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Title: **THE RIGHT OF ACCESS TO INFORMATION: THE CONSTITUTIONALITY OF THE PROMOTION OF ACCESS TO INFORMATION BILL.**

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PRESENTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE MAGISTER LEGUM IN THE FACULTY OF LAW OF THE UNIVERSITY OF THE WESTERN CAPE

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Date of submission: **25 JANUARY 2000**

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1. INTRODUCTION

The Constitution of the Republic of South Africa ("the Constitution") [1] as well as its precursor ("the interim Constitution") [2] entrench the right of access to information. In the Constitution the right of access to information is contained in section 32. Section 32(2) of the Constitution provides in express terms that national legislation should be enacted to give effect to the right of access to information and provides furthermore that the contemplated national legislation may provide for reasonable measures to alleviate the administrative and financial burden on the state. De Waal, Currie and Erasmus [3] refer to the right of access to information contained in section 32 thus as "a right under construction".

In terms of item 23(3) of Schedule 6 to the Constitution this national legislation must be enacted within a period of 3 years from the date when the Constitution became operative: the date of commencement of the Constitution is 4 February 1997 and therefore the national legislation must be enacted on or before 4 February 2000. The Promotion of Access to Information Bill [4] ("the PAIB") has already been drafted as the national legislation contemplated in section 32(2) to give effect to the right of access to information. The PAIB was at the date of writing already adopted by the National Assembly and the National Council of Provinces and is awaiting signature by the President.

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1 Constitution of the Republic of South Africa 108 of 1996.

2 Constitution of the Republic of South Africa 200 of 1993.

3 1999 461.

4 [B67B-98]. The Open Democracy Bill [B67-98] was initially tabled in 1998 but was withdrawn and reintroduced in the 1999/2000 parliamentary session.

It is therefore important to have regard to the provisions of the PAIB in order to determine whether and to what extent the PAIB meets the requirements of the national legislation contemplated in section 32(2) of the Constitution. This thesis will therefore focus on an analysis of the right of access to information in order to determine the nature, extent and effect of this right.

This enquiry is important inasmuch as section 32(2) of the Constitution enjoins Parliament to enact national legislation in order to give effect to this right. If the parameters of this right are not clear and defined it will be difficult to determine whether the national legislation in the form of the PAIB gives effect to the constitutional mandate provided for in section 32(2) of the Constitution. Rights enshrined in the Bill of Rights, such as the right of access to information, are not absolute. The limitation clause contained in section 36(1) of the Constitution provides that the rights enshrined in the Bill of Rights may be limited by a law of general application to the extent that such limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

In this thesis I propose dealing with the right of access to information and the national legislation as follows:

(a) Firstly, the requirements of the national legislation contemplated in section 32 of the Constitution will be determined through a process of interpretation and analysis of section 32(1)(a) and (b); this enquiry will involve a textual analysis of section 32(1) by dismantling the constituent components of the right of

access contained in this sub-section; in interpreting section 32 the case law developed under section 23 of the interim Constitution and section 32 of the Constitution will be examined to determine whether it provides any guidance in this enquiry.

(b) Secondly, the PAIB will be assessed in order to determine whether it meets the requirements of the national legislation contemplated in section 32 of the Constitution, and if it limits the right, whether such limitations are justifiable in terms of section 36(1).

1.1 THE CONSTITUTIONAL PROVISIONS

Section 32 of the Constitution provides as follows:

> "32 Access to information
>
> (1) Everyone has the right of access to -
>
> (a) any information held by the state; and
>
> (b) any information that is held by another person and that is required for the exercise or protection of any rights.
>
> (2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state."

In terms of Item 23(2) of Schedule 6 the provisions of section 32 of the Constitution must in the interim period, pending the enactment of the national legislation contemplated in section 32(2), be regarded to read as follows:

> "(1) Every person has the right of access to all information held by the state or any of its organs in any sphere of government in so far as that information is required for the exercise or protection of any of their rights."

This interim statutory provision which regulates the right of access to information is couched essentially in the same terms as section 23 of the interim Constitution.

2. THE ELEMENTS OF SECTION 32

The textual analysis which is adopted in this thesis relates to section 32 in its final form - and in respect of which national legislation must be enacted - and not the interim section 32. If section 32 is dissected into its essential components certain constituent elements can be identified from that section. The essential components of the right contained in section 32 are the following:

(a) any information;

(b) a right of access;

(c) information;

  (i) held;

  (ii) by the state;

(d) reasonable measures;

(e) information;

(i) held;

(ii) another person;

(iii) required for the exercise or protection of;

(iv) any rights.

These components will be dealt with seriatim.

2.1 ANY INFORMATION

The phrase "any information" will be dealt with under five separate headings as it raises different questions, viz:

(a) definition of information;

(b) form of the information;

(c) ambit of the information;

(d) quantity of the information; and

(e) availability of the information.

In order to achieve an understanding of the term "information" - which appears to be an elusive and elastic concept - and its facets referred to above, regard should be had to the case law which has thus far been developed by our courts.

2.1.1 definition of information

The term "information" is not defined in the Constitution or section 32 thereof and it is therefore important to determine what the definition of "information" is. The dictionary meaning of "information" is indicated as "knowledge acquired in any manner; facts."[5] This definition is particularly wide and would not only include information in a written or documentary form but also include information regardless of form or medium. It is submitted that in the absence of a definition in the Constitution that a generous definition of "information" should be adopted. Such an interpretation would be consistent with the approach adopted by our courts in interpreting fundamental rights, entrenched in the Constitution, to interpret such rights generously and purposively.[6] In *Reàn International Supply Company (Pty) Ltd v Mpumalanga Gaming Board*[7] it was held that the term "information" is wider than the concept "facts" and that a party is entitled to "all information" which, *in casu*, includes all information that led to the refusal of the licence and includes the deliberations of the administrative body. It is submitted therefore that information should thus be regarded as any form of knowledge and includes facts.

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5 Collins: English Dictionary 430.

6 *S v Zuma & Others* 1995(2) SA 642 (CC); 1995(4) BCLR 401 (CC) para [14], *S v Makwanyane* 1995(3) SA 391 (CC); 1995(6) BCLR 665 (CC) para [9]; *S v Mhlungu* 1995(3) SA 391 (CC); 1995(7) BCLR 793 (CC)(para [8].

7 1999(8) BCLR 918 (T) 928 H - J.

2.1.2 form of the information

Case law indicates that the form of the information is not only limited to information contained in a written form but also includes information contained in a video or audio or electronic form. This point is demonstrated by *Afrisun Mpumalanga v Kunene*[8] in which the applicant, who had unsuccessfully applied for a casino licence, brought an application to have the decision of the Gambling Board set aside. The applicant contended that it was entitled to the following information:

(a) All documents submitted from the date on which the applicant and the third respondent (the preferred candidate) had registered as prospective applicants for the casino licence, the submissions and proposals by the candidates as well as the consideration of those proposals;

(b) Video and audio recordings of the Gambling Board's deliberations;

(c) Documents in possession of the Gambling Board in respect of which it was contended by the respondent that such documents were of a confidential and sensitive nature and contained trade secrets.

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[8] 1999(2) SA 599 (T).

Southwood J held [9] that the Mpumalanga Gaming Act [10] contemplates an open and transparent system for the deliberations of the Gaming Board and therefore that the minutes of the Board's deliberations should be disclosed unless a legally justifiable reason for withholding disclosure exists. As regards the disclosure of the information contained in a documentary, audio and video form it was held that:

> "A further and important consideration is that, although not indispensable for the purpose of the review application, the minutes of the deliberations, whether in written, audio or video form, would be reasonably required for the purpose of the review as contemplated by s 32 read with s 23(2)(a) of schedule 6 to the Constitution." [11]

A recording of the deliberations of the Board, whether in video or audio form, would be part and parcel of the record of the deliberations when the decisions were taken. The court consequently ordered the disclosure of such information, including the video recording of the board meetings and deliberations.

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9 *Afrisun* 631 I-J.

10 5 of 1995

11 *Afrisun* 632 C - D.

2.1.3 ambit of the information

The enquiry into the ambit of the information relates to the extent of the information that needs to be furnished. The enquiry into the ambit of the information must be distinguished from the quantity of the information. In the case of the quantity of the information, a single document may suffice provided that such information is sufficient and necessary. The ambit of the information, on the other hand, involves an enquiry as to where the duty to disclose information extends to. It is a trite proposition of administrative law that an applicant is entitled to be informed of all facts of which the administrative body or functionary has knowledge, not only for the purposes of review, but also in respect of the hearing of the application for review. [12] The Constitution - and previously the interim Constitution - altered this position radically by granting the right of access to all information held by the state.

The question as to the ambit of the term "information" was considered in *Rèan International Supply Company (Pty) Ltd v Mpumalanga Gaming Board* [13] where an application for a maintenance and supply of gaming equipment licence was refused. The respondent furnished reasons for its refusal to issue the licence but the applicants, aggrieved by the reasons furnished, launched an application to court seeking an order that the respondent amplify its written reasons by providing certain specified information. The information requested was in the form of a questionnaire.

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12 *Johannesburg City Council v Administrator, Transvaal and Another* 1970(2) SA 89 (T) 91 - 2; *Pieters v Administrateur, Suidwes Afrika en 'n Ander* 1972(2) SA 220 (SWA) 226 G-H; *Loxton v Kenhardt Liquor Licensing Board* 1951(3) SA 334(C).

13 1999(8) BCLR 918 (T).

A written request was also made for the audio recordings of the deliberations of the respondent. This request was met with a tender to furnish an edited transcript of such proceedings and it was contended that the basis for such tender was that the opinions expressed by the members of the board should remain confidential and that their identities should not be revealed. Kirk-Cohen ADJP held that the "information" contemplated in section 32 relates to "all information" held by the relevant authority and that the term "information" is wider than the concept "facts" previously used in the context of administrative law. [14] Where the information is required to decide whether administrative action was justifiable in relation to the reasons given, the aggrieved party is entitled to "all information" including facts which preceded the refusal and which includes the deliberations of the administrative body.

In casu, Kirk-Cohen ADJP held that it would impose an unjustifiable limitation upon the provisions of section 32 (and section 33) of the Constitution to exclude the deliberations from disclosure. [15] This finding, however, does not suggest that it is not possible to refuse the disclosure, if such refusal is a justifiable limitation in terms of section 36 of the Constitution. This proposition is reinforced by the finding of the court that there was no evidence to suggest that the disclosure of the unedited audio recordings might result in reprisals against the members of the respondent. Kirk-Cohen ADJP followed the judgments in *Van Niekerk v Pretoria City Council* [16] and Afrisun Mpumalanga (Pty) Ltd v Kunene [17] that "information" includes the deliberations of the administrative body which would indicate the reasoning of the body.

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14 *Reàn* 928H-J.
15 *Reàn* 928J-929B.
16 1997(3) SA 839 (T) 844B-848G.
17 1999(2) SA 599 (T).

It is submitted that the ambit of the information extends to "all information" which includes facts pertaining to the decision or deliberations of the administrative body.

2.1.4 quantity of the information

The amount of documentation is not the determinant factor but it is the nature of the information furnished, that is decisive. This point is illustrated by the judgment In *Nisec (Pty) Ltd v Western Cape Provincial Tender Board.*[18] The cardinal question which arose was how much information needed to be furnished.

The applicant was informed in writing that the issue of a tender issued to it would be reconsidered by the respondent. The letter informing the applicant attached a memorandum in which the grounds, as well as certain calculations, for the proposed cancellation of the contract were set out in detail. The applicant, dissatisfied with the information supplied, brought an application for access to all relevant documents as well as calculations on which the memorandum had been based. Davis AJ held that the true basis of the dispute can be traced to the common-law principle of natural justice, with its corollary being the right to information, which is aimed at making the principle of natural justice meaningful.[19] Davis AJ held in respect of the information supplied to the respondent:

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[18] 1998(3) SA 228 (C).

[19] *Nisec* 233 F-G.

