allowed to arrange with UKZN to view their scripts and video recordings, except that, they are not allowed to take physical and/or electronic possession of same.*

9.2.4.2 *Having viewed the materials, candidates may then decide whether their scripts should be remarked, as provided for in the Memorandum of Agreement (MOA) entered by the HPCSA and UKZN (attached). The latter holds Intellectually Property Rights, again provided for in the MOA (Section 5.6).*

9.2.4.3 *Like it is standard practice elsewhere, the UKZN develops and maintains an examination paper bank that includes questionnaires and answering memoranda from previous examinations, for future use or reference as may be required. To protect the integrity of the examination system, the material is held confidentially and never released for possession (physical and/or electronic) by external parties, including candidates.*

9.2.4.4 *Also, the practical component (also known as the OSCE) of the examination includes patients who demonstrate symptoms that candidates are required to utilise as part of assessments on their clinical expertise. Both the HPCSA and UKZN are required by law to adhere to the strictest form of patient confidentiality in these types of instances, meaning video materials containing the patients' images cannot be disseminated beyond the primary purpose of the examinations.*

9.2.4.5 *It is for this reason that we believe, Section 44 (2) (a) of POPIA is much more relevant to the HPCSA's decision to allow only for controlled and limited access to the examination records as requested.*

9.2.5 On 2 December 2024, the Regulator received a letter from the complainant, replying to the public body's letter dated 3 October 2024. The complainant made the following reports:

9.2.5.1 Regarding refusal of copies of examination records to protect the integrity of the examination system:

The body's refusal for access to questionnaires and answering memoranda from previous examinations, in order to protect the integrity of the examination system, infringes the requester's

constitutional right to access of information, which he/she is entitled to and which right may only be limited by application of the test enshrined in section 36 of the Constitution and that there are no limitations under PAIA/ POPIA that may limit or deny access to the examination record of a requester, held by a public or private body. Furthermore, at every sitting of an examination the 'examination paper bank' which UKZN so adamantly protects is open for scrutiny by the examinees themselves

9.2.5.2 Regarding refusal of access to protect the identity of patients:

The 'so called patients, referred to by the HPCSA, are in the employ of UKZN.

9.2.5.3 Reliance on Section 44(2) (a) of POPIA:

"the HPCSA's reliance on Section 44 (2) (a) of POPIA as a defense 'to allow for controlled and limited access to the examination records as requested', is misplaced, arbitrary and not in keeping with the object and purpose of the PAIA which enshrines the right of access to information held by a private or public body. Access, in this instance may only be limited to the extent that the limitations are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom as contemplated in section 36 of the Constitution".

9.2.6 It was further submitted that *"In 2021, the Public Protector (PP) was approached to assist our members gain access to their examination record. The PP decided in favour of our members. The HPCSA failed to give effect to this determination. In Kimira Rugnath and 93 others vs the HPCSA and others⁴ the Pretoria High court ordered that the HPCSA give effect to the determination made by the PP within seven days of the order being handed down."*

9.2.7 On 20 May 2025, the Regulator issued a letter to the public body requesting copies of: -

9.2.7.1 the exam guidelines;

9.2.7.2 the notice of disclaimer relating to the examination; and

9.2.7.3 the determination / findings made by the Office of the Public Protector in relation to this matter and your response thereto.

9.2.8 On 26 May 2025, the IO of the HPCSA responded to the Regulator's letter through an email and furnishing the Regulator with the following records: -

9.2.8.1 Medical Board examination Guidelines 12 October 2023, which provides in paragraph 7.3.1, that,

"A candidate may view his or her scripts (theory and OSCE unmanned stations) and video recordings together with the marking memorandum, under the controlled access and supervision of a responsible person appointed by the convening university at the university's premises, provided that a request to do so is submitted to the service provider within Seven (7) days of publication of the Board examination results, either theory or OSCE."

9.2.8.2 Agreement entered by and between the HPCSA and the University of Kwa-Zulu Natal, dated 18 September 2023, which provides in Paragraph 5.6 that,

"HPCSA shall not acquire any right, title or interest in or to any IPR of the Service Provider or its licensors, including but not limited to the IPR relating to the exam questions, exam scripts and recordings of Practical examinations, which contain the Service Provider's IPR and proprietary techniques and methods."

