

ENHANCING TRANSPARENCY WITHIN PUBLIC SECTOR PROCUREMENT: THE SOUTH AFRICAN EXPERIENCE

Peter Volmink

Peter Volmink, BA LLB (University of Cape Town), LLM (Duke University) specializes in the area of procurement law. He is employed as a senior legal advisor in procurement at Transnet Ltd, a South African State Owned Enterprise, where he also serves as the procurement ombudsman. His research interests are in enhancing the integrity of public procurement.

ABSTRACT

This paper explores the extent to which the principles of openness and transparency govern the award of public tenders in South Africa. More particularly, the paper examines the right of unsuccessful bidders to access information pertaining to the manner in which the tender decision was arrived at. The paper also examines the role of the South African judiciary in balancing the constitutional rights of access to information with the protection of “commercially sensitive” and other confidential information. Finally, the paper raises the question whether the legislative measures aimed at promoting transparency in South Africa have enhanced the integrity of public procurement in that country.

INTRODUCTION

One of the hallmarks of an open and democratic society is the free flow of information. Openness and transparency not only enable public scrutiny of government decisions it also strengthens public belief in the legitimacy of government processes. Conversely, “[w]here suspicions of secrecy exists, these have a corrosive influence on public confidence in government.”¹

Apartheid South Africa was the antithesis of an open society. Under apartheid, “South Africans were deprived of the oxygen of information and knowledge”.² Restrictions were placed on the media, the rights to protest and freedom of expression were severely curtailed, official decisions were shrouded in secrecy and an “executive minded” judiciary displayed great deference toward officialdom. Citizens had no general right to request

reasons for official decisions, even in instances where such decisions impacted directly upon their rights.³ In short, secrecy became the order of the day.

However, in 1994 a seismic shift took place in the South African political landscape when South Africa held its first democratic general election and made the transition from a closed society characterized by official secretiveness to one characterized by democratic values. One of the inevitable consequences of this transition was the opening up of access to official information. For the first time ever, South Africans would enjoy a constitutionally guaranteed right of access to information held by state organs as well as a right to demand reasons from the state for actions which impact adversely on their rights. Both the Interim Constitution (IC) of 1993 as well as the Final Constitution (FC) adopted in 1996 extended the principles of openness and transparency to the domain of public procurement.⁴ Both constitutions contained provisions in the Bill of Rights which entrench the right of every person to be given reasons for any “administrative action” which impacts upon his/her rights. Both constitutions also guarantee the right of ordinary citizens to access information (such as official records) held by the state.

These constitutional rights laid the foundation for further legislative interventions aimed at counteracting the “culture of secrecy and unresponsiveness”⁵ which had become pervasive throughout public administration under the pre 1994 government. The Promotion of Administrative Justice Act (PAJA)⁶ and the Promotion of Access to Information Act (PAIA)⁷ gave embodiment to the constitutional right to reasons and access to information respectively.⁸

As stated above, the South African constitution contains provisions which prescribe that public procurement should be subjected to a new regime of openness, transparency and fairness. Section 217(1) of the Constitution states that when an organ of state contracts for goods and services it must do so in a manner which is fair, equitable, transparent, competitive and cost effective. Consequently, failure by organs of state to comply with this standard does not merely amount to an administrative oversight_such failure would amount to a breach of the constitution.

It is universally recognized that the criteria for an open and transparent public procurement system should at a minimum include those listed in Box 1 below.⁹ This paper focuses particularly on the sixth requirement, namely the right of the South African public (more particularly unsuccessful bidders) to scrutinize tender decisions.

Box 1

1. Public invitations to tender wherever possible;
2. Readily accessible information on the laws, regulations and procedures pertaining to public procurement;
3. providing sufficient time for the preparation and submission of bids;
4. The use of objective and predetermined criteria for procurement decisions;
5. Disseminating the evaluation criteria in advance to all bidders;
6. Public scrutiny of tender decisions
7. An effective system of domestic review of tender decisions;
8. Publication of tender awards;
9. Adequate regulation of staff involved in public procurement such as declarations of interest, training, screening etc.

THE RIGHT TO KNOW

The right of access to information and the right to reasons are sometimes referred to collectively as “the right to know”. Although, this paper focuses primarily on the right of access to information within the context of public procurement, it should be borne in mind that the two rights are mutually reinforcing. Both rights support an important constitutional principle – the rule of law. Both rights enable a person adversely affected by a tender decision to ascertain whether the decision was taken lawfully or not.. The Supreme Court of Appeal (SCA) has observed that “*the award of public tenders is notoriously subject to influence and manipulation*”.¹⁰ For this reason an unsuccessful bidder is under no duty to accept the assurances provided by an organ of state that a tender process had been conducted fairly, and may instead ask to be given access to tender documents such as the scoring methodology and score sheets used by the tender evaluation committee to determine whether the correct scoring was followed in selecting the successful bidder. Furthermore, a bidder who has received reasons for a tender decision would be able to determine whether the reasons provided are rational and consistent with the record of the tender decision. Once the reasons for a tender decision

are made public any underlying flaw in the decision making process could be exposed, such as the fact that the decision maker failed to apply his or her mind properly to the matter, that the decision lacked rationality or was taken in bad faith. The exposure of a defective reasoning process in the award of a tender could in turn form the basis for judicial review of decision.¹¹

The difference between the right to reasons and the right of access to information should perhaps be further explained. Reasons provide an explanation or justification for a decision.¹² They are constituted by a decision makers “*explanations as to why it settles upon its final choice*” or put in slightly different terms “*reasons are statements which explain why certain action has been taken.*”¹³ The right of access to information on the other hand entitles a person to be granted access to any “record”¹⁴ in possession of an organ of state or a private party. Other differences come to light when the wording of the two rights as they appear in the constitutional texts are compared.

There have been significant changes to the manner in which the two rights were formulated in the 1993 IC on the one hand and the 1996 FC on the other.. Box 2 sets out the wording of these rights as it appears in the two constitutional texts.

Box 2

	Interim Constitution (IC) (1993)	Final Constitution (FC) (1996)
Access to Information	Section 23 states that “Every person shall have the right of access to all information held by the state or any of its organs at any level of government in so far as such information is required for the exercise or protection of any of his or her rights.”	Section 32(1) states that “Everyone has the right of access to (a) any information held by the state; and (b) any information held by another person that is required for the exercise or protection of

		any rights.”
The Right to Reasons	Section 24(c) states that “every person shall have the right to be furnished with reasons in writing for administrative action which affects any of his or her rights or interests unless the reasons for such action have been made public.”	Section 33(2) states that “Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.”

A comparison of the two texts reveals the following:

- Under the FC, the right to reasons is more limited than the right of access to information in terms of who can avail themselves of the right. Only a person whose rights were “adversely affected” by administrative action has a right to be given reasons¹⁵, whereas under the FC *anyone* can request access to the record of a public entity, whether his or her rights were adversely affected by that public entity or not.¹⁶ Put differently, under the FC, access to information is enjoyed *as of right*, unless the request is refused on the basis of a legally recognized ground (discussed below). Consequently, a person need not tell a public body why he or she requests access to information regarding a tender decision. A person requesting reasons on the other hand must first show that his or her rights were adversely affected. This distinction creates an anomaly for unsuccessful bidders. They enjoy a general entitlement to the documents which were before the tender committee when the decision to appoint the successful bidder was made. However, should they require written reasons for the tender decision, they must first demonstrate that some underlying right has been prejudiced. But how are bidders to know in advance which rights have been violated without first knowing the reasons for the tender decision? A problem of circular logic thus arises because a bidder who is required to first demonstrate a violation of a right before being provided with reasons for a tender decision may well be heard to say “*I don’t know if my rights were violated if I am not first provided with reasons for the decision.*” The courts resolved this conundrum somewhat

inelegantly by simply stating that the provision of reasons was necessary to enable a bidder to know whether his or her right to fair administrative action was infringed or not.¹⁷