> "On the basis of the information made available to applicant by fourth respondent, the conclusion cannot be justified that applicant had not been put in possession of sufficient information to exercise its rights of natural justice in a meaningful fashion."[20]

The *Nisec* judgment seems to suggest that the test to be applied is one of sufficiency and that the court remains the ultimate arbiter to determine whether the information supplied is sufficient or not. This decision is underpinned by the common law principle of *audi alteram partem* which is, *inter alia*, designed to enable a party to be properly heard after he had been placed in possession of sufficient information. It was accordingly held that the memorandum constituted sufficient information for the purpose of enabling the applicant to enforce its rights.

On the other end of the spectrum one is faced with the judgment in *Van der Merwe & Others v Slabbert NO & Others*[21] where the disclosure of a substantial amount of information was ordered. The applicants, who were due to appear before a commission of enquiry, brought an application that they be furnished with copies of witnesses' statements, reports and documentation to enable them to prepare for the hearing.

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[20] *Nisec* 236 E.

[21] 1998(3) SA 613 (N).

Booysen J ordered that the applicants were entitled to those documents not only in terms of the common law but also by virtue of the provisions of section 32 of the Constitution and consequently ordered copies of such witnesses statements, reports and documentation to be furnished to the applicants.[22] Similarly, in *Du Preez and Another v Truth and Reconciliation Commission*[23] it was ordered that those applicants were entitled to copies of witnesses' statements, reports and documentation.

These three cases underscore the fact that the crucial question is not the quantum of the information but whether the information is required as well as the nature of such information.

2.1.5 availability of the information

A further question which needs to be addressed is whether the information should be in a pre-existing form or whether the term "information" also includes information which can be readily ascertained and converted to a transferable form. This raises a further question: is there a duty on the repository of the information to gather facts and information and thereafter to record such information for the purpose of supplying it to the person requesting it?

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22 *Van der Merwe* 625J - 626B.

23 1997(3) SA 204 (A) 235F-I.

In this regard, and by way of illustration, the following questions can be posed: Is a government department obliged to ascertain and furnish particulars of its race or gender composition or, for that matter, the sexual orientation or religious beliefs of its employees; or, as regards its affirmative action policy, how many of its employees were employed on the basis of affirmative action; and, if so, whom of those employees and by reason of which facts such employees would otherwise not have been employed?

It would appear that there will be no need to furnish (further) information or facts if, from the documentation provided by the holder of the information, the information can be readily ascertained.[24]

Our courts disapprove of the mechanism to subject the holder of information to an interrogatory (where the request for information is in the form of a questionnaire to which answers must be supplied).[25] However, if such information is not yet in recorded form but can be easily reduced to recorded form, for example, by accessing a computer or written records, there seems, it is submitted, to be no compelling reason why such information should not be disclosed, provided that such information is readily available.

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[24] *Reàn* 927I-J.

[25] *Reàn* 926G-H. see also the request in *Tobacco Institute of Southern Africa v Minister of Health* 1998(4) SA 745(C) 748G-751F.

2.2 ACCESS

2.2.1 definition of access

The term access is not defined in either the Constitution or the interim Constitution. It is important to consider the meaning of "access". Access, according to its dictionary meaning, is defined as "the right to make use of something or to obtain (information) from a computer."[26] It is therefore submitted that in the context of the right of access to information "access" should be defined as "the making available or the obtaining of information."

2.2.2 manner of access

Access to information means the physical obtaining and/or perusal of such information. This issue was pertinently raised in *Ferela (Pty) Ltd & Others v Commissioner for Inland Revenue & Others*.[27] The applicants sought access to the court file which contained the information in terms of which the Commissioner for Inland Revenue had obtained certain relief against the applicant.

The Commission contended[28] that it was at all times prepared to allow the applicants to make copies of the document which was in any event attached to the application for the warrant. Botha J held that the applicants were entitled to access of the file and furthermore that such access was not only limited to copies of the document but that:

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26 Collins: English Dictionary 4.

27 1998(4) SA 275 (T).

28 *Ferela* 282 A-B.

> "They were entitled to consider the authenticity, validity and ambit of the warrant and they were entitled to consider what steps they could take to have its effect undone. It does not matter, for what purpose, what the procedure is that they adopted or the relief that they claimed." [29]

It is therefore clear that on the authority of the *Ferela* case the applicant was not only entitled to copies of the contents of the file but was also entitled to have sight of the original documents in order to determine their authenticity. The issue was however, left open as to who was responsible for the actual copying and the costs of such copying.

2.2.3 limitation of access

In *Shabalala & Others v Attorney General of Transvaal & Another*[30] the Constitutional Court listed circumstances under which the right of an accused person to have access to that information, might justifiably be denied. Although this decision was heard on the right to a fair trial, the issues raised are also pertinent to the right of access to information. Such instances would include, *inter alia*, where there is a reasonable risk that the disclosure might lead to the identity of the informer or the disclosure of state secrets or to the intimidation or obstruction of the proper ends of justice, methods of police investigation and communications between a legal adviser and his/her client. In such instances the general limitation clause contained in section 36(1) of the Constitution is invoked to determine whether such limitation was justifiable.

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[29] *Ferela* 283 F-G.

[30] 1996(1) SA 725 (CC); 1995(12) BCLR 1593 (CC).

The following should be considered: informers; information gathered as part of a criminal investigation; legal professional privilege; trade secrets; confidential communications, national security, privacy and national governance.

2.2.3.1 informers

The protection afforded to informers is a recognized and widely accepted limitation to access. In *Els v Minister of Safety and Security*[31] the applicant sought an order to compel the police to furnish him with a statement made by an informer. The police declined to divulge the information sought and raised the privilege attaching to information obtained from informers. Kriek J held that section 32(1) of the Constitution confers upon the applicant a right to the information and that the *onus* of proving that a limitation of that right is reasonable and justifiable in an open and democratic society rests upon the state or the person who objects to the disclosure of such information.[32]

It does not mean that such information is automatically immune to disclosure since the court is ultimately vested with the power to decide whether disclosure should be enforced or not.

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31 1998(4) BCLR 434 (NC).

32 *Els* 440A-B.

2.2.3.2 information gathered as part of criminal investigation and law enforcement

In *Shabalala & Others v Attorney General of Transvaal & Another*[33] Mohamed DP (as he then was) dealt with the issue of docket privilege and, in declaring the blanket docket privilege unconstitutional, held that:

> "If the conflicting considerations are weighed, there appears to be an overwhelming balance in favour of an accused person's right to disclosure in those circumstances where there is no reasonable risk that such disclosure might lead to the disclosure of the identify of informers or state secrets or to intimidation or obstruction of the proper ends of justice. The blanket docket privilege which effectively protects even such statements from disclosure therefore appears to be unreasonable, unjustifiable in an open and democratic society and is certain not necessary."[34]

The *Shabalala* judgment of the Constitutional Court puts the question beyond doubt that the docket privilege cannot serve as a blanket privilege against disclosure and that it does not automatically entitle the state to decline disclosure of such information.

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33 1996(1) SA 725 (CC); 1995(12) BCLR 1593 (CC).

34 *Shabalala* 748 G; para [50].

2.2.3.3 legal professional privilege

In *Van Niekerk v Pretoria City Council*[35] Cameron J considered the question whether legal professional privilege could be claimed by the City Council in respect of an electricity report which was compiled after the City Council had received a complaint.

The City Council contended that the report was obtained in contemplation of litigation. Cameron J held that to uphold a claim of legal professional privilege "would go very far indeed to negate the intended impact of s 23."[36] He added that:

> "In my view, recourse to legal professional privilege as a defence to a right asserted under s 23 should be carefully scrutinised. When consideration is given in the present case to whether the proposed limitation is reasonable, the public interest benefit of upholding the applicant's s 23 claim should not be left out of account."[37]

Cameron J consequently ordered the disclosure of the electricity report. It is submitted that this decision is not supported by the weight of legal authority which affords protection to information obtained in contemplation of litigation. In this regard it should be noted that the judgment in *Bogoshi v Van Vuuren and Others; Bogoshi v Director, Office for Serious Economic Offences and others*[38] made it plain that an authority to seize documents in terms of section 6(1) of the Investigation of Serious Economic

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35 1997(3) SA 839 (T).
36 *Van Niekerk* 849F.
37 *Van Niekerk* 849I-J.
38 1996(1) SA 785 (A) 793 D-E.

Offences Act [39] should be confined to non-privileged documents which are not protected by the legal professional privilege. The *Van Niekerk* judgment is furthermore not supported by the judgment in *Shabalala* which held that communications between a legal advisor and his client are privileged and protected from disclosure.[40]

2.2.3.4 national security

This rubric has not been considered in our case law in the context of the Constitution although cursory and *obiter* reference has been made to this topic. In the *Shabalala* judgment the Constitutional Court, in dealing with the docket privilege, held that the state is entitled to resist a claim by an accused for access to any particular document on the basis that such access would lead to the disclosure of state secrets.[41]

By parity of reasoning there would appear not to be a blanket privilege in respect of information relating to state security or national security. In each case the state will have to justify its refusal - based on the limitation clause contained in section 36 of the Constitution - that the refusal of access to such information is justifiable.

2.2.3.5 trade secrets/confidential information

Information containing trade secrets and confidential information appear not to be

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39 117 of 1991.

40 *Shabalala* 745A-D para [40].

41 *Shabalala* 748G; para [50].

protected from disclosure. In *ABBM Printing and Publishing (Pty) Ltd v Transnet Ltd*[42] the respondent attempted to rely on a blanket claim to confidentiality. Schwartzman J applied the principle adopted by the Constitutional Court in the *Shabalala* judgment which rejected the blanket privilege in respect of the police docket and consequently rejected the blanket claim of confidentiality argument.[43]

Southwood J held in *Afrisun Mpumalanga v Kunene* that in our law there is no privilege attaching to trade secrets.[44] In each case the court has to exercise a discretion whether evidence should be allowed or not. In a civil case this discretion is exercised when objection is taken that the evidence was improperly obtained and that the court should therefore disallow such evidence.

2.2.3.6 privacy

Section 14 of the Constitution guarantees the right of privacy. The holder of the information may justify the refusal to disclose information on the basis that the disclosure might violate another person's right to privacy. In *Financial Mail (Pty) Ltd v Sage Holdings Ltd* [45] it was held that a breach of the right of privacy could occur, *inter alia*, by the unlawful disclosure of private facts about a person. Cachalia [46]

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42 1998 (2) SA 109 (W); 1997 (10) BCLR 1429 (W).

43 ABBM 121H-122B.

44 1999(2) SA 599(T).

45 1993(2) SA 451 (A) 426 F.

46 *Cachalia, Cheadle, Davis, Haysom, Maduna and Marcus* (1994) 71.

observe that a request for information from the state could very well impact on a third party's right to privacy. The interrelationship between the right to privacy and the right of access to information was pertinently considered in *Water Engineering & Construction (Pty) Ltd v Lekoa Vaal Metropolitan Council*.[47] The applicant, an unsuccessful tenderer for the supply and installation of mechanical equipment, brought an application for an order compelling access to various documents relating to the process, including copies of all tenders received. The respondent contended that the tenders of third parties were submitted in confidence and that the conditions of tender provided that details submitted by the tenderers would not be divulged to outside parties. Epstein AJ, in dismissing the application, held:

> "In my view, it cannot be that unrestricted access was intended by the framers of the Constitution. If this was so, unscrupulous persons would be able to exploit this provision for their own selfish reasons. A balance must be achieved between the right to access to documents and the right to privacy entrenched in section 14 of the Constitution."[48]

It is submitted that in the context of two competing rights it requires a balancing of the two rights. The Court will have to balance the merit of the request for information against the potential invasion of another person's right to privacy. This will be of particular significance where a party requests confidential medical information held by a state hospital.

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47 1999(9) BCLR 1052 (W).

48 *Water Engineering* 1057E-F.