9.2.9 In an endeavour to resolve the complaints through a settlement process between the parties, in accordance with section 77F of PAIA, read with PAIA Regulation 12, the Regulator attempted to facilitate a settlement of the complaint. However, no settlement agreement was reached by the parties.

9.2.10 Due to the parties being unable to settle their dispute, the IO of the HPCSA and the complainant were notified that the Regulator had decided to conduct a full investigation into the matter, in accordance with section 77C of PAIA.

- 9.2.11 The investigation was conducted in terms of section 77C(1)(a), read with section 11(1) of PAIA.
- 9.2.12 The investigation focused on the relevant legal prescripts that regulate the requirements that should have been met by the HPCSA when processing a request for access to information under its control or in its possession.
- 9.2.13 The investigation sought to determine whether the complainant has satisfied the above-mentioned prerequisites for granting access to the record, and if yes, to determine the appropriate enforcement action to ensure the promotion of the right of access to information.

9.3 Issues investigated

- 9.3.1 Based on the complaint and the reason for refusal of access in the form requested by the complainant, the investigation focused on the following issues:
 - 9.3.1.1 Whether the complainant complied with the procedural requirements prescribed in PAIA, relating to a request for access to the records held by the public body;
 - 9.3.1.2 Whether access to the record is refused in terms of any ground for refusal contemplated in Chapter 4 of Part 2 of PAIA;
 - 9.3.1.3 Whether the disclosure of the record would reveal evidence of, a substantial contravention of, or failure to comply with, the law or an imminent and serious public safety or environmental risk, and whether the public interest in the disclosure of the record clearly outweighs the harm contemplated in the grounds of refusal; and
 - 9.3.1.4 Whether access to the requested records must be given in the applicable forms as the requester indicated in the request.

9.4 The key sources of evidence gathered during the investigation.

9.4.1 Documents

9.4.1.1 PAIA request forms (Form 2);

9.4.1.2 HPCSA's response to the PAIA requests;

9.4.1.3 Complaint forms (Form 5) dated on 12 June 2024, 17 July 2024, and 28 August 2024, respectively.

9.4.2 Correspondence sent and received.

The Regulator sent and received the following correspondence as recorded below:

9.4.2.1 IR Notification letter to the public body, dated 5 August 2024;

9.4.2.2 Response letter to IR from HPCSA, dated 3 October 2024;

9.4.2.3 Letter from the complainant in reply to the public body's submissions, dated 21 December 2024;

9.4.2.4 IR letter to HPCSA, dated 20 May 2025; and

9.4.2.5 HPCSA response, email dated 26 May 2025.

9.4.3 Websites consulted / electronic sources

9.4.3.1 <https://saithpa.org.za/>

9.4.3.2 <https://www.hpcsa.co.za/about-us>

9.5 Relevant legislation and other prescripts

- 9.5.1 Constitution of the Republic of South Africa Act, 108 of 1996;
- 9.5.2 Copyright Act 98 of 1978;
- 9.5.3 Promotion of Access to Information Act, 2 of 2000 as amended;
- 9.5.4 Protection of Personal Information Act, 4 of 2013 as amended; and
- 9.5.5 Regulations relating to the Promotion of Access to Information Act, 2 of 2021.

9.6 Relevant case law

- 9.6.1 *Smuts N.O. and Others v Member of the Executive Council: Eastern Cape Department of Economic Development Environmental Affairs and Tourism and Others* (1199/2021) [2022] ZAECMKHC 42 (26 July 2022);
- 9.6.2 *President of the Republic of South Africa and Others v M & G Media Ltd* (CCT 03/11) [2011] ZACC 32; 2012 (2) BCLR 181 (CC); 2012 (2) SA 50 (CC) (29 November 2011);
- 9.6.3 *Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others* [2023] ZACC 13; and
- 9.6.4 *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623. (A) at 634G-635D.

10. ANALYSIS OF THE ISSUES UNDER INVESTIGATION, IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND RELEVANT PRESCRIPTS

10.1 Has the complainant complied with the procedural requirements of PAIA relating to the request for access to the record?

10.1.1 In terms of section 32(1)(a) of the Constitution, *“Everyone has the right of access to any information held by the state”*. In this regard, the state refers to the HPCSA.