- Whereas the right to reasons was quite broadly phrased under the IC, the right became more attenuated under the FC. The IC granted the right to reasons to any person whose rights or *interests* were *affected* by administrative action. The FC on the other hand limited the right only to persons whose *rights* (not interests) were *adversely* affected (and not merely affected). This shift in focus has also created an anomaly for an unsuccessful bidder. A bidder whose bid has failed may well claim that the decision not to award the tender to him has affected his *interests* and thus under the IC he would be entitled to reasons. However, no bidder can claim that he or she enjoyed a *right* to be awarded a tender and thus under the FC his or her right to reasons would be more restricted. Indeed in earlier cases, certain courts held the view that an unsuccessful tenderer could not lay claim to any rights simply because he or she was refused a tender and therefore had no right to reasons or access to information. However, as will be seen from the discussion below, the courts subsequently adopted a more generous approach, stating that the right in question was not the right to be awarded a tender, but the right to fair and equal treatment during the tender process.
- Whilst the right to reasons may have been truncated under the FC, the right of access to information was significantly broadened in two significant respects. Firstly, the FC does not limit the right of access to information only to information held by the state. The FC has taken a step “*unmatched in human rights jurisprudence*”¹⁸ by extending the right to information held by “*any other person*” such as private sector bodies. This right is however subject to the proviso that a person requesting information from a private sector body must show that the information is required for the protection of his/her rights. As already pointed out above, the second important difference is that unlike the IC, the FC does not require a person requesting access to information held by a public body to demonstrate that the information is requested for the protection of any right. This requirement is limited to requests for information from private bodies.

Whatever the ambiguities and anomalies surrounding the right to know in the new constitutional order, there is no doubt that the Constitution has had a profound effect on the relationship which every organ of state has in its dealings with potential suppliers. Tenderers dealing with the state are in a different position than they were during the pre constitutional era.¹⁹ In light of section 217 of the Constitution any person submitting a tender to an organ of state is legally entitled to expect fairness, openness and equitable conduct from the state in all its actions. As stated by the court in *Van Niekerk's* case “[The right of access to information] entails that public authorities are no longer permitted to “play possum” with members of the public where the rights of the latter are at stake...The purpose of the Constitution...is to subordinate organs of state...to a new regime of openness and fair dealing with the public.”²⁰

THE ROLE OF THE JUDICIARY IN PROMOTING TRANSPARENCY IN PUBLIC PROCUREMENT

Rather like Rip Van Winkel, the South African judiciary appears to have awoken from its pre constitutional slumber to take up its role as the guardian of fundamental rights and freedoms. Buoyed somewhat by the constitutional injunction to give effect to the spirit, purport and objects of the Bill of Rights when interpreting legislation²¹, the courts have generally given a generous and purposive interpretation to the right to reasons and access to information. Judicial pronouncements on a number of key legal issues have had a significant effect on the promotion of transparency in the arena of public procurement.. A few examples of court rulings in the public procurement arena will suffice.

1. One of the first issues to be settled by the courts was that a decision to invite, evaluate and award tenders amounted to “*administrative action*” and was therefore subject to judicial review. In terms of PAJA, a court may only exercise judicial review over an act performed by an organ of state if such act can be classified as “administrative action”. Consequently, had the courts ruled that the award of tenders did not amount to administrative action, such ruling would effectively have placed public procurement beyond the scope of administrative law review. Under South African law not every act performed by an organ of state necessarily amounts to “administrative action”²². Indeed, organs of state argued quite vociferously that a decision to call for, evaluate and award tenders did not amount to the exercise

of any administrative powers. The right to call for and award tenders, so the argument went, was very different from the exercise of normal regulatory powers (eg the power to award a licence) or coercive powers (eg the power to expropriate property) which is subject to administrative law review. Organs of state argued that the power to award tenders flowed simply from their contractual powers to invite the public to submit offers which it could accept or reject at will.²³

However, the courts rejected this argument and ruled that the award of tenders fell squarely within the ambit of “administrative action”.²⁴ This is because “... *the decision is taken by an organ of state which wields public power [and expends public funds] in terms of the Constitution or legislation and the decision materially and directly affects the legal interests or rights of tenderers concerned.*”²⁵ Hence, the courts have concluded that when organs of state issue tenders they cannot be treated as a normal contracting party operating under private law.²⁶

2. The second issue which the courts considered was whether a tenderer who lost a tender could claim that his or her “rights” were affected by the decision. Initially, the courts were somewhat reluctant to recognize that unsuccessful tenderers had any rights worthy of constitutional protection. In *SA Metal Machinery Co Ltd v Transnet Ltd (I)*²⁷ the court stated that tenderers who participated in a public tender did so entirely at their own risk and that unsuccessful tenderers did not even have a legitimate expectation that their tenders would be considered at all, let alone an enforceable right. The court held that until his tender is accepted, a tenderer is effectively a stranger to the tender process and therefore to the qualities which merit constitutional protection against unlawful administrative action.²⁸ The court held that a tenderer could not demand access to information simply in order to establish whether his rights were negatively affected. Such right, said the court, was open only to a person who was able to show a reasonable basis for believing that a disclosure of documents would assist him to protect a right that had been violated.²⁹ The judgment of the court in the *SA Metals I* case did not bode well for the rights of unsuccessful tenderers to access information or be given reasons, as such bidders would invariably not be in a position to stipulate in advance which rights the organ of state had violated.

However in the *Aquafund* case³⁰, the court stated that the right in issue was not the right to be awarded the contract but rather the the right to obtain such information as would enable a bidder to determine whether his right to fair administrative action had been infringed or not. *“If a person is not able to establish whether his rights have been thus infringed, he will clearly be prejudiced. He need not rely on the assurances of the relevant organ of state. To so hold, would revive relics of the past which are inconsistent with the spirit of the constitution.”*³¹ In *Goodman Brothers*³² the Supreme Court of Appeal (“SCA”) developed this point further by stating that the right in issue was the right to equal protection and benefit of the law – i.e. the right of all tenderers to be treated equally in the tender process. The court explained the position as follows:

*The right to equal treatment pervades the whole field of administrative law, where the opportunity for nepotism and unfair discrimination lurks in every dark corner. How can such right be protected other than by insisting that reasons be given for an adverse decision? It is cynical to say to an individual: you have a constitutional right to equal treatment, but you are not allowed to know whether you have been treated equally. The right to be furnished with reasons for an administrative decision is the bulwark of the right to just administrative action.*³³

3. The third issue was whether a person could validly waive a right to be provided with reasons for tender decisions or access to information. In the *Goodman Brothers* case³⁴, an unsuccessful tenderer requested a parastatal body to furnish it with written reasons for rejecting its tender. The parastatal refused the request, relying on a standard provision in its tender documents which stated that *“the company... will [not] assign any reason for the rejection of a tender.”* The court however rejected the argument that by accepting the terms of the tender document, Goodman Brothers had waived its rights to reasons. The court warned that *“One must be careful not to allow all forms of waiver, estoppel acquiescence, etc to undermine the fundamental rights guaranteed in the Bill of rights.”*
4. Under section 23 of the IC, the right of access to information arose only when a person was able to show that his or her right had been affected. The fourth issue that arose for consideration was whether the rights in question were limited only to the rights

listed in the Bill of Rights or whether they included all legal rights, whether emanating from the constitution, legislation or common law. Initially the courts adopted a rather conservative approach and found that the rights were limited to those listed in the Bill of Rights.³⁵ The implication of this ruling was that a person would have no right to access information unless he or she could establish that a fundamental human right was under threat and required protection. The right could not be exercised by a person who for example wanted access to a hospital report to establish a claim for negligence. However, in *Van Niekerk v City Council of Pretoria*³⁶, the court adopted a more generous approach and held that it was “*not only desirable, but interpretively and constitutionally inevitable that section 23 (rights) include all rights, including contractual rights or rights arising from delictual claims.*”³⁷ The implication of the *Van Niekerk*’s case is that section 23 “*does not limit in any way the rights for the protection or exercise of which an applicant is entitled to seek access to officially held information.*” However with the passage of the FC this issue has lost its relevance because section 32 of the FC no longer requires that a person seeking access to information should establish that the information sought is required for the protection of any right.

