Director General

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PUBLIC COMMENTS ON PROMOTION OF ACCESS TO INFORMATION AMENDEMENT BILL, 2011: ACCESS TO INFORMATION IN THE CONTEXT OF GENETICALLY MODIFIED ORGANISMS

The African Centre for Biosafety is a non-profit organisation, based in Johannesburg. We provide authoritative, credible, relevant and current information, research and policy analysis and sharing of best practice, with regard to issues pertaining to genetic engineering, biosafety, and biopiracy in Africa. In this brief, we explain the problems we have and continue to encounter with regard to accessing information from the government with regard to decision making and permit applications/risk assessments with regard to the regulation of genetically modified organisms. This experience we submit, has to be taken into account in the review of PAIA and its amendments.

Following the promulgation of the Genetically Modified Organisms Act in 1997, numerous Genetically Modified Organism (GMO) applications have been approved in SA. GMOs commercially available in South Africa include insect resistant maize and cotton, herbicide tolerant cotton, maize and soybean, and herbicide tolerant and insect resistant cotton and maize, making up 62% of the total maize crop, 80% of the total soybean crop and 90% of the total cotton crop in South Africa comprised of GMOs.[1] According to the International Service for the Acquisition of Agri-Biotech Applications (ISAAA)'s Global Status of commercialised Biotech/GM crops: 2010, South Africa planted 2.2 million ha of GMO crops during 2010.

[1] Keetch, Green & Webster, *The Regulation of GMOs in South Africa* www.africabio.com

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Public interest groups such as the ACB have, over many years, attempted to engage with the government on the regulation of GMOs in South Africa, and to participate in GMO permitting processes. While a valuable contribution to the biosafety debate has been made, these efforts have often been frustrated by a lack of transparency in the decision-making process, and in particular the lack of information made available to the public. The GMO Registrar has consistently insisted on interested and affected parties (I&APs) making formal applications for information under the Promotion of Access to Information Act[2] (PAIA), and even then only a sanitized version is provided that has been expunged by the permit applicant of purportedly confidential business information (CBI) and intellectual property. As a consequence, I&APs are unable to carry out independent evaluation or assessment of the potential risks associated with the transgenic organisms proposed for permitting.

The 1997 GMO Act was amended in 2006, [3] and new GMO Regulations took effect on 26 February 2010. We set out in this submission, details of our problems with accessing information from the government, in terms of the Promotion of Access to Information Act, which is invoked and relied upon, by decision makers under the GMO Act and the extent to which the public's rights to information are being thwarted.

Public Notification of proposed release or commodity clearance of GMOs

The 2010 GMO Regulations follow a similar approach to public notice as that prescribed in the previous regime, although with some noteworthy changes. Public notification is to be given in the form of a notice published in the printed media informing the public of the application.[4] For a proposed general or commodity release of GMOs, the applicant is required to publish the notice in at least three national newspapers. For a proposed trial release, the applicant is required to publish notice in at least two newspapers circulating in the immediate area and one newspaper circulating nationally.[5] Where no newspapers circulate in the immediate area in which the proposed trial release will take place, the applicant is required to inform the public through other means of effective

[2] Act 2 of 2000.
[3] M Mayet, *Regulation of GMOs in South Africa – Details and Shortcomings*, African Centre for Biosafety, (2007).
[4] R9(1).
[5] R9(2).

communication (in which case a record of such proceedings must be provided to the Registrar as proof).[6]

It is mandatory that the published notice contains at least the following details:

- the full name and address of the applicant;
- the objective of the application;
- a general description of the GMO, including the name of the donor organism, recipient organism (if different) and inserted genes e.g. novel trait and marker genes (if present);
- where appropriate a description of the place of release, including the name of the town, the size of the release and information pertaining to the surrounding environment;
- information on how to access a copy of the application;
- a request that interested parties submit comments or objections in connection with the application within a period specified in the notice: Provided that such period shall not be less than thirty days after the date on which the last notice appears in the media; and
- the address of the Registrar to which comments or objections may be submitted.[7]

Changes include a requirement that information be published on how to access a copy of the permit application. This provision is discussed further under the heading 'confidentiality and access to information' below. In addition, proposed general and commodity releases must now be published in three national newspapers, rather than the previous requirement of publication in three local newspapers.