2.2.3.7 national governance

National governance is a priority in all states and in order to ensure proper and effective governance sensitive information must be placed beyond public scrutiny. To this end the privilege attaching to state communications has, even prior to the advent of the Bill of Rights, been part of South African law.[49]

It is submitted that the seeds of a state doctrine has been planted by the judgment in *Tobacco Institute of Southern Africa v Minister of Health*.[50] The facts of the case are briefly these: The applicants contended that they intended playing an active role in the legislative process by making submissions on the Tobacco Products Control Amendment Bill [51] and to that end they required the respondent to make available all the information held by the Department of Health pertaining to the Bill.

The information sought included all studies, memoranda and opinions procured or produced by or submitted to or considered by the department pertaining to environmental tobacco smoke, the environmental effects of smoking, the health risks associated with smoking, the impact bill on the sponsorship of sporting events, its effects upon tobacco consumption etc. Desai J found that the introduction of the Bill did not establish rights and that the Bill would only affect the rights of others once it had become law and therefore the applicants were not entitled to the information they requested. He held that:

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49 *R v Steyn* 1954(1) SA 324 (A) 330; *Van der Linde v Calitz* 1967(2) SA 239 (A).
50 1998(4) SA 745(C).
51 published in Government Gazette 19158 of 14 August 1998.

> "Although, in terms of s 59 of the Constitution, the National Assembly must facilitate public involvement in its legislative and other processes which, inter alia, includes the power of the Portfolio Committee to permit oral evidence or representations to be given or presented by or on behalf of an interested person or party (See rule 53 of the Standing Rules of Parliament), this does not mean that the applicants can frustrate the legislative process by insisting on access to information to protect ostensible rights." [52] (emphasis added).

It is submitted that the thrust of the *Tobacco* judgment is that it is a justifiable limitation for the state to assert that disclosure of the information would impede the proper functioning of the department in question. The effect of this judgment is that it places a blanket denial on access to information that forms part of the deliberative process of the department. It is submitted that to that extent the judgment negates the raison d'être of the right of access to information. It is submitted that the proper approach would have been to conclude that the refusal to such information constituted a violation of the right of access to information. The court should thereafter have conducted the limitation enquiry in terms of section 36(1) in order to establish whether such limitation was justifiable or not. It is submitted that the same result could have been achieved since most if not all, of the refusal of information could be justifiable.

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[52] *Tobacco Institute* 753C.

2.3 INFORMATION HELD BY THE STATE

Section 32 provides that everyone has the right of access to any information held by the state. It is immediately apparent from a comparison between section 32(1)(a) of the Constitution and section 23 of the interim Constitution that section 32 of the Constitution expands the right of access to information held by the state by the removal of the qualification that "such information should be required for the exercise or protection of any rights" of the person seeking the information. At present, the same qualification is contained in the transitional section 32 which is operative until the national legislation contemplated in section 32(2) of the Constitution has been enacted. Section 32(1)(a), which deals with the right of access to information held by the state, does not define the term "information" in the Constitution neither does it contain any exemptions in respect of information that need not be disclosed.

2.3.1 held

The meaning of the term "held" in the context of the right of access to information has not been pertinently considered in the case law. In dealing with the definition of "held" in relation to shares it was defined as connoting "ownership, possession or control."[53] It is submitted that in the context of the right of access to information the term "held" should be defined as meaning "to have possession of or control over information."

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[53] *Union Government v De Kock N.O.* 1918 AD 22, 33; *Bisset Rajak and Co v Taylor* 1967(3) SA 515 (T) 517H; *Benson v Charterhouse (Pty) Ltd and Another* 1986(1) SA 583 (C) 588I - 589G.

2.3.2 by the state

This right of access to information, when enforced against the state, is unqualified unlike the right of access to information held by other persons, which is provided for in section 32(1)(b), and in respect of which a qualification is imposed to the effect that such information must be required for the exercise or protection of any rights. It is therefore important to determine the meaning of the term "state" as a definitive answer to this question will determine whether unqualified access should be given, where the right is enforced against the state, or whether the qualification in section 32(1)(b) - that the information must be required for the exercise or protection of any rights - will be applicable. Needless to say, where the information is held by a person, other than the state, the information that needs to be disclosed is more limited. In the absence of a definition of "state", the definition of "organ of state" must be examined in order to find an answer to this illusive and vexed question. The Constitution, like the interim Constitution, does not contain a definition of "state". Section 8(1) of the Constitution can be invoked as a tool in finding an answer to the question posed; it provides that the Bill of Rights applies to all law and binds the legislature, the executive, the judiciary and all organs of state.

The Constitution does, however, contain a definition of "organ of state", which is defined in section 239 as follows:

"Organ of state means -

(a) any department of state or administration in the national, provincial or local sphere of government; or

(b) any other functionary or institution -

(i) exercising a power or performing a function in terms of the Constitution or a provincial Constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation,

but does not include a court or a judicial officer."

The judiciary is excluded as an "organ of state" in terms of the provisions of section 239. Section 32 does not refer to the concept "organ of state". It is submitted that if regard is had to the provisions of section 8(1) - which provides that the Constitution shall bind the judiciary - then it should follow that the judiciary, as a component of the state, should be bound by the provisions of section 32.

The term "organ of state" contained in section 7(1) of the interim Constitution was considered in the judgment of *Baloro & Others v University of Bophuthatswana & Others* [54] Section 7(1) of the interim Constitution - unlike section 8(1) of the Constitution - were narrowly worded and provided that the chapter entrenching the fundamental rights "shall bind all legislative and executive organs of state at all levels of government."

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[54] 1995(4) SA 197 (B).

Friedman JP held that the term "organs of state" should be given an extended meaning and should include statutory bodies, parastatals, bodies or institutions established by statute but managed and maintained privately, such as universities, law societies, the South African Medical and Dental Council, all bodies supported by the state and operating in close co-operation with structures of state authority and certain private bodies or institutions fulfilling certain key functions under the supervision of organs of the state.[55] On the basis of the extended meaning accorded to "organs of state" as well as the fact that the university was subject to the ultimate exercise of control by the Minister of Education and the Executive Council of the North West Province it was considered an organ of state. The broad approach in *Baloro* was not followed in subsequent cases.

In *Directory Advertising Cost Cutters CC v Minister for Post, Telecommunications and Broadcasting*.[56] it was contended by Telkom S A Limited that it was not an organ of state. Van Dijkhorst J in his attempt to find the meaning of "organ of state" uses as his point of departure the dictionary meaning of "organ of state" and in this regard commented that:

> "Implicit in this definition is that an organ is part of the greater entity, the state, as physically an organ is part of the human body. An organ of state is not an agent of the state, it is part of government (at any of its levels)." [57]

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55 *Baloro* 235J-236C.

56 1996(3) SA 800 (T).

57 *Directory Advertising* 809 H.

On this definition Van Dijkhorst J was therefore constrained to find that an organ of state is a functionary of the state and acts in the exercise of a governmental function[58] and disapproved of the definition of "organ of state" adopted by Friedman JP in the *Baloro* judgment. He concluded that:

> "The concept as used in s 7(1) of the Constitution [200 of 1993] must be limited to institutions which are intrinsic part of government - i.e. part of the public service or consisting of government appointees at all levels of government - national, provincial, regional, and local - and those institutions outside the public service which are controlled by the state - i.e where the majority of the members of the controlling body are appointed by the state or where the functions of that body and their exercise is prescribed by the state to such extent that it is effectively in control. In short, the test is whether the state is in control." [59] (Emphasis supplied).

Woolman dealing with the definition of "organ of state", comments with reference to foreign jurisprudence that:

> "Though this list may not be exhaustive, the primary litmus tests for determining whether a particular entity or actor is a statutory body or functionary are the government control test the government entity test, and the government function test."[60]

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58 *Directory Advertising* 810 C - D.

59 *Directory Advertising* 810 F - H.

60 Chasklason et al 1996 (service 2) 10 - 37.

In respect of the government control test it is not sufficient for the body to be created by statute but it should rather be ascertained whether the body is part of the three tiers of government - legislative, executive or the judiciary - or if not, whether the state retains direct control over the body in question.

The government entity test, on the other hand, is predicated on the principle that the body performs its functions pursuant to and by virtue of statutory authority and whether such functions are performed in furtherance of some state objective.

In terms of the government function test, it has to be determined whether the body performs powers normally associated with government.

The definition adopted by Van Dijkhorst J is unduly restrictive inasmuch as it limits the concept "organ of state" to institutions which are an intrinsic part of government and to institutions outside the public service which are controlled by the state and the majority of its members on its controlling body are appointed by the state and the exercise of their functions are prescribed by the state. The effect of this definition would be that where the state does not appoint the majority of the members of the controlling body of such institution or where the exercise of the function of such body is not directly prescribed by the state - in other words where discretionary management is allowed - such institutions would not qualify as "organs of state". It is therefore not surprising that on the definition adopted by Van Dijkhorst J that he held that institutions such as a Law Society or the Medical and Dental Council does not

qualify as an organ of state [61] whereas those institutions were found to be "organs of state" by Friedman JP.[62] The finding by Van Dijkhorst J that Telkom is an executive organ of government rendering a public service under the control of executive [63] is reconcilable with his definition of "organ of state". The majority of the members on Telkom's controlling body are appointed by the state and furthermore the exercise of the functions of Telkom are prescribed by the state.

In *Oostelike Gauteng Diensteraad v Transvaal Munisipale Pensioenfonds* Cameron J considered the judgment of Van Dijkhorst J in *Directory Advertising* binding on him.[64]

This approach of Cameron J is dissimilar to the approach he adopted in *Van Niekerk v Pretoria City Council* [65] in which he declined to follow the *Directory Advertising* judgment. Cameron J, however, considered the tests applied in the *Directory Advertising* and *Baloro* cases and commented as follows:

> "By die toepassing van die beheertoets in die *Directory Advertising* - saak kan waargeneem word dat dit 'n eng toets is. Die beslissing het immers die breër toets in *Baloro & Others v University of Bophuthatswana & Others* 1995(4) SA 197 (B) uitdruklik verwerp. Die aanvaarding van die eng toets beteken egter na my mening nie dat die toets self onsoepel toegepas moet word nie. Na my mening moet die *Directory Advertising* - toets met 'n mate van soepelheid en aanpasbaarheid toegepas word."[66]

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61 *Directory Advertising* 809I.

62 *Baloro* 236 A-B.

63 *Directory Advertising* 811B.

64 1997 (8) BCLR 1066 (T) 1073 I.

65 1997(3) SA 839 (T).

66 *Oostelike Gauteng Diensteraad* 1074C-D.

Goodman Bros (Pty) Ltd v Transnet Ltd [67] concerns the question whether Transnet can be regarded as an "organ of state". Transnet only has one shareholder, the Minister of Mineral and Energy Affairs and Public Enterprises who had the sole power to appoint the Board of Directors of Transnet. It was contended, *inter alia*, that Transnet enjoyed no financial assistance in the form of grant or subsidies from the government, that the state did not exercise any control over Transnet's business, the conduct of Transnet was not prescribed by statute, the state did not maintain control as to when and how Transnet's powers are to be exercised.[68] Blieden J, in dealing with these contentions advanced on behalf of Transnet held that:

> "In my view these factors which distinguish the respondent from Telkom do not address the real basis for the finding by Van Dijkhorst J that Telkom is an organ of state, namely that it is ultimately controlled by the state through the relevant Minister and in this way exercises a public function. That is precisely the position which prevails with the respondent. There is only one shareholder of the respondent, namely the relevant Minister, and he is the party who appoints the respondent's Board of Directors which in turn is responsible for the administration of the respondent."[69]

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67 1998(4) SA 989 (W).

68 *Goodman Bros* 995B-G.

69 *Goodman Bros* 995H.

This dictum of Blieden J is an attempt to put the judgment of Van Dijkhorst J in the *Directory Advertising* case in perspective and also to introduce a greater measure of flexibility into the control test adopted by Van Dijkhorst J.