5. Fifthly, the courts have held that the right to reasons would be meaningless unless decision makers provided *quality* reasons for taking administrative decisions. The courts have held for example that standard form reasons, where an administrator simply ticks a number of possible options in a tick box were wholly unacceptable.³⁸ The SCA has stated that reasons should be specific, detailed, set out in clear unambiguous language and not in vague generalities or the formal language of legislation.³⁹
6. Sixthly, the courts have berated organs of state which have unreasonably and obdurately refused valid requests for information. The courts have expressed their displeasure at the attitude adopted by such organs of state by ordering punitive costs against the public body concerned.⁴⁰
7. Finally, the courts have held that organs of state should not hide behind confidentiality clauses in contracts or so called “state secrets” in order to circumvent the right of access to information. In the case of *ABBM Printing (Pty) Ltd v Transnet Ltd* the court stated that “*...it would be counter productive and contrary to the constitution to allow the respondent to hide behind an*

*unsubstantiated blanket claim to confidentiality on behalf of tenderers. By way of example only, a claim to confidentiality should not protect from disclosure a “side letter” containing terms other than those appearing in the tender or for that matter the provision of a “kick back.”*⁴¹ This issue will be dealt with in more detail below.

In a nutshell, the SA judiciary has sought to interpret the law in a manner consistent with the principles of openness and transparency. To have done less would have stultified “*the development of accountability and transparency in administrative decision making and would represent a step back to the dark past...in which officials who acted in secret could hide behind a wall of silence.*”⁴²

The right of access to information will now be considered in more detail.

THE RIGHT OF ACCESS TO INFORMATION

The Promotion of Access to Information Act⁴³ was promulgated in order to “*actively promote a society in which the people of South Africa have effective access to information to enable them to more fully exercise and protect all of their rights.*”. One of the stated objectives of PAIA is to do away with the “*secretive and unresponsive culture*” which existed in public and private bodies prior to 1994 and which often led to an abuse of power and human rights violations.⁴⁴ The Act is designed to enable persons to obtain access to records of public or private bodies as swiftly, inexpensively and effortlessly as possible.⁴⁵ PAIA also requires that the courts should interpret legislation purposively by preferring any reasonable interpretation of the Act that is consistent with the requirements of transparency over any alternative interpretation that is inconsistent with those objectives.⁴⁶ PAIA has had a significant impact upon the rights of unsuccessful tenderers to access tender documents. As a general rule, subject to the application of the grounds of refusal under legitimate circumstances, an unsuccessful tenderer would be entitled to be given access to documents such as bid documents received from bidders (after trade secrets and other commercially sensitive information have been removed), score sheets, the evaluation report and minutes of the evaluation and adjudication committees.⁴⁷

What information may be requested?

PAIA states that *any* recorded information (regardless of form or medium) in the possession or under the control of a public body may be requested. As a general rule all documents, archived information, audio or visual recordings as well as computer based information may be requested. It is irrelevant whether the record was created by the public body or some other entity. As long as the record remains under the control of a public body or an independent contractor engaged by that public body, it is regarded as a record of that public body that may be requested.⁴⁸

Who may submit a request?

The Act places very few restrictions on who may submit a request for information.⁴⁹ As a general rule, any person may submit a request for information held by a public body. Furthermore, the law does not require a requestor to provide any reason for requesting information. A request for information may therefore not be refused because the information officer of a public body believes that the information is required for an invalid reason.⁵⁰ The organ of state bears the onus of proving that it is entitled to refuse access to the information.⁵¹ Put simply, whereas the right of access to information under the IC was on a ‘*need to know*’ basis, the right is available under the FC and PAIA on a ‘*right to know*’ basis.⁵²

Is a public body obliged to provide the information?

PAIA stipulates that a public body *must* provide the information requested unless it can justify a refusal on one or more of the grounds recognized in the Act which are as follows:

- (a) the requestor has not complied with certain formalities prescribed by the Act and the regulations;⁵³
- (b) the record is requested after legal proceedings were commenced against the public body and is required for the purpose of such legal proceedings. In such instances, the normal rules of discovery will apply;⁵⁴
- (c) the record requested is a record of Cabinet or one of its committees, the Judicial Services Commission, a court of law, or a member of parliament;
- (d) one of the “grounds of refusal” apply.

What are the grounds of refusal?

Chapter 4 of PAIA lists 12 grounds upon which a public body may refuse a request for access to information. Certain of these grounds of refusal are mandatory ie the Information Officer of a public body must refuse the request if one of the grounds apply, whilst others are discretionary (the information officer may refuse the request). For the sake of brevity, the grounds of refusal that are most commonly invoked by organs of state for refusing a request for information by unsuccessful bidders are listed in Box 3 below. Organs of state usually refuse access to information regarding the selection of the winning bid on the following grounds:

- disclosure would reveal “confidential information” such as trade secrets or other commercially sensitive information belonging to the successful bidder.
- Where the procurement of military equipment is involved the ground for refusal is usually that disclosure would undermine national security.

However, as will be seen from the discussion below, the courts have not allowed organs of state to invoke such claims in a cavalier and unjustified manner.

Box 3: Grounds for Refusal

1. **Mandatory protection of confidential information of a third party.**⁵⁵ Section 36(1) of PAIA protects the confidentiality of commercial information submitted by a third party. In the context of public procurement, information submitted by a “third party” would usually include the bid submitted by the successful tenderer or any other tenderer who participated in the bidding process. Section 36(1) provides that a public body *must* refuse a request for information if the record requested contains:
 - (a) trade secrets of a third party;
 - (b) financial, commercial, scientific or technical information of a third party, other than trade secrets, the disclosure of which would be likely to cause harm to the commercial or financial interests of that third party; or

- (c) 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.⁵⁶

2. **Mandatory protection of other confidential information of a third party.**⁵⁷ In terms of section 37(1)(a) of PAIA, a public body *must* refuse a request for information if the disclosure of the relevant record could establish a legal claim based upon breach of a duty of confidence owed to a third party in terms of a contract. Many commercial agreements contain confidentiality clauses which prohibit the disclosure of the contents of the agreement by one contracting party without the consent of the other contracting party. The effect of section 37(1)(a) is that an organ of state *must* refuse a request for information if the disclosure would result in a breach of such a confidentiality clause.

3. **Defence, security and international relations of Republic.** In terms of section 41 of PAIA, a public body *may* refuse a request for access to a record if its disclosure could reasonably be expected to cause prejudice to the defence, security or international relations of South Africa.

PAIA provides that the various grounds of refusal can be overridden if the public interest so requires. It stipulates that even though one or more grounds of refusal may be applicable, the Information Officer of a public body *must* grant a request for information if disclosure would reveal (a) a serious contravention of the law or (b) an imminent and serious public safety or environmental risk and the public interest in the disclosure of the record outweighs the harm which may ensue by the disclosure.