The new notice also requires that the objective of the application be published, and is more specific regarding the published general description of the GMO and the area

[6] R9(3).
[7] R9(5).

where the release is intended (e.g. the name of the town and the size of the release is to be published).

A study[8] was commissioned by the (now disbanded) National Environmental Advisory Forum (NEAF) regarding public participation in the context of the regulation of GMOs under the 1997 GMO Act and 1999 regulations.[9] A number of concerns relating to public participation process were documented, including concerns relating to the limited opportunity provided for public participation under the public notice requirement.[10] Unfortunately, a number of these concerns have not been addressed under the amended Regulations. For example, the amended Regulations do not incorporate suggestions made by NEAF stakeholders that permit applications be published on an up-to-date website, and that notices be emailed to stakeholders registered on a database. In addition, the 30 day period within which to comment has been retained (resulting in problems where I&APs are required to follow the PAIA procedure for accessing information, or where scientific or specialist input is required to make meaningful representations). It is also not clear how notification will be given to illiterate members of local communities that may be affected by a release of GMOs into their environment (unless this is a proposed trial release in an area with no local newspaper circulation, in which case the applicant is required to inform the public through other, unspecified means of effective communication).

The Registrar is required to refer any comments received from interested parties to the EC within the prescribed time period.[11] The Registrar is also empowered to take any other measure to notify interested parties of applications made, and to invite written comments from such parties.[12]

The new GMO regulatory regime does not make provision for further comment within the GMO permit process, for example in circumstances where the GMO applicant

[8] Pole, A *Public Participation in the Context of GMOs in South Africa*, November 1997 (unpublished research prepared for and on behalf of the NEAF).
[9] GN R1420 of 26 November 1999, as amended by GN R.828 of 21 June 2002, GN R.576 of 2 May 2003, GN R495 of 23 April 2004, GN R.478 of 27 May 2005, GN R.130 of 17 February 2006, GN R.41 of 26 January 2007.
[10] R6 of the 1999 GMO Regulations.
[11] R9(6).
[12] R9(7).

responds to any comments made and furnishes additional information to the GMO Register. Notwithstanding this, it is submitted that in accordance with the principles of fairness, the GMO Registrar should in such circumstances afford I&APs a further opportunity to make representations.[13]

It is relevant to note that the Biosafety Protocol provides that the Parties (which include the South African State) shall, in accordance with their respective laws and regulations, consult the public in the decision-making process regarding living modified organisms (LMOs), and shall make the results of such decisions available to the public.[14]

Confidentiality & Access to Information

One of the problems consistently experienced by parties seeking to participate in the GMO permitting process is an insistence by government officials that a formal application under PAIA must be made in order to access information relating to the application. And even where PAIA applications are submitted, the result is often a refusal by the government officials to provide access to some of the information submitted during the course of the application. The usual reason given for such refusal is that the permit applicant claims that the information is commercially confidentially or contains intellectual property. In practice this has led to the permit applicant putting up a version of the application that excludes information claimed as commercially confidential. This problem is discussed in more detail below.

Another problem that arises is that I&APs are given 30 days to submit their comments, while the information officer considering the PAIA application has 30 days within which to decide the request (which period can be extended by a further 30 days). This means that the time available for commenting will have expired by the time the PAIA application is decided. While late filing of comments can be condoned, the PAIA process is clearly not aligned with the time periods in the GMO regulatory framework.

[13] This right was recognized by a full bench of the Cape High Court in *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs & Tourism and another [2006] 10 BCLR 1179 C.*
[14] Article 23(2).

Access to information relating to GMO permitting applications is governed in part by the GMO Act and Regulations, while PAIA also applies. This hotly contested issue has also come under the judicial scrutiny of both the High Court and Constitutional Court in the Biowatch case, see below.