10.1.2 Section 11(1)(a) of PAIA provides that *“a requester must be given access to a record of a public body if that requester complies with all the procedural requirements in this Act relating to a request for access to that record”*.

10.1.3 The prescribed procedures are contained in sections 18, 75, 77A and 77B of PAIA, read with PAIA Regulations 7, 9, and 10.

10.1.4 In **Paul v MEC for Health Eastern Cape Provincial Government and others**⁵, para 10, the court emphasised the importance of complying with section 11(1) of PAIA and it held that *“One of the things which stand out in section 11 is that compliance with the **procedural requirements of PAIA is not optional**. If any of the procedural requirements are not complied with, the requester is not entitled to the record. The court is similarly not at liberty to waive the peremptory provisions of section 11(1). On a proper construction of section 11(1), both the requester’s entitlement to be given access to a record of a private body and the obligation imposed on the requester to comply with all the procedural requirements of PAIA are couched in peremptory terms. In the absence of full compliance with the procedural requirements of PAIA, the information officer is entitled to refuse access and to not provide the record”*.

⁵ Paul v MEC for Health, Eastern Cape Provincial Government and Others; Mbobo v MEC for Health, Eastern Cape Provincial Government and Others; Ncumani v MEC for Health, Eastern Cape Province and Others (5031/2018; 5108/2018; 5689/2018) [2019] ZAECHC 18; [2019] 3 All SA 879 (ECM) (29 March 2019)

Request for access

- 10.1.5 Section 18(1) of PAIA provides that *“a request for access must be made in the prescribed form to the IO of the public body concerned at his or her address or fax number or electronic mail address”*. **Form 2** of Annexure A to the PAIA Regulations is the prescribed form in PAIA Regulation 7(1).
- 10.1.6 The Requesters submitted their respective requests for access to the records in the prescribed form to the DIO of the HPCSA.

Internal Appeal

- 10.1.7 Section 74(1)(a) of PAIA provides that a requester may lodge an internal appeal against a decision of the IO of a public body⁶ to refuse a request for access to the record.
- 10.1.8 The HPCSA does not fall under the definition of the public body referred to in section 74(1) of PAIA, thus, an internal appeal is not applicable.

Complaint to the Regulator

- 10.1.9 Section 77A(2)(c) of PAIA provides that a requester aggrieved by a decision of the information officer of a public body referred to in paragraph (b) of the definition of “public body” in section 1—
- (i) to refuse a request for access; or
 - (ii) taken in terms of section 22, 26(1) or 29(3);
- may within **180 days of the decision**, submit a complaint, alleging that the decision was not in compliance with PAIA, to the Regulator in the prescribed manner and **form** for appropriate relief.
- 10.1.10 The manner and form for lodging a complaint with the Regulator is prescribed in section 77B of PAIA⁷ and Regulation 10, which provides that a complaint contemplated in section 77A of PAIA, must be lodged with the Regulator, in writing, and on a form that corresponds substantially with **Form 5** of Annexure A to the PAIA Regulations.

⁶ Only applicable to the Public Body referred to in paragraph (a) of the definition of “public body” in section 1

⁷ Section 77B (1) of PAIA- A complaint to the Information Regulator must be made in writing.

10.1.11 The complainant lodged three complaints with the Regulator, in **writing** and on **Form 5** of Annexure A of the PAIA Regulations, **within 180 days** of the decision of the DIO.

10.1.12 The Regulator does not have jurisdiction to investigate a complaint already adjudicated by the Court or currently pending before the Court. The complainant submitted that they did not apply to a court for appropriate relief regarding the matter under investigation.

Analysis of evidence on whether the complainant has complied with the procedural requirements prescribed in PAIA, relating to a request for access to the records held by the HPCSA.

10.1.13 The Requesters duly filed PAIA requests with the DIO and in the **prescribed form**.

10.1.14 The complainant duly lodged its complaint with the Regulator, in writing, on the **prescribed form**, and within the prescribed **period of 180 days**.

10.1.15 Lastly, there is no matter relating to the records in question, **pending before the court**.

10.1.16 Accordingly, the complainant has complied with the procedural requirements of PAIA relating to the request for access to the records held by the HPCSA, as prescribed in PAIA.