The protection of confidential information

Tender submissions usually contain commercially sensitive information such as the details of the technical offer, intellectual property, price structures and other proprietary information of the bidders. Bidders who participate in the tender process do so with the expectation that the contents of their bids would remain confidential and would therefore not be disclosed to their competitors. Earlier court decisions appeared to have given greater weight to the protection of confidential information than the right of access to information. In *SA Metal Machinery Co Ltd v Transnet Ltd*⁵⁸ (1) the court held that “[a]n unrestricted right of access to documents in possession of a public body can easily lead to abuse, especially where, as here, some of the information in the documents has been furnished by third parties in the reasonable expectation that outsiders or competitors will not have unrestricted access to such information.”⁵⁹

The restriction of access to information in cases where commercial harm could ensue is also recognized in the WTO’s Government Agreement on Procurement (“GPA”). Article 19(4) states that “*confidential information provided to any Party which could impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interest of particular enterprises, public or private, or might prejudice fair competition between suppliers shall not be revealed without the formal authorization from the party providing the information.*”

However, this ground of refusal lends itself to abuse if it is invoked by organs of state in an unwarranted manner. The principles of openness and transparency could be easily undermined if organs of state were allowed to refuse requests for information simply by declaring that the information sought is “confidential.” Subsequent to *SA Metals (1)*, the judiciary has shown a greater willingness to scrutinize claims of confidentiality in order to ensure that confidentiality clauses were not being invoked simply to circumvent the requirements of PAIA.

Trade secrets. In *SA Metals(Pty) Ltd v Transnet (3)*⁶⁰ the applicant company sought a court order to compel the public body to provide it with a copy of a contract for the sale of non ferrous metal which it had concluded with a third party. One of the grounds of objection raised by the public body was that the contract contained trade secrets and as such it

was obliged to refuse the request. However, upon examining the contract, the court concluded that the contract did not contain any information resembling trade secrets or other confidential information the disclosure of which could harm the third party. The court rejected the argument of the public body that its strategy of concluding a contract with one purchaser only in order to enhance controls and limit theft of non ferrous metals amounted to a “trade secret” which merited protection.

There have been instances where the courts have found it impossible to determine whether the tender document contained confidential information such as trade secrets, because the relevant documentation had not been placed before it. In such instances the courts have required the organ of state concerned to mark the relevant parts of the record that it regarded as confidential but have nonetheless allowed the requester’s attorneys to be given access to the record, including the confidential parts. Such rulings are usually subject to the strict proviso that, save for the purposes of consulting with counsel or an independent expert, the attorney should not disclose the confidential provisions to anyone, including the requester himself or herself. Should the requester’s attorney dispute the claim to confidentiality the parties would be allowed to approach a judge in chambers for a ruling on the matter.⁶¹

Prices. In *SA Metal & Machinery Co (Pty) Ltd v Transnet Ltd (2)*⁶² the disclosure of the price paid by a successful bidder came into sharp focus. On this occasion, SA Metals had been unsuccessful in a tender for the purchase of scrap metal and scrapped rolling stock and consequently brought an application to court to be given access to salient portions of the completed tender submissions received from all bidders, including the accepted tender price. Transnet refused to disclose the prices on the basis that they constituted an important element in the tender adjudication process and represented the comparative advantage which each tenderer had in the tender process. Transnet argued that the disclosure of prices was likely to harm the financial or commercial interests of the bidders involved because tenders for the purchase of scrap metal were issued every two years and thus the disclosure of each tenderer’s prices could undermine the comparative advantage which each tenderer had when the tender came up for renewal.

However, the court rejected this argument, stating that in terms of section 36(1) (b) of PAIA an organ of state could only refuse to provide financial, commercial or scientific information if the disclosure of such information was *likely* to cause harm to the commercial or financial or commercial

interests of a third party. The court held that the word “*likely*” denoted “*probability*”, opposed to a mere possibility or remote contingency.⁶³

The court also drew a distinction between the disclosure of tender prices before the closing date of a tender and disclosure after such date – stating that whilst tender prices should be protected from disclosure *before* the closing date of a tender in order to protect the commercial and financial interests of tenderers, the same could not be said about disclosure of prices *after* the closing date or after award. As SA Metals brought the application for access to information some 10 months after the tender had already been awarded, the court held the view that the prices tendered were of historical interest only.⁶⁴ The court further explained that “*to cause harm to the commercial and financial interests of the third party by disclosure of the information, the information must obviously have an objective or market value. This will be the case where the information sought is ‘important or essential to the profitability, viability or competitiveness of a commercial operation.’*”⁶⁵

The disclosure of a competitor’s pricing was eventually considered by the Supreme Court of Appeal in *Transnet v SA Metal Machinery Co (Pty) Ltd (4)*⁶⁶. The facts of this case are briefly as follows: During 2001 SA Metals having lost a tender for the removal of galley waste from ships to an entity known as Inter Waste (Pty) Ltd, brought an application for access to Inter Waste’s completed tender document, including details regarding the constituent elements of its prices (eg costs for disposal of waste, monthly cleansing and disinfecting of bins, labour, fuel, etc). Although on this occasion Transnet was prepared to provide the globular price offered by Interwaste, it was not prepared to provide details on the schedule of prices for each constituent element, stating that the information sought included trade secrets as well as financial, commercial or scientific information belonging to Interwaste. Transnet also relied on a clause in its standard tender documents which stated that “*Transnet does not bind itself to... disclose the successful tenderer’s price or any other tendered prices as this is regarded as confidential information.*”

Transnet’s main argument was that the disclosure of the constituent parts of the globular price would give SA Metals insight into Interwaste’s research and methodology. It based this argument on the fact that rates were determined not only with reference to factors constant to all bidders such as fuel and labour, but were also based on factors unique to each bidder, such as its profit margins, gearing, costs of infrastructure and its own assessment of the work that had to be done. Transnet argued that inasmuch as Interwaste’s rates were based upon its own knowledge, experience, expertise and research, disclosure of the rates would enable

SA Metals to ride on Interwaste's efforts by adjusting its own rates in light of Interwaste's tender. SA Metals on the other hand argued that as matter of logic, it could not deduce Interwaste's profit margins simply by reference to its rates, as to do so would require it to have knowledge of all the other variable factors which SA Metals did not have access to or requested.

The SCA followed a similar line of reasoning to that of the high court in *SA Metals v Transnet (2)*. It stated that section 36(1)(c) required nothing short of a *probability* of harm and not a mere possibility. This interpretation, said the SCA, was necessitated by the fact that the Act itself read with the Constitution demonstrated that government information had to be available to the public as a matter of right, subject to certain limited and specific exceptions. The word "probable" thus made it more difficult to refuse information. This approach, said the court was consistent with the injunction in the Act that courts should give preference to any reasonable interpretation which is consistent with the objectives of the Act over an interpretation which was inconsistent with the Act. The court also held that there were no grounds at all for concluding that the disclosure of Interwaste's rates for 2001 would cause probable harm to it when the contract would be put out to tender again in 2005, as tenderers would require information relative to that tender.

Confidentiality clauses. As stated earlier, many commercial agreements contain clauses in which the contracting parties undertake to treat the agreement with utmost confidentiality and not disclose the contents thereof to any other party. Section 37(1)(a) of PAIA specifically provides that the information officer of a public body *must* refuse a request for access to information if the disclosure would constitute an action for breach of a duty of confidence. However, in *SA Metals v Transnet (3)*⁶⁷, the court stated that public bodies and third parties should be prevented from subverting the Act by inserting a confidentiality clause when in fact nothing of a confidential nature worthy of protection was contained in the contract.⁶⁸ In *Transnet v SA Metals (4)* the SCA followed a similar line of reasoning and stated the following:

"To my mind the overriding consideration here is that the appellant, being an organ of state, is bound by a constitutional obligation to conduct its operations transparently and accountably. Once it enters into a commercial agreement of a public character like the one in issue (disclosure of the details of which does not involve any risk, for example, to state security or

*the safety of the public) the imperative of transparency and accountability entitles members of the public, in whose interest an organ of state operates, to know what expenditure such an agreement entails. I therefore fail to see how the confidentiality clause could validly protect the successful tenderer's tender price from disclosure after the contract has been awarded. Accepting a need for confidentiality in the pre-award phase, it seems to me that the intention of the drafter of the notice was no more than that a tenderer should not be able to know a competing tenderer's price in that period...It follows that once the contract was awarded the confidentiality clause, certainly in so far as the successful tenderer is concerned, was a spent force and offered Inter Waste no further protection from disclosure as regards its tender price."*⁶⁹

The position adopted by the courts amounts to this: claims of confidentiality *per se* do not justify the withholding of information. It is unconstitutional to allow organs of state to hide behind unsubstantiated claims to confidentiality. A request for access to information may be refused only where disclosure would *probably* (not possibly) result in commercial harm. The courts have held that disclosure of the price tendered by the successful tenderer is essential to ensure not only that the tender process is transparent but also that the award was made responsibly. A legal culture rooted in accountability and transparency would require nothing less.