In *Mistry v Interim National Medical and Dental Council of South Africa* [70] certain officials of the Medical and Dental Council seized various items from the applicant. The applicant contended that his right to privacy was violated. The main application was preceded by an application for interim relief in which Booysen J concluded that the Medical and Dental Council was not an organ of state.

This conclusion was reached by placing reliance on the *Directory Advertising* case and by applying the control test. The Minister appointed some of the members on the Council albeit not the majority and the Council, in terms of its objects set forth in the statute, is, *inter alia*, empowered to assist in the promotion of the health of the population of the Republic; to advise the matter on any matter falling within the scope of the Act; to communicate to the Minister information on matters of public importance acquired by the Council in the course of the performance of its functions under the Act to advise the Minister with regard to the amendment or adjustment of the Act in support to the universal norms and the values of the medical profession with greater emphasis on professional practice, democracy, transparency, equity, accessibility and community involvement.

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[70] 1997(7) BCLR 933 (D).

Corder and Du Plessis [71] hold the view that the enquiry whether a body or functionary is an organ of state will depend on the extent to which it is integrated in the structures of state authority and that the enquiry should not be on the nature of the statutory source from which the existence of such body is derived.

The weight of legal authority favours the view that the "control test" should be applied in order to determine whether an institution is an "organ of state". The predominant view is set out in *Directory Cost-cutters v Minister for Post, Telecommunications and Broadcasting* [72] and was followed in *Claase v Transnet Bpk* [73] and *Lebowa Granite (Pty) Ltd v Lebowa Mineral Trust.*[74]

2.4 REASONABLE MEASURES

In terms of section 32(2) the national legislation may provide for reasonable measures to alleviate the administrative and financial burden on the state. The absence of the word "must" is indicative of an intention on the part of the Legislature that such reasonable measures are not peremptory. The insertion of the word "may" indicate that there is no obligation on Parliament to make provision for such reasonable measures.

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71 Understanding South Africa's Transitional Bill of Rights (1994) 110 .

72 1996(3) SA 800 (T).

73 1999(3) SA 1012 (T) 1019 E-I

74 1999(8) BCLR 908 (T) 914 D-E.

Parliament is therefore vested with a discretion to provide for such reasonable measures. The absence of provisions providing for such reasonable measures, it is submitted, does not visit the national legislation with invalidity.

The reasonable measures contemplated in section 32(2) evidently has no effect on the determination of the nature and scope of the right of access to information. It may place limitations on the use or exercise of the right.

De Waal, Currie & Erasmus [75] draws a distinction between qualifications which demarcate the scope of the right and special limitation clauses. Examples of demarcation clauses are the following: section 15 of the Constitution guarantees the right to freedom of religion, belief and opinion but section 15(3) provides for legislation recognising "systems of personal and family law under any tradition, or adhered to by persons professing a particular religion."; section 16 guarantees the right of freedom of expression but section 16(2) provides that the right does not extend to propaganda for war, incitement of violence or advocacy of hatred that is based on race, ethnicity, gender or religion and that constitutes incitement to cause harm.

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[75] *De Waal, Currie & Erasmus* (1999) 160.

Special limitation clauses, on the other hand create special criteria in terms of which some of the rights may be limited by the legislature."[76] The Constitution contains a number of special limitation clauses. Section 15 entrenches the right to religion, belief and opinion but section 15(2) provides that religious observances may be conducted at state or state-aided institutions provided that those observances follow rules made by the appropriate public authorities, are conducted on an equitable basis and attendance at those observances are free and voluntary. Section 22 guarantees the right to choose one's trade, occupation or profession freely but provides that the practise of a trade, occupation or profession may be regulated by law. Section 23(5) guarantees the right of trade unions, employers' organisations or employers to engage in collective bargaining but also provides that national legislation may be enacted to regulate collective bargaining; this subsection, however, provides expressly that to the extent that the legislation may limit a right in the Bill of Rights, such limitation must comply with section 36(1). In addition, section 23(6) provides that national legislation may recognise union security arrangements contained in collective agreements but to the extent that such legislation may limit a right in Bill of Rights, such limitation must comply with section 36(1).

A further example is contained in section 25 which deals with the right of property. Section 25(8) provides that the state may take legislative and other measures to achieve land, water and related reform in order to redress the results of past discrimination but contains a proviso however that any departure from the provisions of section 25 shall be in accordance with section 36(1).

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[76] *supra* 161.

The Constitutional Court in dealing with the right of economic activity, entrenched in section 26 of the interim Constitution, which is equated with the right of freedom of trade, occupation profession contained in section 22 of the Constitution, held in *S v Lawrence* [77] that it is permissible to regulate the manner in which particular activities, for example, that of doctors and lawyers should be conducted provided that such regulations are not arbitrary.

The special limitation contained in section 32(2) therefore entitles the state to impose measures which is limited only to alleviating the administrative and financial burden upon the state. The state would therefore be entitled to impose fees for access to information as it would serve to alleviate the financial burden on the state.

In this regard, a distinction must be drawn between the special limitation clause and the limitation analysis conducted in terms of the section 36 limitation clause. It is not necessary for the state to rely on section 36 to justify the imposition of the limitations contained in section 32(2) since the source of that authority is derived from the express provisions of section 32(2). The alleviation of an administrative and financial burden on the state would on its own hardly qualify as a ground for limitation in terms of section 36(1) although administrative difficulties [78] and financial burdens [79] are taken into account as considerations in dealing with the limitation analysis in terms of section 36(1).

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77 1997(1) BCLR 1348 (CC); 1997(4) SA 1176 (CC) para [33] and [34].

78 *S v Ntuli* 1996(1) SA 1207 (CC) para [23]

79 *Azapo and Others v President of the Republic of South Africa* 1996(4) SA 671 (CC) para [44]

The incorporation of a provision authorising the imposition of reasonable measures to alleviate the administrative and financial burden presents an anomaly. It only makes provision for the alleviation of the administrative and financial burden on the state and does not extend to private institutions or individuals. To that extent the reasonable measures are limited and the national legislation can therefore not alleviate the administrative and financial burden in respect of such private institutions or individuals.

2.5 INFORMATION HELD BY ANOTHER PERSON REQUIRED FOR THE EXERCISE OR PROTECTION OF ANY RIGHTS

Unlike information held by the state, information held by persons other than the state is qualified by the proviso that such information must be required for the exercise or protection of any rights.

A debate has evolved in the case law on the definition of "rights" and which rights are included as protectable rights for the purpose for which the information is sought. A narrow interpretation of "rights" would limit the right of access; conversely, a wide interpretation, would create a bigger category of rights which can be protected by the right of access to information. This requirement can be dissected into sub-components, viz the meaning of:

(a) “held”

(b) “another person”

(c) "required for the exercise or protection of"

(d) "any rights"

2.5.1 held

It is submitted that the principles in respect of information held by the state applies with equal force to information held by another person within the context of section 32(1)(b) of the Constitution. It is submitted that no compelling reasons exist why different considerations should apply to information held by entities other than the state or organs of state.

2.5.2 another person

The reference to "another person" refers to persons other than the state or an organ of state. The Constitution does not contain an express definition of person.

Section 8(1) of the Constitution provides in unequivocal terms that the Bill of Rights applies to all law. The use of the collective noun "is indicative that the Bill of Rights is applicable to customary law, statute law and common law. The common law governs the relationship between private individuals is therefore subject to constitutional scrutiny. It is submitted therefore that section 8(1) *per se* permits the horizontal application of section 32 of the Constitution. Moreover, it is submitted that based on the express wording of section 32 it envisages horizontal application since the right is available to "another person" if it is required for the exercise or

protection of any rights.[80] Sections 8(2) and 8(3) make the Bill of Rights applicable to natural and juristic persons and thereby bring juristic persons such as companies, close corporations, corporations and banks within the purview of the provisions of section 32.

2.5.3 required for the exercise or protection

Section 32(1)(b) limits the right of access to information held by another person to such information that is required for the exercise or protection of any rights. This sub-section therefore limits the information to such information as is required "*for the exercise or protection of any rights*" the extent of this limitation depends on the interpretation that is given to the term *"required"*.

In *Shabalala v Attorney-General, Transvaal*[81] it was held that: "the word *'required'* is capable of a number of meanings ranging from 'desire' 'through' 'necessary' to 'indispensable' . . . to my mind 'required' in s 23 conveys an element of need: the information does not have to be essential, but it certainly has to be more than 'useful' . . . or 'relevant' . . . or simply 'desired'." Cloete J held that the word "required" should be accorded the meaning "necessary". This narrow interpretation obviously limits the entitlement to the information which is sought.

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[80] This view is supported by Devenish (1999) 445.

[81] 1994(6) BCLR 93 (T); 1995(1) SA 608 (T) 624 C-D.

In *Van Huysteen v Minister of Environmental Affairs and Tourism*[82] Farlam J followed the full bench decision in *Nortje v Attorney-General (Cape)*[83] that the word "required" must be understood as meaning "reasonably required". Farlam J adopted an objective test to determine whether the information was "reasonably required" and that the request of the information should be approached not solely from the applicant's perspective but by taking the respective positions of both the applicant and the respondent into account.

In *Aquafund (Pty) Ltd v Premier of the Province of the Western Cape*[84] Traverso J followed the interpretation that "required" should be construed to mean "reasonably required". In *Aquafund* the applicant contended that it required the tender documents in respect of tenders submitted by other persons some of whom have been successful to enable it to determine whether or not its right to lawful administrative action have been violated. Traverso J held that every person is entitled to lawful administrative action and a person will clearly be prejudiced if that person is not able to establish whether his/her rights have been infringed.[85] Such a person is not obliged to accept the assurances of the organ of state that his or her rights were not violated during the procedures, *in casu*, the Tender Board. In *Roux v Die Meester & Ander*[86] the applicant was excluded by the Master from attending the testimony of a witness before an enquiry into the affairs of the applicant.

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82 1996(1) SA 283 (C) 299 D - 300 F; 1995(9) BCLR 1191 (C).

83 1995(2) SA 460 (C) 474 F - 475 A.

84 1997(7) BCLR 907 (C) 913 G - H.

85 *Aquafund* 916 E - F.

86 1997(1) SA 815 (T).

Roos J held that the enquiry was of a purely investigative nature where no findings, which could detrimentally affect the applicants or any determination of rights, were made.[87] The purpose of the meeting was simply to record the evidence. Consequently, it was held that the applicant failed to show that he required the information for the exercise or protection of any of his rights or that he had any rights that required protection. Roos J followed the interpretation in *Shabalala v Attorney-General, Transvaal* [88] that the word "require" postulates an element of necessity ("necessary").

Cameron J adopted the approach in *Le Roux v Direkteur-Generaal Van Handel en Nywerheid* [89] that an applicant who contends that he requires certain documentation should lay a foundation for his contention that the documents are required. The applicant's founding affidavit merely described the documents which he required without providing any specificity. Cameron J consequently refused the request for such information save for a report which was obviously relevant and required by the applicant. It is submitted that this approach adopted by Cameron J can frustrate the purpose and nature of the right of access to information since, in most cases, an applicant will invariably not know - let alone being able to catalogue and discuss - the documents in possession of the other party. This places too high an *onus* on an applicant.

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87 *Roux* 824C-D.

88 1994(6) BCLR 85 (T); 1995(1) SA 608 (T).

89 1997(4) SA 174 (T) 187C-D.

In *ABBM Printing and Publishing v Transnet*[90] Schwartzman J held that the word "required" in section 32 of the Constitution should be given a generous and purposive meaning and should be understood to mean "reasonably required."[91] In support of this proposition he relied on *Van Niekerk v Pretoria City Council*[92] and *Nortje v Attorney-General, Cape*.[93] He goes on to hold that until such time as the applicant had sight of the documents it could not decide whether it had any claim for relief and that sight of the documents could obviate further litigation. It was consequently held that:

> "To uphold the respondent's submission would also be subversive of the object of ss 32 and 33 of the Constitution, would stultify the development of accountability and transparency in administrative decision-making and would represent a step back to the dark past. See the *Aquafund* judgment at pp. 23 - 4, in which officials who acted in secret could hide behind a wall of silence."[94]

On an almost identical set of facts the court came to a completely different conclusion in *S A Metal Machinery Company Ltd v Transnet Ltd*.[95]

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90 1998(2) SA 109 (W).