10.2 Whether access to those records is refused in terms of any ground for refusal contemplated in Chapter 4 of Part 2 of PAIA

10.2.1 The right of access to any information held by the State is contained in section 32(1)(a) of the Constitution.

10.2.2 PAIA seeks to strike a balance with other competing rights, such as the right to privacy⁸, in so far as the protection of personal information is concerned.

⁸ Section 14 of the Constitution

10.2.3 PAIA is not merely legislation giving effect to the constitutional right of access to information, but it is a law of general application that limits the right of access to information under certain grounds for refusal of access to the records ("Exemptions") held by the public body.

10.2.4 The grounds of refusal of access to information, as contemplated in Chapter 4 of Part 2 of PAIA, are the laws of general application referred to in section 36(1) of the Constitution. These grounds of refusal are, subject to section 36 of the Constitution, reasonable and justifiable grounds for limiting the Constitutional right of access to any information.

10.2.5 In **Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others**, the Constitutional Court held that⁹–

"PAIA provides a statutory right of access to records held by the state and private bodies. In the latter instance, this right is exercisable to the extent that a requested record is required for the exercise or protection of rights. Both private and public bodies are under a duty to provide access to requested records, or part thereof unless refusal of the request is permitted by one or more grounds of PAIA. The grounds of refusal limit the constitutional right of access to information to protect fundamental rights and important aspects of the public interest."

10.2.6 Upon request for adequate reasons for the refusal of access, including the provisions of PAIA that were relied on, the DIO made the following submissions:

10.2.6.1 The DIO denied having refused access to the requested records and submitted that the applicants are granted access, however, not in the format of their preference.

10.2.6.2 It was further submitted that candidates are allowed to arrange with UKZN to view their scripts and video recordings, except that, they are not allowed to take physical and/or electronic possession of same.

⁹ Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others [2023] ZACC 13, paragraph 53

10.2.6.3 The DIO also submitted that the provision of section 44 (2) (a) of POPIA is much more relevant to the HPCSA's decision to allow only for controlled and limited access to the examination records as requested.

10.2.7 It is the Regulator's view that none of the above submissions are provided for in Chapter 4 of Part 2 of PAIA and as a result, the Regulator finds that the refusal of access was not in terms of any ground for refusal contemplated in Chapter 4 of Part 2 of PAIA.

10.3 Whether the disclosure of the record would reveal evidence of a substantial contravention of, or failure to comply with, the law and the public interest in the disclosure of the record clearly outweighs the harm contemplated in the grounds of refusal.

10.3.1 Having found that access to the records held by the public body was not refused in terms of the listed grounds for refusal, as contemplated in PAIA, there is no need for the Regulator to determine the public interest override.

10.3.2 As a result of the above, the mandatory disclosure in the public's interest, in terms of section 46 of PAIA, is not relevant and/or applicable under the circumstances.

10.4 Whether access to the requested records must be given in the applicable forms as the requester indicated in the request

10.4.1 Having found that the complainant has complied with the procedural requirements of PAIA relating to the request for access to the records held by the HPCSA and that the refusal of access was not in terms of any ground for refusal contemplated in Chapter 4 of Part 2 of PAIA, the Regulator concludes that the provisions of section 11(1) of PAIA have been fulfilled and therefore the complainant must be granted access to the requested records.

- 10.4.2 It has been established that the complainant is not aggrieved by the decision of the DIO to refuse access but that the complainant is aggrieved by the decision of the DIO made in terms of section 29(3) of PAIA.
- 10.4.3 Section 29(1) of PAIA provides that, if access has been granted, that requester must, subject to subsections (3) and (9) and section 31, be given access in the applicable forms as the requester indicated in the request, and in the language contemplated in section 31.
- 10.4.4 Section 29(3) of PAIA provides certain limitations to the right to access in the applicable forms as the requester indicated in the request. The section provides that, *"If the requester has requested access in a particular form, access must, subject to section 28, be given in that form, unless to do so would—*
- (a) interfere unreasonably with the effective administration of the public body concerned;*
 - (b) be detrimental to the preservation of the record; or*
 - (c) amount to an infringement of copyright not owned by the State or the public body concerned."*
- 10.4.5 The DIO submitted that the allegation of denial to access is incorrect, in that the applicants are provided access, however, not in the format of their preference. It was further submitted that in terms of the Memorandum of Agreement (MOA) entered by the HPCSA and UKZN, the latter holds Intellectually Property Rights, as provided for in paragraph 5.6 of the MOA.
- 10.4.6 Accordingly, it is the DIO's view that the intellectual property of the information requested is owned by UKZN as appointed by the HPCSA and that providing access in printed form and electronic format would impede the effectiveness of the examination system.