State security

The procurement of military equipment is notoriously susceptible to corruption. This is because the procurement exercise is often highly technical in nature, supplies are usually acquired from a single source and the acquisition is not subject to public scrutiny because of national security concerns.⁷⁰ In this context, officials find it relatively easy to hide behind a wall of silence by refusing requests for information on the grounds that disclosure would reveal details pertaining to the quantities, characteristics, capabilities, vulnerability or deployment of weapons and other military equipment⁷¹. However, the Constitutional Court has drawn a distinction between the protection of information in the name of state security simply to avoid embarrassment (which is unconstitutional) and the protection of information to avoid harm (which is constitutional, provided that the harm is non trivial and non speculative).⁷²

This principle was put to the test in *CCII Systems (Pty) Ltd v Fakie NO*.⁷³ Between 2000 – 2001, a commission of enquiry was set up to conduct an enquiry into the controversial Strategic Defence Package (SDP), a multi billion rand arms acquisition program. The applicant company *CCII* which was one of the tenderers for the supply of computer systems to be installed on corvettes, alleged that it had been unlawfully excluded from the bidding process due to political pressure. The company then sought access to all information that had been obtained by the commission from various sources as well as all earlier draft versions of the report. The state opposed the application on various grounds, including the fact that the documents were provided to the commission by third parties on the basis of confidentiality and that the security of the country could be prejudiced by the disclosure of the documents.

The court however rejected the state's blanket refusal to disclose documents. The court emphasized that the onus was on the government agency concerned to identify the record it wished to protect on the grounds of state security, to outline the basis for the objection, and to indicate whether the objection related to the entire document or only a portion thereof. The court therefore ordered the government to list all the documents that they objected to disclosing and to state clearly and concisely (a) a description of the document or record (b) the basis for the objection (c) an indication whether the objection related to the whole document or only to portions thereof and if so (d) to which portions.

HAS ACCESS TO INFORMATION LEGISLATION ENHANCED THE INTEGRITY OF PUBLIC PROCUREMENT IN SOUTH AFRICA?

Transparency is universally recognized as absolutely indispensable in the fight against corruption.⁷⁴ A number of key international instruments require member states to give effect to laws that promote transparency.⁷⁵ However, the experience of many developing countries has shown that laws on the statute book which promote transparency do not necessarily result in greater transparency in practice. South Africa is a case in point. The legal regime complies with almost all of the essential characteristics required to promote transparency as depicted in Box 4 below.⁷⁶ However, despite the lofty standards contained in the Constitution and legislative framework, the *practice* of public procurement in South Africa is often marred by scandal arising from nepotism, corruption and other irregular practices. In a recent case, the Supreme Court of Appeal observed that in

its experience the lofty constitutional principles pertaining to public procurement were more honoured in the breach than in the observance.⁷⁷

**Box 4: Essential features of an effective access to information regime:
Cloete and Auriacombe**

1. constitutional or statutory recognition of the right of access to information
2. a right of access that is broadly defined and extends to all organs, agencies or departments of the state
3. a narrow definition in precise and specific language, of exemptions to the right of access
4. statutory language that makes it clear that access is to be the norm and exemptions are to be resorted to only in exceptional cases
5. speedy processing and disposition of requests for access
6. independent review of denial of access
7. minimal or no fees for processing documents requested
8. the creation and training of a cadre of officials to assist persons making access requests
9. widespread publicity about the right of access

The South African Human Rights Commission (SAHRC), the body responsible for the implementation and monitoring of PAIA, appears to be less than sanguine about the effect PAIA has had on good governance and informed public scrutiny. It states that “*these laudable principles [of openness and transparency] are meant to inform the frameworks for democratic transformation and delivery, but whether any tangible delivery on PAIA has been achieved is questionable.*”⁷⁸

A number of reasons lie at the heart of the failure of PAIA to live up to expectations:

- *Design flaws.* The complex nature of the legislative scheme makes it extraordinarily difficult for ordinary persons to navigate their way through the maze of technicalities created of the Act. The legislation is rigid and cumbersome as a result of the number

of formalities prescribed by the Act.⁷⁹ Although government departments are required to submit annual reports to the SAHRC on the number of requests received, granted and denied etc to enable effective monitoring, the Act does not impose any sanction on a department which fails to do so. This has resulted in a high level of reporting delinquency on the part of government departments.

- *Absence of alternative dispute mechanism.* Perhaps the most glaring shortcoming of PAIA is “*the absence of an independent, accessible and authoritative mechanism for the resolution of information access disputes, other than resort to the courts.*”⁸⁰ At present, a requester who has been denied information must resort to litigation in the courts as the only means of obtaining relief. Even though the courts have for the most part come to the assistance of persons whose request for access to information was unjustifiably refused, litigation in South Africa tends to be “*exclusionary and elitist*”.⁸¹ Its prohibitive costs as well as its time consuming and bureaucratic processes places it beyond the reach of most ordinary citizens. The lack of an informal, effective, cost efficient and speedy process has no doubt discouraged the public from enforcing their rights of access to information. For this reason only a small number of cases have reached the courts. This will hopefully change with the appointment of an Information Protection Regulator as envisaged in the Protection of Personal Information Bill presently before Parliament.⁸²
- *Lack of public awareness.* Although the SAHRC has compiled a simple language guide to PAIA, not much has happened by way of public education. Yet, without an aggressive public education campaign the public at large will remain unaware of their right to access information let alone know how to enforce that right within a rigid and complex system. As Roberts observes “*a large portion of the South African public, because of our unique historical legacy, is unaccustomed to claiming access to government information and is not familiar with the mechanisms for holding government institutions accountable.*”⁸³
- *Lack of training for public officials.* It is not sufficient for the public to be made aware of their rights under the Act. Public officials also have to be made aware of their duties in terms of the Act.⁸⁴ Many public officials simply do not understand the right of the public to access information or their duty to provide access and have tended to refuse requests for information in an obdurate

and unjustified manner. The courts have in the past chastened organs of state for their “*disregard of the aims of the Act and the absence of common sense and reasonableness*” which have resulted in the courts having to deal with matters which should never have required litigation.⁸⁵ However, it is doubtful whether such chastening has altered the mindset of many public officials.