GMO Act

The amended GMO Act prohibits any officials from disclosing information acquired during the permitting process,[15] but stipulates that the following information shall not be kept confidential:

- the general description of the genetically modified organisms, the name and address of the applicant, and the purpose of the contained use or release and the location of use;
- the methods and plans for the monitoring of the genetically modified organisms and for emergency measures in the case of an accident; and
- the summary of the scientifically based risk assessment of the impact on the environment and human and animal health.[16]

The EC must decide – after consulting with the permit applicant – which information will be kept confidential.[17] The EC may decide to withhold such information if it is satisfied that the information should be withheld in order to protect the intellectual property of the applicant.[18]

This is an important provision, as in practice the Registrar and/or the EC allows the permit applicant to make this decision, resulting in the applicant making a version of the application available to I&APs that has much of the relevant information removed (this is

[15] Section 18(1).

[16] Section 18(2)(a)-(c). These exceptions include if the disclosure of information is necessary for the proper application of the provisions of this Act; if it is for the purposes of any legal proceedings under this Act; when ordered to do so by any competent court; or if the official is authorised to do so by the Minister. These exceptions correlate largely with the information identified in the Biosafety Protocol as not being considered confidential – see Article 21(6)(a)-(d).

[17] Section 18(2).

[18] Section 18(3).

referred to as a 'non-CBI' version of the application). Such an approach is irregular, as the amended GMO Act obliges the EC to make this decision. The permit applicant should be consulted only (i.e. invited to comment or express its views on what should be regarded as confidential). Importantly, this decision is an administrative action, and the EC must also comply with the requirements of the common law and PAJA before making a decision. In particular, I&APs should also be afforded an opportunity to make representations on the issue of confidentiality before the EC makes a decision on what information should be kept confidential. Abrogation of its statutory obligation to make the decision, as well as a failure to provide I&APs with an opportunity to make representations before making the decision, renders the decision administratively unfair and liable to be set aside on appeal or review.

The Biowatch case

The issue of the state's obligations to provide certain information regarding GMOs to the public was the subject of litigation instituted by the NGO Biowatch. In the cased of the Trustees, Biowatch Trust v Registrar, Genetic Resources, and Others[19], Dunn AJ addressed the issue of how commercial confidentiality should be approached. The permit applicants (which included Monsanto, Stoneville and D&PL SA) had argued that the issue of the protection of confidential, technological and private information would justify a refusal to grant access to information sought by Biowatch. While it was noted in the judgment that the right of access to information is not an absolute right, and has to be balanced with justifiable governmental and private concerns for maintaining confidentiality of certain information,[20] it was also noted in the judgment regarding any refusal to grant access based on PAIA or the limitations clause contained in the SA Constitution that:

> Obviously the onus of justifying such a limitation would be on the person who seeks to limit the right… The same applies to PAIA, because the burden of establishing that the refusal of a request for access is justified rests on the party claiming the refusal.

[19] 2005 (4) (SA) 111 (T).
[20] Ibid, at paragraph 39.

While Biowatch was largely successful in obtaining a High Court judgment in its favour relating to information requested, it was burdened with an adverse costs order in favour of Monsanto. On appeal against this costs order, the Constitutional Court commented that the state had a duty to:

> … grasp the nettle and draw an appropriate line between information to be disclosed and information to be withheld.[21]

The judgment noted further that Monsanto was joined in the matter:

> …because the governmental authorities had failed to exercise their constitutional and statutory obligations to separate the confidential wheat from the non-confidential chaff.[22]

In the circumstances the appeal succeeded, with the Constitutional Court concluding that where the state is shown to have failed to fulfill its constitutional and statutory obligations, and where different parties are affected, the state should bear the costs of litigants who have been successful against it, and ordinarily there should be no costs orders against any private litigants who become involved.[23]

The reasoning of the High Court and the Constitutional Court therefore supports the ACB's contention that the permit applicant has the onus of establishing that any refusal is justified on the basis of commercial confidentiality, and that the EC has a statutory obligation to decide what information can justifiably be withheld on the basis that it is bona fide commercially confidential information. Any abrogation of this duty would taint the permitting decision as unfair and legally flawed.