Analysis of evidence on whether access to the requested records must be given in the applicable forms as the requester indicated in the request

- 10.4.7 When exercising its statutory obligation to protect, promote, and ensure fulfilment of the right of access to any information held by the body, the

Regulator shall, in line with the purposive interpretation of the constitutional right of access to information, advance the objectives of PAIA¹⁰.

10.4.8 The third fundamental principle for a purposive interpretation of the constitutional right of access to information, as laid down in *Smuts NO and others v MEC, Eastern Cape Department of Economic Development Environmental Affairs and Tourism and others*¹¹, provides that, “the burden of justifying a limitation of a right falls on the party wishing to do so, and not on the right-holder”. The second principle in that judgement provides that “withholding information is permitted only in instances described in PAIA. These exemptions and grounds of refusal must be narrowly construed because they involve limitation of a constitutional right”.

10.4.9 Therefore, the DIO has the burden of justifying a limitation of a right of access to its records in the form indicated in the request, and not the complainant, who is the right-holder. The DIO's burden of justifying a limitation of a right of access to the records in the form requested is to be discharged on a balance of probabilities by providing adequate evidence that the disclosure of the records in the form requested would result in any one of the outcomes listed in section 29(3) of PAIA.

10.4.10 In the matter of **President of the Republic of South Africa and Others v M & G Media Ltd**¹², the court held that-

*“The facts upon which the exemption is justified will invariably be within the knowledge of the holder of the information. In these circumstances, the requester may have to resort to a bare denial of the facts alleged by the holder of information justifying refusal of access. A bare denial will normally not be sufficient to raise a genuine dispute of fact, and **the Plascon-Evans rule would require that the application be decided on the factual allegations made by the party refusing access to the record**¹³.*

¹⁰ Section 9 of PAIA

¹¹ *Smuts NO and others v MEC, Eastern Cape Department of Economic Development Environmental Affairs and Tourism and others* (1199/2021) [2022] ZAECKMHC 42 (26 July 2022)

¹² In the Constitutional Court judgment, *President of the RSA and Others v M & G Media Ltd* 2012 (2) BCLR 181 (CC) (Mail & Guardian CC) Paragraph 34

¹³ See *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634G-635D.

10.4.11 Furthermore, in paragraph 23 of the said case, the court held that the public body must, to discharge its burden under PAIA, provide evidence that the record in question falls within the description of the statutory exemption it seeks to claim. The proper approach to the question of whether the state has discharged its burden is to ask whether the state has put forward sufficient evidence for a court to conclude that, on the balance of probabilities, the information withheld falls within the exemption claimed.

10.4.12 Accordingly, when exercising the option to refuse access in the form requested, and essentially discharging its burden under PAIA, the public body must provide evidence that the record in question falls within the description of the statutory exemption it seeks to claim.

10.4.13 The IO has not advanced any evidence to prove that granting access in the form requested would (a) interfere unreasonably with the effective administration of the public body concerned; and (b) be detrimental to the preservation of the record, save to say that: -

10.4.13.1 *"UKZN develops and maintains an examination paper bank that includes questionnaires and answering memoranda from previous examinations, for future use or reference as may be required, and that to protect the integrity of the examination system, the material is held confidentially and never released for possession (physical and/or electronic) by external parties, including candidates"; and*

10.4.13.2 that *"the practical component (also known as the OSCE) of the examination includes patients who demonstrate symptoms that candidates are required to utilise as part of assessments on their clinical expertise. Both the HPCSA and UKZN are required by law to adhere to the strictest form of patient confidentiality in these types of instances, meaning video materials containing the patients' images cannot be disseminated beyond the primary purpose of the examinations.*

10.4.14 It is not clear to the Regulator how the above submissions are applicable to the exclusions set out in section 29(3) of PAIA and thus justify the

limitation of the complainant's right of access to the records in the form requested. Consequently, it is the Regulator's view that the DIO has advanced a bare denial, which is not sufficient to justify the limitation of the complainant's right to access the records in the form requested.