91 *ABBM Printing* 119B.

92 1997(3) SA 839 (T).

93 1995(2) SA 460 (C).

94 *ABBM Printing* 119C-D.

95 1999(1) BCLR 58 (W).

The applicant had been unsuccessful in its tender application and brought an application to compel the respondent to furnish it with documents relating to the evaluation of the tenders including copies of all tenders received. Heher J held that section 32 of the Constitution is not capable of meaning that access should be ordered if sight of those documents is required in order to determine whether a right needs to be protected.[96]

In support of this finding Heher J seeks to invoke the broad, generous and purposive approach to constitutional interpretation set out in the Constitutional Court case in *Shabalala* [97] but nonetheless found that disclosure was not warranted. It is difficult to comprehend how the dictum in the *Shabalala* case -which includes a reference to "a legal culture of accountability and transparency" - can assist Heher J in this conclusion.

Heher J proposed a staged approach to the application of rights contained in the Bill of Rights with the first stage being to identify a contravention of a guaranteed right, the *onus* in this regard being on the aggrieved person.[98] He does not however mention or deal at all with the second stage of his approach. He concludes that the applicant failed to show any connection between the documents sought and the protection of its rights and in support of that conclusion he relies on the *Le Roux* judgment of Cameron J that the applicant did not specify why the documents were reasonably required.[99]

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96 *S A Metal* 64 I.

97 *Shabalala* 740 D-G.

98 *S A Metal* 65 B-C.

99 *S A Metal* 65 D-E.

In *Tony Rahme Marketing Agencies v Greater Johannesburg Transmetropolitan Council* [100] the applicant sought to interdict the respondent (a local authority) from giving effect to a decision to terminate the applicant's agreement of lease and restraining the respondent from communicating to the applicant's producers that the applicant's leases had been terminated. Goldstein J held that there was nothing to indicate that the producers require the information for the purpose set out in section 32(1) of the Constitution and therefore restrained the respondent from disclosing such information to the producers.[101]

The judicial authority appears to favour the interpretation that the word "required" should be accorded the meaning "reasonably required". It is submitted that this expansive interpretation - as opposed to a narrow one which requires that the information be relevant - is consistent with and gives effect to the right of access to information contained in section 32(1).

2.5.4 <u>any rights</u>

In *Directory Advertising* Van Dijkhorst J limited the word "rights" in section 23 of the interim Constitution to the fundamental rights entrenched in chapter 3 of the interim Constitution.[102] Van Dijkhorst J based his finding on the premise that:

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100 1997(4) SA 213 (W).

101 *Tony Rahme* 217G-H.

102 *Directory Advertising* 813A.

> "The scope of chapter 3 is wide, it covers all human rights that were thought to need protection. It is unlikely that the drafters of this Constitution would, in using the word "rights" in s 23 have intended to give it a still wider meaning. There is also no compelling reason for doing so. What needed protection was fundamental human rights, as tabulated in chapter 3, and the means to do so. An important part of such protection is the access to relevant information." [103]

In addition, Van Dijkhorst J commented that the Constitutional Court in *Shabalala v Attorney General, Transvaal* had dealt with the subject only in the context of the rights contained in Chapter 3 of the interim Constitution.[104] It is submitted that this conclusion is not justified inasmuch as the Constitutional Court was only concerned with an interpretation and application of the rights of an accused person in terms of section 25 of the interim Constitution and Mahomed DP held that section 23 was irrelevant to determining the entitlement of an accused person to the contents of a criminal docket.

In *Van Huyssteen v Minister of Environmental Affairs and Tourism* [105] Farlam J noted, without discussion, that section 23 of the interim Constitution does not in any way limit the term "rights" in respect of which an applicant is entitled to obtain access and neither is there any limitation or restriction in respect of the manner or form in which such exercise or protection of the right will take place. Farlam J held that the term "right" includes statutory rights.[106]

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103 *Directory Advertising* 812 I-J.

104 *Directory Advertising* 812G.

105 1996(1) SA 283 (C).

106 *Van Huyssteen* 300E.

Directory Advertising drew criticism from subsequent cases, particularly the Transvaal Provincial Division, from which it originated and was not followed in subsequent cases.

In *Van Niekerk v Pretoria City Council*[107] Cameron J disapproved of the interpretation that the term "rights" should be confined to the fundamental rights set out in chapter 3 of the interim Constitution. The basis for Cameron J's refusal to follow the *Directory Advertising* interpretation of rights are threefold:

(a) the wording of section 23 of the interim Constitution was wide and unlimited; it contains no limitation as if section 23 intended to be limited to fundamental rights as set out in chapter 3 then the legislature would have specified so expressly;

(b) it is a fundamental principle of the canons of statutory construction that where the same words are used in the same enactment the legislature intended the words to bear the same meaning throughout the enactment;

(c) the purpose of section 23 constrains a broader approach to the principles which underlay the inclusion of section 23 which was designed in order to attain the values in an open and democratic society.

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[107] 1997(3) SA 839 (T).

The *Directory Advertising* case received similar criticism in *Nisec (Pty) Ltd v Western Cape Provincial Tender Board & Others* [108] where Davis AJ held:

> "Not only is there no textual basis for such a conclusion, but this interpretation would appear to run contrary to the very purpose of the provision, namely to enable citizens to enforce their rights against the state, many of which rights derive from sources outside of the Constitution, such as the common law. The objective of an open and democratic society as envisaged in the Constitution is surely served by a more purposive interpretation of "rights" than that adopted by Van Dijkhorst J."[109]

The narrow interpretation in the *Directory Advertising* case was not followed but the wider approach of Cameron J in the *Van Niekerk* case was endorsed in *ABBM Printing & Publishing (Pty) Ltd v Transnet Ltd.* [110] Cameron J followed his earlier judgment in *Van Niekerk* (*supra)* in the matter of *Le Roux v Direkteur-Generaal van Handel en Nywerheid.*[111]

In *Uni Windows v East London Municipality* [112] Leach J accorded a wide interpretation to "rights" by holding that the right to be protected or exercise did not have to lie against the state and in this regard Leach concluded that:

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108 1998(3) SA 228 (C).

109 *Nisec* 237 C-D.

110 1998(2) SA 109 (W).

111 1997(4) SA 174 (T).

112 1995(8) BCLR 1091 (E).

> "It is not a requirement of section 23 that such person shall only have a right of access to information if the right which he/she wishes to protect or exercise lies against the state or any of its organs of government. Thus, for example, a party injured a motor vehicle collision who wishes to sue the third party insurer would seem to have a right of access to a police docket relating to the accident which gave rise to his/her injuries notwithstanding such injured person having no right to claim damages from the police."[113]

In *Le Roux v Direkteur-Generaal van Handel en Nywerheid*[114] Cameron J held that the word "rights" in section 23 includes all rights, including those against fellow subjects and that there is nothing in the wording of section 23 which precludes the application of that section in cases where a subject requires information from the state in order to exercise or protect his/her rights against another subject.

The weight of authority seems to favour the interpretation that the word "*rights*" should be generously interpreted to include access to information in respect of the fundamental rights enumerated in the Bill of Rights, common law rights, arising from contract or delict, and even legislative rights. The right of access to information is not limited to the state but also includes rights which are enforceable between fellow subjects.

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113 *Uni Windows* 1095 H-I.

114 1997(4) SA 174 (T) 183 H-I.

3. THE PROMOTION OF ACCESS TO INFORMATION BILL ("PAIB")

3.1 Introduction

The Promotion of Access to Information Bill ("PAIB")[115] has been drafted as the national legislation contemplated in section 32(2) of the Constitution and purports to give effect to the right of access to information. The source of Parliament's authority to enact this legislation is twofold: firstly, it derives from the express provisions of section 32(2) that national legislation must be enacted; secondly, in terms of section 44 of the Constitution Parliament is vested with the national legislative authority which includes the power to make provision for access to information. The provisions of section 32(2) will lapse and the suspended section 32 will come into operation should the national legislation not be enacted within the three year period provided for in section 23 of the Constitution.[116] In *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, [117] the Constitutional Court rejected the notion that the suspension of the right of access to information rendered the Constitution incapable of certification. It is therefore necessary to assess whether the PAIB meets the requirements of the national legislation contemplated in section 32(2) of the Constitution; if it does, it meets the

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115 [B67B-98] has already been adopted by the National Assembly and the National Council of Provinces and is awaiting signature by the President.

116 *De Waal, Currie and Erasmus* (1999) 462.

117 1996(4) SA 744 (CC) paras [83] and [85].

constitutional imperative imposed in section 32(2) of the Constitution.[118] Conversely, a negative answer to this enquiry leads to the conclusion that the PAIB does not comply with the constitutional imperative and will consequently not replace the operation of section 32(1).

This enquiry is still necessary even though the PAIB states in its preamble that the purpose of the PAIB is to give effect to the right of access to information since the mere *ipse dixit* does not determine compliance with section 32 of the Constitution.

I propose adopting the same format which I employed in analysing the right of access to information as provided for in section 32(1) of the Constitution. As the legislation contemplated in section 32(2) of the Constitution must give effect to this right as embodied in section 32(1) of the Constitution, I shall discuss the PAIB under the following headings:

(a) any information;

(b) access;

(c) information held by the state;

(d) reasonable measures;

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[118] *Klaaren* (1997) 13 SAJHR 550

(e) information:

(i) held by;

(ii) another person;

(iii) required for the exercise or protection of any; and

(iv) rights;

3.2 ANY INFORMATION

The term "any information" contains multiple questions and involves, as it was contended in the discussion of section 32(2) above, the following enquiries: firstly, the definition of information; secondly, the form of the information; thirdly, the ambit of the information; fourthly, the quantity of the information, and fifthly, the availability of the information.

3.2.1. definition of information

The PAIB, like section 32(1) of the Constitution, contains no definition of the term "information".

In the discussion on the definition of "information" [119] it was contended that a generous definition of "information" should be adopted. It is submitted in the absence of a definition of information in the PAIB that it must be assumed that the legislature intended that a generous definition of "information", which is consistent with the approach adopted by our courts in interpreting fundamental rights, should be adopted. Information should therefore be regarded as any form of knowledge and that it includes facts.

It is submitted that the definition of "record" is narrower than the definition of "information". It does not include information which is not in recorded form or medium and would therefore exclude information which can be readily ascertained. The definition employed in the PAIB is therefore in conflict with the generous and purposive approach which was advocated above in the discussion of the definition of information. It is submitted that it is a moot point to what extent, if at all, the definition of "record" will pass constitutional muster when it is subjected to judicial scrutiny.

3.2.2 form of the information

The definition of "record" provides that it means recorded information regardless of form or medium. Clause 29 deals with the forms of access and provides for access to be given in a written or printed form, as well as video or audio or electronic form.

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[119] paragraph 2.1.1 above.

It is submitted that the PAIB does not limit the information to information contained in a written form but it also includes information contained in a video or audio or electronic form and it is therefore consistent with the approach adopted in the case law.[120]

3.2.3 ambit of the information

Clause 11(1) of the PAIB guarantees the right of access to "a record" held by the body and provides:

> "11(1) A requester must be given access to a record of a public body if -
>
> (a) that requester complies with all the procedural requirements in this Act relating to a request for access to that record; and
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> (b) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part."

In respect of private bodies the right of access to information is similarly guaranteed. Clause 50(1) provides as follows:

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[120] *Afrisun Mpumalanga v Kunene* 1999(2) SA 599 (T) 632 C-D.

"50(1) A requester must be given access to any record of a private body if:

(a) that record is required for the exercise or protection of any rights;

(b) that person complies with the procedural requirements in this Act relating to a request of that record; and

(c) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part."