- *Absence of political support.* The success of access to information legislation is largely dependent upon strong political leadership. If executive support for access to information is absent or limited to rhetoric, government departments are unlikely to give requests for access to information the necessary priority. Cloete and Auriacombe argue that “*accountability and transparency seem to be ‘mere mantras chanted but given no substance’ if political leaders and government officials manipulate the power of the state for their own benefit without constraints.*”⁸⁶ A study conducted by the Australian Law Reform Commission demonstrates that the approaches of various Attorneys General and Presidents regarding requests for information under the US Freedom of Information Act had a significant influence on the amount of information disclosed by lower ranking government officials throughout the US administration.⁸⁷ In the now famous words of US Supreme Court Justice Brandeis “*our government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example.*”⁸⁸ The efforts on the part of the South African government to block investigations into the controversial arms deal saga did little to enhance its image as a champion of openness and transparency.
- *Institutional resistance.* Public officials appear to be reluctant to abandon the culture of secrecy that had been prevalent in the public service during the pre 1994 era. This resistance has led to inordinate delays in responding to requests and to a high percentage of requests being declined.
- *Inadequate funding.* Although the SAHRC is specifically mandated to monitor the implementation of the Act, to train public officials and to educate the public about the Act, it operates under severe resource restrictions. These constraints have impacted adversely on the volume and nature of litigious, mediatory, training and educational initiatives it could undertake.⁸⁹

CONCLUSION

The right to know gives substance to the constitutional promise of an open and democratic society. In the context of public procurement, it brings to light the rationale for tender decisions that would otherwise have remained hidden from the public eye. It enables aggrieved bidders, the media, the courts, the NGO community and the public at large to perform the critical function of scrutinizing and challenging tender decisions. It helps to develop a culture of justification within the public service by requiring public officials to justify their decisions. Because of the ever present risk of abuse and manipulation of state tenders, it is imperative that tender decisions be subjected to a robust review processes to determine whether the award was made in conformance with the highest standards of probity.

South Africa has a strong constitutional, legislative, judicial and administrative framework which entrenches the right of access to information and the right to reasons. However, other critical features are lacking. The system does not provide for speedy access to information nor does it allow for an inexpensive extra judicial mechanism for reviewing decisions to refuse requests for access to information. The current system is complex and rigid. The public at large know very little about their rights of access to information and public officials tend to know very little about their obligations to provide information. Key public procurement transactions, such as the controversial arms deal saga, remain shrouded in mystery. In summary, access to information laws have not lived up to expectations and requires significant overhauling in order to remove the design defects and allow for a more streamlined and efficient system.

However, legislative amendments by themselves would not be sufficient. Other parallel measures should be introduced to enhance the level of transparency of public tendering in South Africa. These include the following:

- *Independent review of each important stage in the tendering process.* It should become standard practice within the public sector that high value or complex tenders are submitted for external review and validation by independent firms of forensic and legal specialists. The purpose of the review process would be to test compliance with key control measures and to provide assurance that proper processes were followed. Independent reviews should be conducted at each critical stage of the procurement cycle ie the demand stage, going to market stage, the

receipt and opening of bids, the evaluation of bids, the award of the contract and the execution of the contract.

- *Effective mechanisms to resolve complaints.* Courts of law are not conducive to the resolution of complaints in an expeditious and accessible manner. For this reason, alternative structures should be created to deal with complaints and appeals from unsuccessful bidders. These could be internal to the procuring entity or operate externally from it. It is however essential that such bodies operate with integrity and independence and are granted powers to implement effective remedies. It is also essential that the decisions of such bodies remain subject to judicial review.
- *Targeted education programs to make bidders aware of their rights during the bidding process.* Although there has been a significant rise in the amount of legal challenges brought by unsuccessful bidders in South Africa, the supplier community in general appears to be reluctant to enforce their rights to fair administrative action. There are important commercial and practical reasons for the somewhat supine attitude adopted by suppliers. Many are unwilling to risk souring important business relationships with organs of state by adopting a litigious approach. Litigation not only places enormous strain on commercial relationships but also diverts attention and financial resources away from the primary task of running a business (which are critically important in a time of slow economic recovery). Education programs aimed at informing suppliers about their rights to fair administrative action, access to information and reasons may however increase the level of scrutiny of tender decisions by the supplier community, especially if alternative dispute resolution mechanisms are put in place to facilitate a speedy resolution to the dispute without alienating the parties from each other.
- *Involvement of non state actors.* The OECD recommends the practice of “direct social control” over key procurement transactions. This entails the involvement of representatives of civil society as observers in monitoring high value or complex procurement transactions that entail a significant risk of corruption.⁹⁰ The Constitutional Court recently observed that “Both the NGO and individual requesters have a critical role to play in ensuring that our democratic government is accountable responsive and open. Indeed, the Constitution contemplates a public administration that is accountable and requires that

*‘transparency must be fostered by providing the public with timely, accessible and accurate information.’ Thus the public and NGOs must be encouraged and not obstructed in carrying out their civic duties.”*⁹¹ Strict criteria should however be used to determine when direct social control may be used and to control the handling of confidential information etc.

Ultimately, the cost of opaqueness significantly outweighs the cost of transparency in public procurement. Opaqueness inevitably results in poor quality decision making, the acquisition of inappropriate goods and services and the selection of undeserving suppliers. This inevitably undermines the goals of fair competition, speedy service delivery, the provision of quality services and cost effectiveness. It also imposes an intolerable financial and social burden on the South African public and contributes to social turbulence. As Ramphele has observed, *“The growing gap between the promise of our constitutional democracy and the practice of governance is breeding despair and passive aggression.”*⁹²

NOTES

¹ Cloete, F., Auriacombe, CJ. (2007). “Governance and Transparency in South Africa.” *Politeia*, 26 (2): 192:206 at page 197

² Calland, R. (2001). “Access to Information: Modern SA and Globalization.” *Unpublished paper delivered at Seminar on Freedom of Information in Central and Eastern Europe*, 3 - 5 October 2001

³ Hoexter, C. (2007). *Administrative Law in South Africa*, page 419

⁴ The 1996 Final Constitution is currently the constitution of South Africa. It will be referred to in this paper interchangeably as the “FC” or simply “the Constitution.”

⁵ See the preamble to the Promotion of Access to Information Act

⁶ Act 3 of 2000

⁷ Act 2 of 2000

⁸ There are many other pieces of legislation impacting upon public procurement in South Africa which fall outside the focus of this paper. These include the Preferential Procurement Policy Framework Act 5 of 2000, Public Finance Management Act 1 of 1999 and the Black Economic Empowerment Act 53 of 2003

⁹ See article 9(1) of the United Nations Convention Against Corruption. See also OECD, Integrity in Public Procurement, Good Practice from A to Z

¹⁰ Minister of Social Development and Others v Phoenix Cash and Carry –Pmb CC 2007 (3) All SA 115 (SCA) at paragraph 1

¹¹ Section 6 of PAJA outlines the grounds for judicial review of administrative action

¹² Hoexter, C. op cit page 415

¹³ Kiva v Minister of Correctional Services and Another [2006] JOL 18512 (E) at paragraph 38

¹⁴ Section 1 of the Promotion of Access to Information Act 2 of 2000, defines a “Record” as

“...any recorded information

(a) regardless of form or medium;

(b) in the possession or under the control of a public or private body respectively; and

(c) whether or not it was created by that public or private body, respectively”

¹⁵ Section 5(1) of the Promotion of Access to Information Act 3 of 2000

¹⁶ Hoexter, C. op cit page 415

¹⁷ Aquafund (Pty) Ltd v Premier of Western Cape 1997 (7) BCLR 907 (C)

¹⁸ Clutchco (Pty) Ltd v Davis [2005] 2 ALL SA 225 (SCA) at paragraph 10

¹⁹ Goodman Brothers (Pty) Ltd v Transnet Ltd 1998 (8) BCLR 1024 (W) at 1032

²⁰ Van Niekerk v City Council of Pretoria [1997] 1 All SA 305 (T) at page 315

²¹ Section 39 of the Final Constitution

²² For example, the courts have held that a decision by an organ of state to dismiss an employee does not amount to administrative action (Transnet Ltd v Goodman Brothers (Pty) Ltd 2001 (2) BCLR 176 (SCA) at para 34). The courts have also held that a decision by a public body to cancel a contract that was concluded on equal terms with a major commercial undertaking did not constitute administrative action. (Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC 2001 (3) SA 1013 (SCA)) The determining factors in deciding whether state action amounts to “administrative action” includes the source of the power exercised, the nature of the power, its subject matter, whether it involves the exercise of a public duty, and how closely it is related on the one hand to policy matters which are not administrative, and on the other to the implementation of legislation, which is. (President of the RSA and Others v SARFU and Others 1999 (10) BCLR 1059 (CC) at para 142)