10.4.15 Notwithstanding the above, the DIO submitted a copy of an MOA which provides that, in terms of paragraph 5.6 thereof, the HPCSA shall not acquire any right, title or interest in or to any IPR of the Service Provider or its licensors, including but not limited to the IPR relating to the exam questions, exam scripts and recordings of Practical examinations, which contain the Service Provider's IPR and proprietary techniques and methods.

10.4.16 Accordingly, it is the DIO's submission that the intellectual property of the information requested is owned by UKZN as appointed by the HPCSA and that providing access in printed form and electronic format would impede the effectiveness of the examination system.

10.4.17 The only reasonable inference to draw from this submission is that the DIO is invoking the limitation set out in section 29(3)(c) of PAIA, which provides for the refusal of access in the form requested if to do otherwise would amount to an infringement of copyright not owned by the State or the public body.

10.4.18 In other words, section 29(3)(c) of PAIA provides that refusal of access in the form requested would be justified if disclosure of the records in the form requested would result in a copyright infringement.

10.4.19 Therefore, the DIO's burden of justifying the limitation of the right of access to the records in the form requested requires the DIO to provide evidence that the records in question fall within the description of the statutory exemption it seeks to claim.

Copyright Infringement

10.4.20 It is not in dispute whether the copyright subsists in the requested records, nor the fact that UKZN is the owner of such Copyright. The issue in dispute is whether the DIO has advanced sufficient evidence to support the claim that the act of disclosing the records in the form requested would amount to an infringement of such Copyright.

10.4.21 Copyright law in South Africa is embodied in the Copyright Act¹⁴, which governs the right to control the use of and reproduction of the works. The exam records and memoranda sought by the requesters fall under the definition of literary works as defined in the Copyright Act¹⁵. Therefore, books, articles, conference papers and even examination papers produced by academics, through their own skill and labour, are protected by copyright¹⁶. The video recordings are defined as cinematograph film.¹⁷

10.4.22 Copyright infringement is defined in section 23 of the Copyright Act which provides that Copyright shall be infringed by any person, not being the owner of the copyright, who, without the license of such owner, does or causes any other person to do, in the Republic, any act which the owner has the exclusive right to do or to authorise. Accordingly, Copyright infringement occurs when a person, without the permission of the Copyright holder, does something which the Copyright holder has the exclusive right to do, such as making a copy of the work, translating the work or including sections of that work in another work.

10.4.23 Acts of Copyright infringement are set out in section 23(2) of the Copyright Act and include the actions of a person who, without the licence of the owner of the copyright and at a time when copyright subsists in a work-

- (a) imports an article into the Republic for a purpose other than for his private and domestic use;
- (b) sells, lets, or by way of trade offers or exposes for sale or hire in the Republic any article;

¹⁴ Copyright Act 98 of 1978

¹⁵ Section 7 of the Copyright Act 98 of 1978

¹⁶ Copyright Infringement, Plagiarism, an unseemly spat or a case of academic bad manners - Tanya Woker

¹⁷ Section 7 of the Copyright Act 98 of 1978

- (c) distributes in the Republic any article for the purposes of trade, or for any other purpose, to such an extent that the owner of the copyright in question is prejudicially affected; or
- (d) acquires an article relating to a computer program in the Republic.”

10.4.24 Even though the body is a public body and the requester is not required to provide a reason for the request for access to the records, the requesters stated that they seek the records to exercise their right to litigate if necessary.

10.4.25 The DIO has not advanced any submission that relates to the conduct they seek to prevent by not disclosing the requesters' exam scripts, memoranda and/or video recordings in the form requested, save to say that, *“to protect the integrity of the examination system, the material is held confidentially and never released for possession (physical and/or electronic) by external parties, including candidates.”*

10.4.26 The above submission by the DIO does not amount to any of the acts described in section 23 of the Copyright Act. None of the requesters has indicated an intention to use the requested records in any manner that falls within the acts described in section 23 of the Copyright Act. Therefore, DIO has failed to advance sufficient evidence to support the claim that the act of disclosing the records in the form requested would amount to an infringement of Copyright owned by UKZN.