[21] Ibid, paragraph 54.
[22] Ibid.
[23] Ibid, paragraph 56.

GMO Regulations

As mentioned earlier in this paper, the amended GMO Regulations include a requirement that the public notice includes information on how to access a copy of the permit application.[24] The permit application is made up of a scientifically based risk assessment, proposed risk management measures, and (where the EC required it) any assessment conducted in accordance with NEMA of the impact of the proposed activity on the environment and an assessment of the socio-economic considerations of the activity.

If the permit application as submitted to the GMO Registrar is made available to I&APs, this will go a long way towards ensuring that I&APs can make informed, meaningful representations. If, on the other hand, only a sanitized version of the risk assessment (and any other documents forming part of the application) is made available, the acid test will be whether or not the EC discharged its statutory and constitutional obligations to sort the confidential chaff from the non-constitutional wheat. If the permit applicant is given carte blanche to make this determination, the EC/Registrar will be in breach of these statutory and constitutional obligations.

What will also be important in assessing whether or not a fair procedure has been followed is the issue of how the requester will be granted access to the permit application referred to in the notice. Unfortunately, the Regulations do not provide any guidance on the manner in which access to the application is to be afforded. This results in uncertainty. Conceivably, the GMO permit applicant might simply state that the permit application can be accessed on request from the Registrar. However, it is just as conceivable that the GMO Applicant might state that the application can be accessed by way of a formal request for information under PAIA (an onerous process discussed in more detail below). Regardless of the means of access indicated by the permit applicant, it is undesirable that the GMO regulatory regime should not provide guidance on the manner in which an I&AP is to be afforded access to a copy of the application. This means of access should then be reflected in the public notice. In the circumstances, it is suggested that the amended GMO Act and Regulations need to be further amended to include clear provisions on how access to a copy of the permit application is to be obtained.

[24] R9.

In contrast, Environmental Impact Assessments (EIA) Regulations made under the National Environmental Management Act[25] (NEMA) provide that the notice given to IA&Ps must state where further information on the application or activity can be obtained. The person conducting the public participation process is obliged to ensure that information containing all relevant facts is made available to potential I&APs,[26] and this person must also be independent.[27] This stands in stark contrast to the anemic public participation provided for in the GMO regulatory framework, where participation is limited to making representations on an abridged version of the permit application made available by the permit applicant him or herself.

While it is hoped that I&APs will be afforded access to the permit application based on the requirement of regulation 9 without having to resort to a formal PAIA application, it is possible (and perhaps probable) that the permit applicant may indicate that the method of accessing the information is by making a formal PAIA application..

Promotion of Access to Information Act

In terms of PAIA, a requester must be given access to the record of a public body if that requester has complied with all of the procedural requirements for making a request, and if access is not refused in terms of any of the mandatory grounds for refusal envisaged by the Act.[28] As mentioned in the introduction to this section above, the information officer is obliged to decide within 30 days to grant or refuse the request.[29] This period can be extended for a further period of 30 days under certain circumstances.[30]

In the ACB's experience, the Department of Agriculture has relied on the mandatory grounds of refusal contained in PAIA.[31]

[25] 107 of 1998, as amended. GN R. 543 of 18 June 2010*: Environmental Impact Assessment Regulations, 2010*, r54(3)(iv).
[26] EIA Regulations, r54(7).
[27] Ibid, r17.
[28] Section 11.
[29] S25.
[30] S26.

Section 36 provides for the mandatory protection of commercial information of a third party held by a public body, and obliges the public body to refuse a request for access if the record contains:

- trade secrets of a third party;
- financial, commercial, scientific or technical information, other than trade secrets, of a third party, the disclosure of which would be likely to cause harm to the commercial or financial interests of that third party; or
- information supplied in confidence by a third party the disclosure of which could reasonably be expected:

  (i) to put that third party at a disadvantage in contractual or other negotiations; or

  (ii) to prejudice that third party in commercial competition.