The reference in these clauses to "a record" or "any record", it is submitted, serves to reinforce the view that the extent of the information sought is not narrowly circumscribed. In respect of information held by the state the only limitation which is imposed in clause 11 is that the request for access to such record is subject to the grounds of refusal and the procedural requirements of the Act. As regards a record in possession of a private body a further requirement is imposed that the record must be required for the exercise or protection of any rights.

In the discussion dealing with section 32 of the Constitution it was concluded that our courts construed the ambit of information widely: the person requesting such information is entitled to all information.[121]

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[121] *Reàn International Supply Company (Pty) Ltd v Mpumalanga Gaming Board* 1999(8) BCLR 918 (T) 928 H - J.

The PAIB is consistent with this approach since clauses 11 and 50 guarantee access to "any record". This is reinforced by the residual phrase contained in the definition of "record" as meaning "recorded information regardless of form or medium, and includes . . ."

3.2.4 quantity of the information

The PAIB provides for access to "a record" or "any record" in respect of a public body or private body in clauses 11 and 50 respectively.

There would appear not to be any restriction on the quantity of the information which should be disclosed. The only proviso is that the request to the record should not constitute a frivolous or vexatious request in terms of clause 45 in which event the request for disclosure of the record may be refused.

It is submitted that the PAIB does not limit the quantity of information that should be furnished and it is therefore consistent with the case law where a large quantity of information was ordered.[122]

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122 *Van der Merwe & Others v Slabbert NO & Others* 1998(3) SA 613 (N); *Du Preez & Another v Truth and Reconciliation Commission* 1997(3) SA 204 (A).

3.2.5 availability of information

The information contemplated in the PAIB is limited to information in recorded form. The PAIB employs the term "record", which is defined in clause 1 as follows:

> ""record" of, or in relation to, a public or private body, means any recorded information -
>
> (a) regardless of form or medium;
>
> (b) in the possession or under the control of that public or private body, respectively; and
>
> (c) whether or not it was created by that public or private body respectively.

The definition of "record" therefore excludes information not in recorded form and would therefore not permit a request for information which is not yet in recorded form although such information can be readily ascertained and converted to a recorded form to be supplied to the person requesting such information. The reference in the definition to "regardless of form or medium" does not assist in the enquiry whether the definition of "record" extends to information not yet in recorded form since the "form or medium" is limited to recorded information. In addition, the PAIB does not impose a positive duty on the officials of governmental bodies to reduce information to recorded form; this would lead to the anomalous situation where officials would be entitled not to reduce information in recorded form and thereby circumvent the provisions of the PAIB.

It is submitted that the PAIB fails to give access to information which is available and which can be readily ascertained and transferred to recorded form to be furnished to the requester.

3.3 **ACCESS**

3.3.1 definition of access

The term "access" is similarly not defined in the PAIB. What the PAIB seeks to do, however, is to provide for the manner in which access is to be afforded. It is submitted however that the PAIB does provide for records to be made available to and to be obtained by the requester and therefore accords with the definition of access advocated in paragraph 2.2.1 above.

3.3.2 manner of access

The PAIB provides in clause 11 and clause 50 that a requester must be given access to any record of a public body and a private body respectively. In respect of the right of access to a record of a public body two conditions should be met: firstly, the requester must comply with all the requirements relating to the request for access to that record; secondly, that access to that record is not refused in terms of the grounds for refusal contemplated in terms of Chapter 4 applicable in respect of a public body and private body respectively.

To be able to have access to a record a requester must make a request for access to the record.

Clause 18 requires that the request must be made in writing in a prescribed form unless the requester is unable or because of illiteracy or disability to make the request in writing, in which event the request may be made orally. It also places a duty on the governmental body to assist the requester, free of charge, so as to enable the requester to comply with the formalities required in respect of the request.[123] A distinction is drawn in the PAIB between a personal requester - defined as a requester who seeks access to a record containing personal information about the requester - and a requester other than a personal requester.

Clause 22(1) provides that a requester other than a personal requester, must pay a request fee before the request is processed. In addition, provision is also made for the payment of access fees once the request for access to a record has been granted. As regards access fees, a distinction is similarly drawn between a personal requester and requesters other than a personal requester. The requester, including a personal requester, must pay an access fee for reproduction and for search and preparation for any time required in excess of the prescribed hours to search for and prepare the record.

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[123] Clause 19.

Clause 29 of the PAIB provides in express terms how access to the information is to be afforded where access is sought from a public body. It provides that where no access fee is payable - such as in case of a personal requester - access should be given "immediately."[124]

It is submitted that the term "immediately" should not be given a literal meaning but should be accorded the accepted legal meaning that access should be given "within such convenient time as is reasonably required in the circumstances."[125] It is significant to note that where access is sought from a private body that such access must be given "as soon as reasonably possible after notification in terms of section 56."[126] It is submitted that the approach contneded would serve a dual purpose: firstly, it would remove the anomaly between clause 29 and clause 60; secondly, it would alleviate the administrative burden on the public body of having to give access "immediately."

Clause 29(2) of the PAIB deals with the manner of access and provides:

> "29(2)The forms of access to a record in respect of which a request of access has been granted, are the following:

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124 Clause 29(1)(b).

125 *Orkin Bros (Pretoria) Ltd v Ah Kai* 1935 WLD 44; *R v Paphitis* 1968(2) SA 652 (RA).

126 Clause 60.

(a) If the record is in written or printed form, by supplying a copy of the record or by making arrangements for the inspection of the record;

(b) if the record is not in written or printed form -

(i) in the case of a record from which visual images or printed transcriptions of those images are capable of being reproduced by means of equipment which is ordinarily available to the public body concerned, by making arrangements to view those images or be supplied with copies or transcriptions of them;

(ii) in the case of a record in which words or information are recorded in such manner that they are capable of being reproduced in the form of sound by equipment which is ordinarily available to the public body concerned -

(aa) by making arrangements to hear those sounds; or

(bb) if the public body is capable of producing a written or printed transcription of those sounds by the use of equipment which is ordinarily available to it, by supplying such a transcription;

(iii) in the case of a record which is held on computer, or in electronic or machine-readable form, and from which the governmental body concerned is capable of producing a printed copy of-

(aa) the record, or a part of it; or

(bb) information derived from the record,

by using computer equipment and expertise ordinarily available to the public body, by supplying such a copy;

(iv) in the case of a record available or capable of being made available in computer readable form, by supplying a copy in that form; or

(v) in any other case, by supplying a copy of the record."

The PAIB provides in respect of a record which is in written or printed form that a copy thereof be supplied or that the record be inspected.[127] This provision is consistent with the approach adopted in *Ferela (Pty) Ltd & Others v Commissioner for Inland Revenue & Others*[128] in which it was held that access does not only include the right to obtain a copy of a document where the information is contained in a written form but also includes the right to consider the authenticity of such document.

Access in terms of the PAIB is not only limited to access in respect of information contained in a written or printed form but is also afforded in respect of information

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127 Clause 29(2)(a).

128 1998(4) SA 275 (T) 283.

which is contained in video or audio form. In respect of information so contained, the public body is obliged to either reproduce such information in printed form or, if it is not possible to be reduced to printed form, that a copy or a transcript thereof be made available. It is submitted that the PAIB, in allowing for a copy or transcript of video or audio records to be made available to the requester, is consistent with the approach in *Reàn International Supply Company (Pty) Ltd and Others v Mpumalanga Gaming Board*[129] and *Afrisun Mpumalanga (Pty) Ltd v Kunene NO and Others*[130] in which information contained in an audio and video form was ordered. In addition, the requester is entitled to view those images.[131]

The PAIB does not allow for access to records in the form of an interrogatory (where the request is made in the form of detailed questions to which answers must be supplied). It simply provides for access to information in a recorded form.

In this regard it should be noted that the courts have disapproved of the strategy to subject the holder of the information to such an interrogatory. [132]

It is submitted that the access provided for by the PAIB is wide and generous and accords not only with the case law but also with the spirit of the Constitution.

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129 1999(8) BCLR 918 (T) 929 F-G.

130 1999(2) SA 599 (T) 634 D-E.

131 Clause 29(2)(b)(i).

132 *Reàn supra* 926 G - H; *Tobacco Institute (supra)* 748 G-751 F.

It is clear that the PAIB places restrictions on the exercise of the right of access to information inasmuch as it requires the payment of access fees - other than in the case of a personal requester in which event payment is limited to time required in excess of the prescribed laws - before access to the record is afforded. It is self evident that the search for and preparation of a record imposes a financial - and administrative - burden on the public body.

It is submitted that the restriction of the payment of access fees is justified by the provisions of section 32(2) of the Constitution which provides that the national legislation, in this case the PAIB, may provide for reasonable measures to alleviate the administrative and financial burden on the state.

3.3.3 limitation of access

The PAIB imposes limitations in respect of access to records. It draws a distinction between the holder of the information and the nature of the information.

In clause 12 the PAIB deals with the exclusion of certain public bodies or offices from the provisions of the PAIB. It provides as follows:

> "12. This Act does not apply to a record of-
>
> (a) the Cabinet and its committees;
>
> (b) the judicial functions of-

(i) a court referred to in section 166 of the Constitution;

(ii) a Special Tribunal established in terms of section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act No. 74 of 1996); or

(iii) a judicial officer of such court or Special Tribunal; or

(c) an individual member of Parliament or of a provincial legislature in that capacity."

It is submitted that the PAIB therefore limits access to the record on the basis of the holder of such record.

In respect of the nature of the information it provides for the refusal of access to record which depends on the nature of the information contained in the record. This includes information relating, *inter alia*, to informers, protection of law enforcement, defence, security, commercial information, confidential information.

The PAIB deals with the refusal of access relating to the nature of the information in a two pronged manner: firstly, it provides for the mandatory refusal of information if certain requirements are met; secondly, it thereafter confers a discretion on the information officer to disclose the record in certain instances.

In dealing with the limitation of access relating to the nature of the information the same methodology adopted in the discussion on these limitation of access will be adopted in the discussion of the limitations contained in the PAIB and the following categories will be considered: informers, information gathered as part of law enforcement, legal professional privilege, trade secrets/confidential information, privacy and national governance.

The limitations relating to the holder of the information will therefore be considered in the following manner and sequence: the Cabinet, courts and judicial officers and an individual member of Parliament or provincial legislature.

3.3.3.1 informers

Clause 39(1)(b)(iii)(bb) provides for a discretionary refusal of information where access to such a request for access would disclose the identity of a confidential source of information. The PAIB therefore does not recognise a blanket informer privilege but leaves the question of disclosure in the discretion of the information officer. Such information is in terms of this clause not automatically immune to disclosure.

This provision in the PAIB accords with the approach pertinently adopted by our courts in *Els v Minister of Safety and Security*[133] in which it was held that there is no blanket privilege relating to informers and that in dealing with a request for the identity of an informer the state has to justify a refusal - and consequently a limitation - of such information.

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133 1998(4) BCLR 434 (NC) 440 A-B.

3.3.3.2 information gathered as part of criminal investigation and law enforcement

Clause 39 provides for mandatory protection of police dockets in bail proceedings and discretionary refusal by the information officer of access to a record in matters relating to law enforcement and legal proceedings. It provides as follows:

> "39(1) The information officer of a public body-
>
> (a) must refuse a request for access to a record of the body if access to that record is prohibited in terms of section 60(14) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977); or
>
> (b) may refuse a request for access to a record of the body if-
>
> (i) the record contains methods, techniques, procedures or guidelines for -
>
> (aa) the prevention, detection, curtailment or investigation of a contravention or possible contravention of the law; or
>
> "(bb) the prosecution of alleged offenders,
>
> and the disclosure of those methods, procedures or guidelines could reasonably be expected to prejudice the effectiveness of those methods, techniques, procedures or guidelines or lead to the circumvention of the law or facilitate the commission of an offence;

(ii) the prosecution of an alleged offender is being prepared or about to commence or pending and the disclosure of the record could reasonably be expected-

(aa) to impede that prosecution; or

(bb) to result in a miscarriage of justice in that prosecution;

(iii) the disclosure of the record could reasonably be expected-

(aa) to prejudice the investigation of a contravention or possible contravention of the law which is about to commence or is in progress or, if it has been suspended to terminated, is likely to be resumed;

(bb) to reveal, or enable a person to ascertain, the identity of a confidential source of information in relation to the enforcement or administration of the law;

(cc) to result in the intimidation or coercion of a witness, or a person who might be or has been called as a witness, in criminal proceedings or other proceedings to enforce the law;

(dd) to facilitate the commission of a contravention of the law, including, but not limited to, subject to subsection (2), escape from lawful detention; or

(ee) to prejudice or impair the fairness of a trial or the impartiality of an adjudication."