10.4.27 Furthermore, section 12 of the Copyright Act, provides for the general exceptions from protection of literary and musical works and states that *“Copyright shall not be infringed by any fair dealing with a literary or musical work-*

- (a) *for the purposes of research or private study by, or the personal or private use of, the person using the work;*
- (b) *for the purposes of criticism or review of that work or of another work;*
or
- (c) *for the purpose of reporting current events -*
 - (i) *in a newspaper, magazine or similar periodical; or*
 - (ii) *by means of broadcasting or in a cinematograph film;*

Provided that, in the case of paragraphs (b) and (c) (i), the source shall be mentioned, as well as the name of the author if it appears on the work.”

10.4.28 Accordingly, the fair use of copyright work is not an infringement of copyright if it is used for the above-mentioned purposes. Taking into consideration that the requesters have requested access to copies of their personal exam scripts, the answer sheet used to mark the script and/or the video recordings of the practical exam taken pursuant to their private studies and the fact that the records are sought for the purpose to review their own work, the Regulator concludes that Copyright shall not be infringed by any fair dealing with the requested records and therefore, access must be granted in the form requested as indicated in the requests.

10.4.29 In the **Smuts NO and others' case**¹⁸, the court held that “*Legislation which gives effect to constitutional rights and provides mechanisms for their promotion and enforcement must be interpreted generously and purposively, and with due attention to context*”.

10.4.30 The court, in the **Smuts NO and others**, held that while access may be denied where it is clearly justified, doubts should typically be resolved in favour of disclosure, and a discretion exercised accordingly. It is the Regulator's view that the DIO has not advanced any submission that relates to the conduct they seek to prevent by not disclosing the requesters' exam scripts, memoranda and/or video recordings in the form requested, and thus has failed to adduce sufficient evidence upon which the Regulator can be satisfied that access to the requested records in the form requested would amount to copyright infringement as set out in section 29(3) of PAIA.

10.4.31 It is the Regulator's view that the information officer failed, on a balance of probabilities, to discharge the burden of justifying a limitation of the right to access to information in the form requested, as contained in section 29(3) of PAIA.

¹⁸ Paragraph 8

10.4.32 Therefore, our investigation has found that access to the records held by the public body must be granted in the form requested, as the limitations set out in section 29(3) of PAIA are not applicable to the records requested.

11. PRELIMINARY FINDINGS AND RECOMMENDATIONS TO THE ENFORCEMENT COMMITTEE

After having investigated, in terms of section 77C(1)(a) of PAIA, and having regard to all circumstances of the case, the Regulator has made the following preliminary findings and recommendations:

11.1 Preliminary Findings

11.1.1 Whether the complainant complied with the procedural requirements prescribed in PAIA, relating to a request for access to that record.

11.1.1.1 The investigation of this complaint was preceded by an assessment of the prescribed pre-requisites, as prescribed in the PAIA Regulations, and the complaint met all the prescribed pre-requisites.

- a. the applicable PAIA request forms, Form 2, were duly submitted to the IO, in accordance with section 18(1) of PAIA;
- b. access to records was refused by the IO;
- c. the complainant did not apply to court for appropriate relief regarding access to the record which is the subject matter under investigation;
- d. the complaint was lodged with the Regulator on the prescribed form, Form 5 of Annexure A to the PAIA Regulations; and
- e. the complaint was lodged with the Regulator using the prescribed period of 180 days.

11.1.1.2 Accordingly, the complainant has complied with the procedural requirements, as prescribed in PAIA, relating to the request for access to the record held by the HPCSA.

11.1.2 Whether access to the records is refused in terms of any ground for refusal contemplated in Chapter 4 of Part 2 of PAIA

11.1.2.1 Access to the record held by the public body was not refused in terms of any ground for refusal contemplated in Chapter 4 of Part 2 of PAIA.

11.1.2.2 The IO refused access in the form indicated by the requesters in their request forms in terms of section 29(3) of PAIA.

11.1.2.3 Accordingly, the IO failed to discharge his burden of justifying a limitation of the constitutional right of access to information, as contained in section 32(1)(b) of the Constitution.