PAIA provides further that a record may not be refused on the above grounds insofar as it consists of information:

- already publicly available;
- about a third party who has consented in writing to its disclosure; or
- about the results of any product or environmental testing or other investigation which would reveal a serious public safety or environmental risk.[32]

Section 37 provides for mandatory protection of certain categories of confidential information of a third party if the disclosure would constitute an action for breach of confidence owed to a third party in terms of an agreement. The public body also has the discretion to refuse access if the record consists of information supplied in confidence by the third party if the disclosure could reasonably be expected to prejudice the supply of similar information or information from the same source, and if it is in the public

[31] Refusal notice from Department: Environmental Affairs & Tourism dated 22 June 2009 in response to ACB application for access to bioprospecting permit applications by Gowar Enterprises (PAIA25005) and Parceval Pharmaceuticals (PAIA 25006).

[32] S36(2)(a)-(c) and s36(3).

interest that such information should continue to be supplied.[33] Again this information may not be refused if it is already publicly available, or if the third party has consented to its disclosure.[34]

Section 43 deals with mandatory protection of research information of a third party. It provides that a public body must refuse access if the record contains information about research being or to be carried out by or on behalf of a third party, if the disclosure would be likely to expose the third party, the person carrying out the research, or the subject matter of the research to serious disadvantage.

Importantly, section 46 provides for mandatory disclosure in the public interest in certain situations, including if the public interest in the disclosure clearly outweighs the harm contemplated in the provision in question.

It is relevant to note that PAIA operates to the exclusion of any provision of other legislation that prohibits or restricts the disclosure of a record of a public or private body, and if it is materially inconsistent with an object or specific provision of PAIA.[35]

Promotion of Access to Information Bill

PAIA currently provides that nothing contained in its provisions prevents the giving of access to records of public or private bodies in terms of legislation referred to in Part 1 or Part 2 respectively of the Schedule to PAIA.[36] This Schedule currently refers to section 31(1) of NEMA and s36 of the Financial Intelligence Act.[37] Confusingly, section 31(1) of NEMA was deleted in September 2009.[38]

Shortcomings with this provision have been recognized by the Department of Justice and Constitutional Development, which recently published an amendment Bill for

[33] S37(1).
[34] S37(2).
[35] Section 5.
[36] Section 6.
[37] Schedule to PAIA.
[38] See section 14 of the National Environmental Laws Amendment Act, 2008: Proclamation No. 65, *GG 32580* of 18 September 2009.

comment.[39] The background note to this Bill states that its aim is to provide a requester who wishes to request access to records held by public or private bodies, and who is faced with a choice between using PAIA or another piece of legislation (which is regarded as covering subordinate legislation such as rules and regulations),[40] with an efficient point of reference to help him or her make a choice.

The proposed amendment to PAIA removes reference to legislation listed in the Schedule, and simply provides that nothing in PAIA will prevent the giving of access to a record of a public or private body in terms of legislation which provides for access in a manner that is not materially more onerous than PAIA.[41]

To the extent that the GMO Act or regulations provide for access to records, an I&AP would be entitled to choose to access the applicable records through these provisions. As it has been mentioned above, it is not entirely clear whether the GMO regulatory regime provides a mechanism for accessing information, save for the regulation 9 requirement that a permit applicant shall provide information on how to access a copy of the application.

In the circumstances, the GMO regulatory framework needs to be amended to include clear provisions on the manner in which information relating to GMOs can be accessed.

Appeals

Where a permit has been refused or granted, the applicant or any objector aggrieved by the decision may appeal against the decision to the Minister. Such an appeal must be lodged within the period and in the manner prescribed and upon the payment of the prescribed fee. In such circumstances the Minister is required to appoint an Appeal Board to hear the appeal.[42] The GMO Act provides further that any member of the

[39] Promotion of Access to Information Bill, GN 43 *GG 33960* of 24 January 2011.
[40] Ibid, background note section 2.6(a).
[41] Section 1 of the Promotion of Access to Information Bill, proposed substitution of s6 of PAIA.
[42] Section 19(1).