The constitutionality of section 60(14) of the Criminal Procedure Act[134] was considered in *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat.*[135] Kriegler J, in expressing the unanimous view of the Court, held that:

> "Therefore, notwithstanding the provisions of ss(14), a prosecutor may have to be ordered by the court, under ss(11), to lift the veil in order to afford the arrestee the reasonable opportunity prescribed there. Subsection (14) can therefore not be read as sanctioning a flat refusal on the part of the prosecution to divulge any information relating to the pending charge(s) against the arrestee, even where the information is necessary to give effect to the "reasonable opportunity" requirement of ss(11). And there is a ready - and less absolute - interpretation of ss(14) which is both consistent with its language and in harmony with ss (11). The words "have access to" in ss(14) are to be interpreted as barring physical access to the contents of the docket in the sense of having sight of or perusing such contents."[136]

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134 51 of 1977.

135 1999(4) SA 623 (CC).

136 *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 673 A-D; para [84].

The Constitutional Court was at pains to point out that an accused person does not have a general right at the bail stage to the contents of the police docket unlike the right of access which the accused may have to the police docket in order to protect the right to a fair trial.[137] The accused would therefore be barred from having physical access to the police docket at the bail stage. The court may however order the state (prosecution) to furnish sufficient details of the charge to enable the accused to show that the circumstances are exceptional and that bail should be granted.[138]

Clause 39(1)(a) of the PAIB provides that access to the record (the police docket in bail proceedings) must be refused if access is prohibited in terms of section 60(14). Section 60(14) is, however, on an interpretation of the express wording thereof only limited to the accused. It is submitted that a person, other than an accused, would not be covered by the mandatory prohibition against refusal of the contents of the police docket in bail proceedings. In such event, however, the discretionary grounds of refusal contained in clause 39(1)(b) would be applicable in deciding whether access should be given to that person (other than the accused). It is submitted that clause 39(1)(a) is consistent with the judgment in *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat.*[139]

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137 *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 673 D-E; para [85].

138 *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 671 D-E; para [80].

139 1999(4) SA 623 (CC).

Shabalala v Attorney General of Transvaal dealt with the issue of disclosure of information held by the police and prosecuting authorities in the docket and held that the state can justify a refusal to disclose information which might lead to the disclosure of the identity of informers or state secrets or to the intimidation or obstruction of the proper ends of justice.[140]

It would seem that the information referred to in clause 39(1)(b) relates to information which are sought by persons other than the accused. It deals, inter alia, with records containing methods, techniques, procedures or guidelines for the prevention, detection, suppression or investigation of offences or where the disclosure of the record would result in the intimidation or coercion of a witness.

On an analysis of clause 39(1)(b), it is submitted, that it is aimed at persons who seek to obtain information for purposes other than legal proceedings such as research or newsreporting.

The approach adopted in clause 39(1)(b) is consistent with the approach adopted by the Constitutional Court that the right of an accused person to the docket is governed by section 35 of the Constitution[141] and not the right of access to information.

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140 1996(1) SA 725 (CC) 745 A-D; para [40].

141 *Shabalala* 742 G-743B; para [34].

3.3.3.3 legal professional privilege

Clause 40 of the PAIB deals with information which is privileged from production in legal proceedings and provides:

> "40 The information officer of a public body must refuse a request for access to a record of the body if the record is privileged from production in legal proceedings unless the person entitled to the privilege has waived the privilege."

The clause precludes disclosure of such information if the record is privileged. The information officer first has to determine whether the contents of the record is privileged or not. If the record is privileged, the information officer has no overriding discretion to allow access to such record. This provision rectifies, it is submitted, the incorrect approach adopted in *Van Niekerk v City Council of Pretoria*[142] in which the legal professional privilege was negated by Cameron J and the disclosure of an electricity report, which was prepared for the purpose and in contemplation of legal proceedings, was ordered. It is submitted that clause 40 is consistent with the principle that legal professional privilege is a fundamental cornerstone of our judicial system.[143] Moreover, it is submitted that this clause is consistent with the judgment of the Constitutional Court in *Shabalala v Attorney General of Transvaal*[144] where protection was afforded to legal professional privilege.

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142 1997(3) SA 839 (T) 849 I-J.

143 *S v Safatsa* 1998(1)N SA 868 (A) 885 E-J; *Sasol III (Edms) Bpk v Minister van Wet en Orde* 1991(3) SA 766 (T). *Bogoshi v Van Vuuren and others; Bogoshi v Director, Office for Serious Economic Offences and Others* 1996(1) SA 785 (A) 793 D-F.

144 *Shabalala* 745 A-D; para [40].

3.3.3.4 national security

The national security and defence of the Republic of south Africa is governed by clause 41, which provides for the refusal of a record if its disclosure could reasonably be expected to prejudice the defence or security of the Republic. It also deals with confidential information supplied to the Republic or supplied by the Republic to another state or an international organisation in terms of an arrangement or international agreement or information which is required to be held in confidence by an international agreement or customary international law.

It covers a wide spectrum of information, *inter alia*, military strategy or operations, the quantity or deployment of weapons and the deployment or functions of any military force, unit or personnel.

This clause does not provide for a blanket refusal of a record that pertains to matters of national security and defence. It is submitted that the refusal of access to a record in terms of this clause is consistent with the approach adopted in the *Shabalala* judgment[145] that the state is entitled to resist a request for information which would lead to the disclosure of state secrets.

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[145] *Shabalala* 748 G; para [50].

3.3.3.5 trade secrets and confidential information

Trade secrets and confidential information in relation to a public body is dealt with in the PAIB in clauses 36 and 37. Clause 36(1) provides for the mandatory refusal of a request for access to a record if the record contains:

(a) trade secrets of a third party;

(b) 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 party;

(c) information supplied in confidence by a third party the disclosure of which could reasonably be expected to put that third party at a disadvantage in contractual or other negotiations or prejudice that third party in commercial competition.

Clause 64(1) relates to private bodies and is couched in the same terms. The same considerations mentioned in respect of clause 36(1) apply to clause 64(1).

Clause 36(2) provides that access to a record may not be refused insofar as the record consists of information:

(a) already publicly available;

(b) about a third party who has consented to the disclosure of the record;

(c) about the results of any product or environmental testing or other investigation supplied by, carried out by or on behalf of a third party and its disclosure would reveal a serious public safety or environmental risk.

Clause 64(2) deals with commercial information of a third party held by a private body. It is couched in the same form as section 36(2) except that section 64(2) contains no reference to a record which is already publicly available. It would therefore seem that a private body is precluded from disclosing the contents of a record which contains commercial information of a third party, even though such information is already publicly available.

Clause 37 deals with the mandatory protection of certain as well as other confidential information of a third party where such record is held by a public body. It provides in clause 37(1)(a) that the information officer must refuse a request for access to a record if the disclosure of the record would constitute an action for breach of a duty of confidence owed to a third party in terms of an agreement. The only precondition to justify the refusal of the confidential information is that the disclosure would constitute an action for breach of a duty of confidence owed to a third party in terms of an agreement. It is submitted that clause 37(1)(a), insofar as it provides for the mandatory refusal of information which would constitute an action for breach of a duty of confidence owed to a third party, is inconsistent with the approach adopted by our courts in dealing with trade secrets and confidential information. In this regard the judgment in *ABBM Printing and Publishing (Pty) Ltd v Transnet Ltd* held that there is

no blanket claim to confidentiality.[146] In addition, *Afrisun Mpumalanga v Kunene*[147] held that there is no privilege in our law attaching to trade secrets.

3.3.3.6 privacy

Clause 34(1) of the PAIB deals with the mandatory protection of privacy of a third party where a record containing information about the third party is held by a public body. It provides as follows:

> "34(1) Subject to subsection (2), the information officer of a public body must refuse a request for access to a record of the body if its disclosure would involve the unreasonable disclosure of personal information about a third party, including a deceased individual."

This mandatory ground of refusal in paragraph 34(1) does not apply where the following grounds are present:

(a) where the information is already publicly available;

(b) where the third party concerned has already consented to the requester that such information be disclosed;

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146 1998(2) SA 109 (W); 1997(10) BCLR 1429 (W) 121 H-122 B.

147 1999(2) SA 599 (T) 629 A-D.

(c) where the information concerns the physical or mental health or well-being of a person who is under the age of 18 years and under the care of the requester and such person is incapable of understanding the nature of the request and if giving access would be in that person's individual's best interest;

(d) where the information concerns a person who is deceased and the requester is, or is requesting with the written consent of, the person's next of kin;

(e) where the information concerns an individual who is or was an official of a public body and which relates to the position or functions of the individual and which includes information relating, *inter alia*, to the title, work address, work telephone number and other similar particulars of the individual or the classification, salary scale or remuneration or responsibilities or services performed by that individual.[148]

Clause 63 contains similar provisions relating to the protection of third parties in respect of information (record) held by a private body. The protection of privacy in clauses 34 and 63 is underpinned by two considerations: firstly, the disclosure should involve the unreasonable disclosure of information; and secondly, the disclosure should relate to personal information about a third party.

The information officer is vested with a discretion to determine whether the disclosure involves an unreasonable disclosure or not. In this regard dit should be noted that the

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148 Clause 34(2).

PAIB gives no instruction or assistance how this discretion should be exercised in context of access to information. It is submitted that since this enquiry involves two competing constitutional rights that these two rights must be weighed in order to achieve a balance between them. This general approach derives support from the judgment in *Water Engineering & Construction (Pty) Ltd v Lekoa Vaal Metropolitan Council.* [149] Epstein AJ, however, did not conduct the enquiry into the balancing of the competing rights but instead dismissed the application on the basis of non-joinder of the third parties. It is submitted that the court will ultimately ascertain whether the claim to privacy is objectively reasonable and whether access to such information should be given.[150]

In conclusion, it is submitted that clauses 34 and 63 meet the constitutional standard since these clauses achieve a balance in providing, on the one hand, for access to information in respect of third parties and, on the other hand, provide protection of the right of privacy of third parties.

3.3.3.7 national governance

The PAIB seeks to achieve a balance between ensuring the proper functioning of government whilst providing for a right of access to information held by public bodies.

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149 1999(9) BCLR 1052 (W) 1057 E-F.

150 *Bernstein and Others v Bester and Others NNO* 1996(2) SA 751 (CC) 796 G-798 G; para [85] - [90].

Clause 42(1) provides that access to a record may be refused if the disclosure of the record would be likely to jeopardise the economic interests or financial welfare of the Republic or the ability of the government to manage the economy of the Republic. Clause 42(2) provides for a discretionary ground of refusal of information if the information contains, *inter alia*:

(a) trade secrets of the state or a governmental body;

(b) financial, commercial, scientific or technical information, other than trade secrets, held by a public body for the purpose of conducting a commercial activity the disclosure of which could reasonably cause harm to the commercial or financial interest of the state or a public body;

(c) information the disclosure of which would be likely to put a public body at a disadvantage in contractual or other negotiations or cause it prejudice in commercial competition;

(d) a computer programme owned by the state or a governmental body, except in so far as it is required to give access to a record to which access is granted in terms of the PAIB.