11.1.2.4 As a result, access to the records held by the public body was not refused in terms of any ground for refusal contemplated in Chapter 4 of Part 2 of PAIA.

11.1.3 Whether the disclosure of the record would reveal evidence of a substantial contravention of, or failure to comply with, the law and the public interest in the disclosure of the record clearly outweighs the harm contemplated in the grounds of refusal.

11.1.3.1 Having found that the IO has failed to provide reasonable and or adequate evidence, on a balance of probabilities, for the refusal of access to the record held by the public body in terms of the listed grounds for refusal, as contemplated in PAIA, there is no need for the Regulator to determine the public interest override.

11.1.3.2 As a result of the above, the mandatory disclosure in the public's interest, in terms of section 46 of PAIA, is not relevant and/or applicable under the circumstances.

11.1.4 Whether access to the requested records must be given in the applicable forms as the requester indicated in the request

11.1.4.1 The IO has not advanced any submission that relates to the conduct they seek to prevent by not disclosing the requesters' exam scripts, memoranda and/or video recordings in the form requested, and thus has failed to adduce sufficient evidence upon which the Regulator can be satisfied that access to the requested records in the form requested would amount to copyright infringement as set out in section 29(3) of PAIA.

11.1.4.2 It is the Regulator's view that the IO failed, on a balance of probabilities, to discharge the burden of justifying a limitation of the right to access to information in the form requested, as contained in section 29(3) of PAIA.

11.1.4.3 Therefore, our investigation has found that access to the records held by the public body must be granted in the form requested, as the limitations set out in section 29(3) of PAIA are not applicable to the records requested.

11.2 Preliminary Recommendations

11.2.1 Having considered the nature of the records requested, and the above-mentioned preliminary findings, the following enforcement action is hereby recommended for consideration by the Enforcement Committee:

11.2.1.1 The decision of the IO of the HPCSA to refuse access to the requested records in the form indicated in the requests is hereby set aside in terms of section 77J(1)(a) of PAIA; and

11.2.1.2 The IO is directed, in terms of section 77J(1)(b) of PAIA, to-

11.2.1.2.1 Grant to the requesters access to copies of:

a) the examination record of the examination

written;

- b) answer sheet/ memorandum; and
- c) Video recording (Where applicable); and

11.2.1.2.2 disclose the said records to the complainant, within thirty (30) days of issuing an Enforcement Notice upon receipt of payment of access fee, if any.

12 COMPLIANCE MONITORING WITH THE IMPLEMENTATION OF THE ENFORCEMENT NOTICE

12.1 Upon receipt of an Enforcement Notice, the IO is required to submit an Implementation Plan to the Regulator and the complainant, within **ten (10)** days of receipt of the Enforcement Notice, outlining how the records will be disclosed to the complainant within the prescribed period.

12.2 Section 90(1) of PAIA provides that a person who, with intent to deny a right of access in terms of this Act—

12.2.1 destroys, damages, or alters a record;

12.2.2 conceals a record; or

12.2.3 falsifies a record or makes a false record,

commits an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding two years.

12.3 In accordance with section 77K of PAIA, the information officer who refuses or fails to comply with an Enforcement Notice referred to in section 77J of PAIA, is guilty of an offence and liable upon conviction to fine or imprisonment for a period not exceeding three (3) years or to both such a fine and such imprisonment.

13 REVIEW OF THE DECISION OF THE INFORMATION REGULATOR

13.1 The decision of the Regulator is final and the complainant or an IO of a public body that is aggrieved by any final decision of the Regulator, in the form of an Enforcement Notice, may in accordance with Section 78(2) and (4) of PAIA and within 180 days of receipt of the decision concerned, apply to a court for appropriate relief in terms of section 82 of PAIA.

13.2 However, the decision to review the decision of the Regulator must be communicated to the Regulator within 10 days of receipt of the Enforcement Notice, through the following email - paiacomplaints@infoRegulator.org.za.



Adv Makhwedi Madisa-Makgopa

ACTING EXECUTIVE: PAIA

Date: 11 September 2025

Investigator: Ms Mathapelo Magagula - Senior Complaints & Investigations Officer (PAIA)