²³ See for example the argument of the respondent in Aquafund (Pty) Ltd v Premier of the Western Cape 1997 (7) BCLR 907 (c)

²⁴ Steenkamp v Provincial Tender Board, Eastern Cape 2007 (3) BCLR 300 (CC) at paragraph 21. See also Steenkamp NO v Provincial Tender Board, Eastern Cape 2006 (3) SA 151 (SCA) ; Greys Marine Houtbay (Pty) Ltd and Others v Minister of Public Works and Others 2005 (6) SA 313 (SCA) ; Logbro Properties CC v Bedderson NO and Others 2003 (2) SA 460 (SCA) ; Transnet Ltd v Goodman Brothers (Pty) Ltd 2001 (1) SA 853 (SCA); Olitzki Property Holdings

v State Tender Board and Another 2001 (8) BCLR 779 (SCA); 2001 (3) SA 1247 (SCA), Umfolozi Transport (Edms) Bpk v Minister van Vervoer en andere [1997] 2 All SA 548 (A) at 552i to 553c; ; Tirhani Auctioneers (Gauteng) (Pty)(Ltd) v Transnet Ltd and Another [2007] 3 All SA 70 (W) at para 9; Tetra Mobile Radio (Pty) Ltd v MEC, Department of Works and Others 2008 (1) SA 438 (SCA) at para 8

²⁵ Steenkamp NO v Provincial Tender Board, Eastern Cape 2007 (3) BCLR 300 (CC) at para 21

²⁶ Goodman Brothers (Pty) Ltd v Transnet Ltd 1998 (8) BCLR 1024 (W) at page 1031

²⁷ SA Metal and Machinery Co (Pty) Ltd v Transnet Ltd [1998] JOL 3984 (W). There are four reported judgments involving these parties. To avoid confusion, reference will be made to SA Metal Machinery Co Ltd v Transnet (1) to (4) respectively.

²⁸ Page 14 of the judgment

²⁹ Judgment of Heher J in SA Metals case cited with approval in Goodman Brothers (Pty) Ltd v Transnet Ltd 1998 (8) BCLR 1024 (W)

³⁰ Aquafund (Pty) Ltd v Premier of the Western Cape 1997 (7) BCLR 907 (C) at page 916

³¹ *ibid*

³² Transnet Ltd v Goodman Brothers (Pty) Ltd 2001 (2) BCLR 176 (SCA)

³³ The SCA rejected the reasoning of the high court in SA Metal Machinery v Transnet Ltd (1) in which the court found that unless an until a tender was accepted the tenderer had no rights or legitimate interests that required protection.

³⁴ *supra*

³⁵ Directory advertising Cost Cutters CC v Minister for Posts, Telecommunications and Broadcasting and Others 1996 (3) SA 800 (T)

³⁶ [1997] 1 ALL SA 305 (T)

³⁷ *ibid*

³⁸ Nomala v Permanent Secretary, Department of Welfare 2001 (8) BCLR 844 (E)

³⁹ Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd 2003 (6) SA 407 (SCA) at para 40

⁴⁰ Claase v Information Officer of South African Airways (Pty) Ltd [2006] JOL 18804 (SCA)

⁴¹ ABBM Printing and Publishing (Pty) Ltd v Transnet Ltd 1997 (10) BCLR 1429 (W) at paragraph 24.3

⁴² ABBM Printing *supra* at paragraph 22.1

⁴³ Act 2 of 2000

⁴⁴ See the Preamble to the Act

⁴⁵ Section 9(d) of PAIA

⁴⁶ Section 2(1) of PAIA. See also *Unitas Hospital v Van Wyk and Another* [2006] 4 ALL SA 231 (SCA) at para 31

⁴⁷ Bolton, P. (2007). *The Law of Public Procurement in South Africa*, page 250

⁴⁸ Section 4 of PAIA

⁴⁹ The Act prohibits certain persons from requesting information. In terms of section 7(1) a person engaged in litigation with an organ of state may not request information in terms of PAIA. Such person must request the information by following the normal rules of discovery instead. A public body is not permitted to request information from another public body, although it is permitted to request information from a private body.

⁵⁰ Section 11(3) of PAIA

⁵¹ Section 81(3) of PAIA

⁵² Bolton, P. (2007). *The Law of Public Procurement in South Africa*, page 250

⁵³ The correct forms prescribed by regulation must be completed. However, Section 19(2) provides that the Information Officer of the public body may not refuse a request due to non compliance with formalities unless the information officer has offered to assist the requestor to comply with the formal requirements eg filling out the correct forms.

⁵⁴ Section 7 of PAIA

⁵⁵ Section 36 of PAIA

⁵⁶ Bolton, P. op cit at page 247 correctly observes that the supply of information in confidence by a third party is not enough to ensure its protection against disclosure. The disclosure must also be expected to disadvantage the third party in its contractual negotiations or prejudice the third party in commercial competition. Examples include a third party's list of clients, profit margins etc.

⁵⁷ Section 37 of PAIA

⁵⁸ [1998] JOL 3984 (W)

⁵⁹ Page 11 of the judgment. Similar sentiments were expressed in *Water Engineering and Construction (Pty) Ltd v Lekoa Vaal Metropolitan Council* 1999 (9) BCLR 1052 (W) in which the court stated the following: "...it cannot be that unscrupulous persons would be able to exploit this provision for their own selfish reasons. A balance must be achieved between the right to access information and the right to privacy entrenched in section 14 of the Constitution." (at page 1057)

⁶⁰ [2003] JOL 11882 (T)

⁶¹ *ABBM Printing and Publishing (Pty) Ltd v Transnet Ltd* supra

⁶² [2003] 1 All SA 335 (W)

⁶³ Paragraph 12 of the judgment

⁶⁴ The court took cognizance of the fact that the prices for scrap steel were based on the ever fluctuating international dollar steel price, and concluded that the price tendered by the successful tenderer some 10 months earlier bore no relation to the price that would be tendered in the next bi annual tender. The price tendered by the winning bidder was expressed not in terms of a formula, but purely in terms of US dollars. Disclosure would thus not entail disclosure of a specific formula or method of calculating price which may or may not be a trade secret or some protectable interest. "*It is not that the profit margin or the method of calculation of the third party's price is disclosed: had this been the case competitors would have been able to calculate future prices. Disclosure of the*

third party's price is a historical fact that alone gives no indication of future prices."