Appeal Board must recuse him/herself in the event of a conflict of interest.[43] Unfortunately, the identities of the persons who make up this Appeal Board have not been made public, and a request made by the ACB to the Department for this information was refused.[44] This secrecy compounds the lack of transparency evident in the GMO regulatory process.

The Appeal Board is empowered to make a number of decisions, including confirming, setting aside, substituting or amending any provision.[45] It can refer the matter back to the Registrar for reconsideration by the EC.[46] It also has a wide discretion to make any order it considers fit in order to minimize a significant impact on the environment or human and animal health (after a due consideration of the potential risks and benefits).[47] In making its decision, the EC may consider new scientific or technical evidence or any other information that is, in the opinion of the Appeal Board, directly applicable to the appeal.[48]

Where an appeal is successful, the appeal fee is refunded to the applicant. If it is amended, a portion of the fee as determined by the EC is refunded to the appellant.[49]

The Appeal Board is required to record its full decision in writing, together with reasons for this decision. It is also required to furnish it to the Minister, the Registrar and all parties directly involved in the appeal, and to make it available to the public, within 30 days after the final decision has been taken.[50]

The GMO Regulations provide that an appeal in terms the GMO Act shall, amongst other things, be lodged with the Minister in writing within thirty days from the date on which the appellant was notified in writing of the decision or action concerned, and shall

[43] Section 19(2)(c).
[44] Email from Department of Agriculture, Fisheries and Forestry to ACB dated 18 February 2011, stating that *'Details regarding the appeal board members remains confidential, however any specific communication to the appeal board can be channeled via our offices'*.
[45] Section 19(4)(a).
[46] Section 19(4)(b).
[47] Section 19(4)(c).
[48] Section 19(4)(d).
[49] Section 19(5).
[50] Section 19(6).

state the grounds on which the appeal is based.[51] The appellant is required to submit a copy of the appeal to the Registrar.[52]

Interestingly, the amended Regulations provide that the Appeal Board may request the appellant and any other party to appear before it to clarify any issue on appeal.[53] In light of the Department's refusal to divulge the identities of the Appeal Board members, it will be interesting to see how the Appeal Board maintains its anonymity in the event that it exercises its discretion in this regard! The chairperson of the EC is required to give the appellant and any other party at least seven days notice in advance of the date, time and place at which he or she is to appear before the Appeal Board.[54] The chairperson is permitted to request that new scientific or technical evidence or any other information that is, in the opinion of the Appeal Board, directly applicable to the appeal, be lodged with the chairperson in writing within such period as the chairperson may determine.[55]

In the event that the Appeal Board requests the appellant or any other party to appear before it, the chairperson may:

- summon any person who may give material information concerning the subject matter of the appeal or who has any document which has any bearing upon the subject matter of the appeal, to appear before the appeal board to be interrogated or produce that document, and the Registrar may retain for examination any document so produced;
- administer an oath to or accept an affirmation from any person called as a witness at the hearing; and
- call as a witness any person summoned to appear, and interrogate him or her and require him or her to produce any document in his or her possession or custody or under his or her control.[56]

[51] R11(1).
[52] R11(2).
[53] R11(3).
[54] R11(4).
[55] R11(5).
[56] R11(7)(a).

Any person asked to appear before the Appeal Board is permitted to:

- call witnesses during the hearing and to cross-examine other witnesses; and
- notify his or her witness of the date, time and place of the hearing and to ensure their presence at the hearing.[57]

The appellant is allowed to present his or her case first and to call witnesses,[58] whereafter any other person requested to appear is allowed to present his or her case and call witnesses.[59] The appellant and any other party is also entitled to legal representation during any appearance before the appeal board.[60]

The Appeal Board is required to provide the Minister and the Registrar with a decision on appeal, together with the reasons therefore, within ninety days from the date that the Appeal Board received the relevant documentation pertaining to the appeal.[61] Once the Minister has made a final decision on the appeal, the Registrar is required to make the decision and reasons available to all parties directly involved in the appeal and the public within thirty days.