⁶⁵ *ibid*

⁶⁶ [2006] 1 ALL SA 352 (SCA)

⁶⁷ [2003] 1 ALL SA 335 (W)

⁶⁸ Page 18 of the judgment

⁶⁹ At paragraph 55 of the judgment

⁷⁰ OECD, (2007). *Bribery in Public Procurement: Methods, Actors and Counter Measures*, pages 24 and 27

⁷¹ See section 41 (2) (b) of PAIA

⁷² *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services; Freedom of Expression Institute In re: Masethla v President of the Republic of South Africa and Another 2008 (8) BCLR 771 (CC)*. For an analysis of this case see Klaaren, Jonathan "Open Justice and Beyond: Independent Newspapers v Minister for Intelligence Services: In Re Masethla" *South African Law Journal* 126 (1), page 32

⁷³ *CCII Systems (Pty) Ltd v Fakie NO & Others* [2003] JOL 11324 (T)

⁷⁴ OECD, (2007). *Bribery in Public procurement, Methods, Actors and counter measures*, page 22

⁷⁵ UN Convention Against Corruption, African Union Convention on Preventing and Combating Corruption (2003)

⁷⁶ Cloete, F., Auriacombe, CJ. (2007). "Governance and Transparency in South Africa." *Politeia*, 26 (2): 192:206

⁷⁷ *Minister of Social Development and Others v Phoenix Cash and Carry –Pmb CC 2007 (3) All SA 115 (SCA)* at paragraph 1

⁷⁸ Human Rights Development Report (2008). *SAHRC*, page 71

⁷⁹ Cloete, F., Auriacombe, CJ. *op cit* page 23

⁸⁰ Allen, K., Currie, I. (2007). "Enforcing Access to Information and Privacy Rights: Evaluating Proposals For An Information Protection Regulator For South Africa." *South African Journal of Human Rights*, 23: 570 at 572

⁸¹ Human Rights Development Report, (2008). *SAHRC*, page 72

⁸² This Bill (B9-2009) which is currently before Parliament envisages the appointment of an Information Protection Regulator to act as mediator and to resolve complaints in matters relating to access to information as provided by PAIA.

⁸³ Roberts, B. (2006). "Prerequisites For The Successful Implementation of the Promotion of Access to Information Act 2 of 2000." *Journal of Public Administration*, Special issue 2

⁸⁴ Allen, K., Currie, I. *op cit* page 578

⁸⁵ *Claase v Information Officer of SAA (Pty) Ltd* [2006] JOL 18804 (SCA) at paragraph 1; *MEC For Roads and Public Works v Intertrade Two (Pty) Ltd* 2006 (5) SA 1 (SCA)

⁸⁶ *Op cit* 196

⁸⁷ *Ibid*

⁸⁸ *Olmstead v US* 277 US 438, 485 (1928)

⁸⁹ Human Rights Development Report, (2008). *SAHRC* page 72

⁹⁰ OECD, (2008). *Enhancing Integrity in Public Procurement: A Checklist*, page 27

⁹¹ *Brummer v Minister of Social Development and others (SA History Archives Trust & Another as amici curiae)* [2009] JOL 24044 (CC) at para 55

⁹² Ramphele, M. (2010). "Multiple Voices Are the Oxygen of Democracy" Article published in Sunday Times, [4 April 2010]

REFERENCES

Books

Bolton, P. (2007). *The Law of Government Procurement in South Africa*. LexisNexis Butterworths.

Hoexter, C. (2007). *Administrative Law In South Africa*. Juta & Co, Ltd.

OECD, (2008). *Enhancing Integrity in Public Procurement: A Checklist*.

OECD, (2007). *Bribery in Public Procurement, Methods, Actors and counter measures*.

Human Rights Development Report, (2008). *SAHRC*

UN Convention Against Corruption, African Union Convention on Preventing and Combating Corruption (2003)

Articles

Allen, K., Currie, I. (2007). "Enforcing Access to Information and Privacy Rights: Evaluating Proposals For An Information Protection Regulator For South Africa." *South African Journal of Human Rights*, 23: 570.

Calland, R. (2001). "Access to Information: Modern SA and Globalization." *Unpublished paper delivered at Seminar on Freedom of Information in Central and Eastern Europe*, 3 - 5 October 2001.

Cloete, F., Auriacombe, CJ. (2007). "Governance and Transparency in South Africa." *Politeia*, 26 (2): 192-206.

Klaaren, J. (2009). "Open Justice and Beyond: Independent Newspapers v Minister For Intelligence Services: In Re Masethla." *South African Law Journal*, 126 (1): 24.

Ntlama, N. (2003). "The Effectiveness of the Promotion of Access To Information Act 2 of 2000 For the Protection of Socio Economic Rights." *Stellenbosch Law Review*, 14 (2): 273

Ramphela, M. (2010). "Multiple Voices Are the Oxygen of Democracy" *Article published in Sunday Times*, [4 April 2010].

Roberts, B. (2006). "Prerequisites For The Successful Implementation of the Promotion of Access to Information Act 2 of 2000." *Journal of Public Administration*, Special issue 2.

Roberts, B. (2006). "Scope of the Promotion of Access to Information Act 2 of 2000: A Comparative Perspective." *Politeia*, 25 (2).

Cases

ABBM Printing and Publishing (Pty) Ltd v Transnet Ltd 1997 (10) BCLR 1429 (W)

Aquafund (Pty) Ltd v Premier of Western Cape 1997 (7) BCLR 907 (C)

Brummer v Minister of Social Development and others (SA Histroy Archives Trust and Another as Amici curiae) [2009] JOL 24044 (CC)

Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC 2001 (3) SA 1013 (SCA)

Clause v Information Officer of SAA (Pty) Ltd [2006] JOL 18804 (SCA)

CCII Systems (Pty) Ltd v Fakie NO & Others [2003] JOL 11324 (T)

Clutcho (Pty) Ltd v Davis [2005] 2 All SA 225 (SCA)

Directory advertising Cost Cutters CC v Minister for Posts, Telecommunications and Broadcasting and Others 1996 (3) SA 800 (T)

Goodman Brothers (Pty) Ltd v Transnet Ltd 1998 (8) BCLR 1024 (W)

Greys Marine Houtbay (Pty) Ltd and Others v Minister of Public Works and Others 2005 (6) SA 313 (SCA)

Independent Newspapers (Pty) Ltd v Minister for Intelligence Services; Freedom of Expression Institute In re: Masethla v President of the Republic of South Africa and Another 2008 (8) BCLR 771 (CC)

Kiva v Minister of Correctional Services and Another [2006] JOL 18512 (E)

Logbro Properties CC v Bedderson NO and Others 2003 (2) SA 460 (SCA)

Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd 2003 (6) SA 407 (SCA)

Minister of Social Development and Others v Phoenix Cash and Carry-Pmb CC 2007 (3) All SA 115 (SCA)

Mittalsteel SA Ltd v Hlatshwayo 2007 (4) BCLR 386 (SCA)

Nomala v Permanent Secretary, Department of Welfare 2001 (8) BCLR 844 (E)

Olitzki Property Holdings v State Tender Board and Another 2001 (8) BCLR 779 (SCA)

Olmstead v US 277 US 438, 485 (1928)

President of the RSA and Others v SARFU and Others 1999 (10) BCLR 1059 (CC)

SA Metal Machinery Co Ltd v Transnet Ltd [1998] JOL 3984 (W)

SA Metal Machinery Co (Pty) Ltd v Transnet Ltd [2002] JOL 10427 (W)

SA Metal Machinery Co (Pty) Ltd v Transnet Ltd and Another [2003] JOL 11882 (T)

Steenkamp v Provincial Tender Board, Eastern Cape 2007 (3) BCLR 300 (CC)

Tetra Mobile Radio (Pty) Ltd v MEC, Department of Public Works and Others 2008 (1) SA 438 (SCA)

Transnet Ltd v Goodman Brothers (Pty) Ltd 2001 (2) BCLR 176 (SCA)

Transnet Ltd and another v SA Metal Machinery Co (Pty) Ltd [2006] 1 ALL SA 352 (SCA)

Unitas Hospital v Van Wyk and Another [2006] 4 All SA 231 (SCA)

Van Niekerk v City Council of Pretoria [1997] 1 All SA 305 (T)

Water Engineering and Construction (Pty) Ltd v Lekoa Vaal Metropolitan Council 1999 (9) BCLR 1052 (W)

Acts

Constitution of South Africa Act 108 of 1996

Interim Constitution of South Africa Act 200 of 1993 (repealed)

Promotion of Access to Information Act 2 of 2000

Promotion of Administrative Justice Act 3 of 2000

Protection of Personal Information Bill (B9 – 2009)