While the appeal process has been significantly improved, some obstacles to a fair appeal process remain. One obstacle is the ongoing secrecy surrounding the identities of the members of the Appeal Board discussed above. Another obstacle arises in circumstances where a GMO permit applicant appeals against a permit refusal. While the amended appeal process does not exclude an I&AP from making representations with regard to the appeal, it does not make provision for such a party to be notified of the appeal or to obtain access to the grounds of appeal.

Case Study: Spunta G2 Potato Appeal

[57] R11(7)(b).
[58] R11(7)(c).
[59] R11(7)(d).
[60] R11(8).
[61] R11(11).

This problem is illustrated by ACB"s experience in the Spunta G2 Potato appeal. In 2009, the EC refused to grant the African Research Council (ARC) a permit for the general (commercial) release of genetically modified potatoes. The ACB, who had objected to the permit being granted, discovered through informal channels that the ARC had appealed against the refusal. As a consequence, the ACB wrote to the Minister requesting an opportunity to represent its views in the appeal process. A formal request for a copy of the ARC's appeal document was also made under PAIA. This request was refused on 29 November 2009, with the Department justifying its refusal on the basis that 'the ARC documents in respect of the appeal… is (sic) regarded as confidential as the ARC applicant feels that if the appeal letter is made public now, it may influence the process and/or outcome of the appeal'.[62] The ACB appealed to the Minister against this refusal on 25 January 2010. One of the grounds of appeal was that the information was already publicly available.

Within this context, the ACB's attorney wrote to the Minister asserting the ACB's right to make representations in the appeal process, requesting that the Department's officials be instructed to provide the ACB with the relevant contacts details of the Appeal Board, and requesting the Minister to make her decision on the ACB's PAIA appeal.[63] While no response was received from the Minister, on 26 November 2010 the Director of Biosafety wrote to the ACB advising that the chairperson of the Appeal Board was of the view that:

> 'in order for the ARC appeal to be lawful, reasonable and procedurally fair, the ACB must be given an opportunity to make representations to the appeal board regarding the ARC appeal. The Chairperson appreciates that in order for you to make representations you may require certain information forming part of the ARC appeal process… however… certain of the information contained in the ARC's appeal may be confidential and… the ARC may legitimately object to the provision of this information'.

The ACB was requested to provide a list of the information required to make representations to the Appeal Board, and to provide a comprehensive motivation as to

[62] 26 November 2009 letter from the Department of Agriculture to the ACB.
[63] 22 April 2010 letter from Adrian Pole Attorneys to Minister Joemat-Pieterrson.

why this information was required. The ACB responded by pointing out that the ACB had not been afforded sight of the documentation founding, forming part of, or supporting the ARC's appeal, and that it was in the dark regarding the grounds of appeal. As a consequence, the ACB requested the ARC's grounds of appeal and any documentation or specialist reports put up to support its grounds of appeal. A motivation was also provided setting out why the dictates of procedural fairness required that this information be furnished.

On 25 February 2011, the Director of Biosafety wrote to the ACB on behalf of the Appeal Board advising that the Appeal Board had met on 7 February 2011, and had decided that the issue of confidentiality did not arise as the documentation comprising the appeal was already in the public domain. A copy of the ARC's eight page grounds of appeal was provided to the ACB, together with an invitation for the ACB to make representations within 21 days.

While the identity of the Appeal Board members remain secret, its decision to recognize the ACB's right to make representations, and to have access to the appeal documentation, is commendable. The Appeal Board also appears to have applied its mind to whether the ARC discharged its onus to justify a refusal on the grounds of confidentiality. The reasonable and fair approach applied by the Appeals Board stands in stark contrast to Department of Agriculture information officer's refusal to grant the ACB access to the information on the spurious grounds discussed above. It is also significant that this information was supplied within the GMO permit appeal process, and outside of the context of a formal PAIA application.

Yours sincerely

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