Clause 44(1)(a) deals specifically with the operations of public bodies and provides as follows:

"44(1) Subject to subsections(3) and (4), the information officer of a public body may refuse a request for access to a record of the body -

(a) if the record contains-

(i) an opinion, advice, report or recommendation obtained or prepared; or

(ii) an account of a consultation, discussion or deliberation that has occurred, including, but not limited to, minutes of a meeting,

for the purpose of assisting to formulate a policy or take a decision in the exercise of a power or performance of a duty conferred or imposed by law; or

(b) if -

(i) the disclosure of the record could reasonably be expected to frustrate the deliberative process in a public body or between public bodies by inhibiting the candid -

(aa) communication of an opinion, advice, report or recommendation; or

(bb) conduct of that consultation, discussion or deliberation; or

(ii) the disclosure of the record could, by premature disclosure of a policy or contemplated policy,

reasonably be expected to frustrate the success of that policy.

(2) Subject to subsection (4), the information officer of a public body may refuse a request for access to a record of the body if-

(a) the disclosure of the record could reasonably be expected to jeopardise the effectiveness of a testing, examining or auditing procedure or method used by a public body;

(b) the record contains evaluative material, whether or not the person who supplied it is identified in the record, and the disclosure of the material would breach an express or implied promise which was-

(i) made to the person who supplied the material; and

(ii) to the effect that the material or the identity of the person who supplied it, or both, would be held in confidence; or

(c) the record contains a preliminary, working or other draft of an official of a public body."

It is clear from clause 44(1)(a) that that clause is aimed at the decisional process of public bodies. It relates to two categories of information viz:

(a) an opinion; advice, report or recommendation obtained or prepared;

(b) an account of a consultation, discussion or deliberation that has occurred.

As regards the opinions, advices, reports or recommendations it would appear that such information does not only have to be generated within or by the public body but that it also includes opinions, advice, reports or recommendations obtained or prepared by source outside the public body. This would obviously include recommendations or submissions supplied to the public body by outside sources and which were prepared with a view to persuade the public body to take a particular decision.

Where the public body has conducted a consultation, discussion or deliberation the account thereof or the minutes of a meeting would form part of the record of the public body.[151]

It is this kind of information which was requested by the applicants in *Tobacco Institute of Southern Africa v Minister of Health.*[152] It is submitted that had the court in the *Tobacco* case approached those requests on the basis of the limitation enquiry in terms of section 36(1) it might perhaps have arrived at the same conclusion to refuse the disclosure of the information on the basis of a justifiable limitation.

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[151] Clause 44(1)(a)(ii).

[152] 1998(4) SA 745 (C) 748 G-751 E.

Clause 44(1)(b) deals with the disclosure of a record which could reasonably be expected to "frustrate the deliberative process" in a public body or between public bodies by "inhibiting the candid communication of an opinion, advice, report or recommendation or conduct of a consultation, discussion or deliberation." The deliberative process referred to in this clause relate to the operations of a pubic body.

It is submitted that the discretionary refusal of access to a record which relates to the operations of a public body is consistent with the tenor of the right of access to information developed by our courts and section 32, in particular, and the Constitution, in general.

3.3.3.8 the Cabinet

Clause 12(a) excludes the records of the Cabinet and its committees from the provisions of the PAIB. At present there is no statutory authority in terms of the Constitution or other national legislation which permits an exclusion of the Cabinet from the provisions of the PAIB.

The exclusion of the Cabinet and its committees from the provisions of the PAIB constitutes a *prima facie* violation of the right of access to information. The state will therefore have to justify the limitation in terms of section 36 of the Constitution. It is submitted that the right of access to information is a fundamental right enshrined in section 32 of the Constitution. Its inclusion in the Constitution was aimed at creating an open and transparent system of governance which is not served by the exclusion

of the Cabinet from the provisions of the PAIB. It is submitted further that no compelling reasons exist why the Cabinet should be excluded from the provisions of the PAIB since the exclusion of the Cabinet can only serve to create secrecy in Cabinet deliberations and functioning. It is further submitted that the limitation is so wide in extent that it creates a blanket limitation on the deliberations and functioning of the Cabinet. Moreover, it is submitted the PAIB itself contains less restrictive means to deal with the operations of governmental bodies, such as the Cabinet. Clause 44(1) of the PAIB provides for the refusal of information relating to the operations of public bodies and it is submitted that those provisions could have been employed to regulate the deliberations and functioning of the Cabinet.

3.3.3.9 courts and judicial officers

Clause 12(b) excludes the provisions of the PAIB from the judicial functions of a court, a special tribunal[153] or a judicial officer of such court or special tribunal. The PAIB does not contain any definition of "judicial functions." The definition of "judicial functions" was dealt with in *S v Khumalo*[154] in which it was held that that phrase relates to all such functions as would fall within the statutory powers conferred upon a judicial officer.

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153 established in terms of section 2 of the Special Investigating Units and Special Tribunals Act 74 of 1996.

154 1973(1) SA 567 (R) 569 E-F.

The judgment in *Mphahlele v First National Bank of South Africa*[155] provides assistance in this regard. The facts are briefly as follows: The applicant petitioned the Supreme Court of Appeal for leave to appeal after his application for leave to appeal to the Transvaal High Court was refused. The petition was refused by two judges of the former court without hearing argument and without furnishing reasons. The applicant thereupon applied to the Constitutional Court for an order directing the two judges to furnish reasons and to grant leave to appeal. Goldstone J delivered the judgment of a unanimous court and dealt with the duty of judges to give reasons, as follows:

> "There is no express Constitutional provision which requires judges to furnish reasons for their decision. Nonetheless, in terms of section 1 of the Constitution, the rule of law is one of the founding values of our democratic state, and the judiciary is bound by it. The rule of law undoubtedly requires judges not to act arbitrarily and to be accountable. The manner in which they ordinarily account for their decisions is by furnishing reasons . . . It explains to the parties, and to the public at large which has an interest in courts being open and transparent, why a case is decided as it is. It is a discipline which curbs arbitrary judicial decisions."[156]

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155 1999(3) BCLR 253 (CC).

156 *Mphahlele* 257 C-D; para [12].

It is submitted that the basis of the duty for judicial officers to give reasons for their decisions can be derived from the fact that they exercise powers conferred upon them by statute. In any event, court files, which include the judgment where the matter has been finalised, are public documents and generally open to public scrutiny.

The duty to give reasons was upheld except that it was held that that duty is not applicable in the case of a refusal of a petition for leave to appeal by the Supreme Court of Appeal and which does not involve a constitutional issue.[157]

In *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat*[158] the Constitutional Court dealt, *inter alia*, with the constitutionality of the provisions of section 60(5) - (8) of the Criminal Procedure Act 51 of 1977, which contains certain guidelines that a court should take into account when considering whether an accused should be granted bail or not. Kriegler J held that:

> "Such guidelines are no interference by the Legislature in the exercise of the Judiciary's adjudicative function: They are a proper exercise by the Legislature of its functions, including the power and responsibility to afford the judiciary guidance where it regards it as necessary."[159]

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157 *Mphahlele* 257 H-258 A; para [14].

158 1999(4) SA 623 (CC).

159 *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 654 I-J; para [43].

It is submitted that the phrase "judicial functions" should be interpreted to refer to the adjudicative functions performed by the judiciary. Such a construction would maintain the separation of powers between the judiciary and the legislature. The adjudicative function would be free from interference by the legislature. The effect would be that the information which forms part of the adjudicative (judicial) function, such as the notes and summaries of the evidence of the trial and the preparation of the judgment kept by the judicial officer, would not be subject to public scrutiny. Once the judgment is delivered by the court, it becomes a matter of public knowledge and record.

The construction that "judicial functions" should relate to adjudicative functions would permit a request for records not directly related to the adjudicative functions, such as records relating, *inter alia*, to the following: the salary scales of judicial officers; the case loads of courts, the number of judicial officers employed.

3.3.3.10 an individual member of Parliament or a provincial legislature

Clause 12(c) provides that the PAIB does not apply to a record of an individual member of Parliament or of a provincial legislature in that capacity. The Constitution however provides that the legislative authority of the Republic of South Africa vest in Parliament[160] whilst the legislative authority at provincial level vests in the provincial legislature.[161] Section 8(1) of the Constitution provides in express terms that the Bill of Rights, which includes the right of access to information entrenched in section 32, binds the legislature.

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160 Section 43 of the Constitution.

161 Section 104 of the Constitution

It is submitted that a member of Parliament derives his/her appointment and authority from the provisions of the Constitution and is as such subject to the provisions of the Constitution. Moreover, it is submitted that this proposition is fortified by the provisions of section 2 of the Constitution which provides that the Constitution is the supreme law of the Republic and that law or conduct inconsistent with it is invalid. It is submitted therefore that the exclusion of an individual member of Parliament or the provincial legislature constitutes a limitation of the right of access to information and that such limitation has no authority by virtue of the provisions of the Constitution or national legislation.

In particular, it is submitted that the exclusion of an individual member of Parliament or provincial legislature is not justifiable in terms of the general limitation clause contained in section 36(1) of the Constitution. In this regard it is submitted that access to information is a fundamental right which enjoys protection in the Constitution. If the purpose of the limitation is aimed at enabling a member of Parliament or the provincial legislature to fulfil his public duties, then it is submitted that the same purpose can be achieved by employing the provisions of clause 44 of the PAIB which deals with the refusal of a record relating to the operations of public bodies which, by definition, includes a functionary who exercises a public power in terms of the Constitution or performs a public function in terms of any legislation. The limitation so imposed places a blanket denial on access to a record held by a member of Parliament or the provincial legislature which is not justifiable.

3.4 INFORMATION HELD BY THE STATE

3.4.1 held

Section 32(1)(a) of the Constitution provides for a right of access to any information which is held by the state. It is therefore necessary to determine to what extent the PAIB gives effect to the right of access to information held by the state.

The PAIB provides that its provisions apply to a record of a public or a private body regardless of when the record came into existence.[162]

Clause 4 deals specifically with records held by public or private bodies and provides as follows:

> "4. For the purposes of this Act, but subject to section 12, a record in the possession or under the control of -
>
> (a) an official of a public body or private body in his or her capacity as such; or
>
> (b) an independent contractor engaged by a public body or private body in the capacity as such contractor,
>
> is regarded as being a record of that public body or private body, respectively."

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[162] Clause 3

The PAIB therefore equates the term "held" with "being in possession of or being under the control of" and it would therefore accord with the definition which was advocated in the discussion of "held" in relation to section 32(1)(a).[163]

3.4.2 by the state

The PAIB employs the term "public body" in respect of information held by the state. It contains a definitive list as to what constitutes a public body, which is defined as follows:

> "(a) Any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or
>
> (b) any other functionary or institution when -
>
> (i) exercising a power or performing a duty in terms of the Constitution or a provincial constitution; or
>
> (ii) exercising a public power or performing a public duty in terms of any legislation. "[164]

In defining a "public body" the PAIB followed substantially the wording of the definition of "organ of state" provided for in section 239 of the Constitution. Insofar as the definition of "public body" includes any department of state or any administration in the national or provincial sphere of government or any municipality in the local sphere of government, no criticism can be levelled at the PAIB.

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163 paragraph 2.3.1 above.

164 Clause 1.

The remainder of the definition of "public body" requires closer scrutiny. It deals further with any functionary or institution in the context of two categories, viz when such functionary or institution:

(a) exercises a power or performs a duty in terms of the Constitution or a provincial constitution;

(b) exercises a public power or performs a public function in terms of any legislation.

On this definition an institution of which the government holds the majority shareholding and which is controlled by the government would be excluded from the definition of "public body" if such institution neither exercises a power or performs a duty in terms of the Constitution or provincial constitution exercises a public power or performs a public function in terms of any legislation. On the definition of "public body" employed in the PAIB it is submitted that the test is no longer whether the state controls the institution (the control test). This definition therefore does not adopt the control test favoured by our case law to determine whether a body is an organ of state.[165] This definition consequently narrows the scope of the right of access to information against the state which is an unqualified right of access against the state in terms of section 32(1)(a) of the Constitution.

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165 *Directory Advertising Cost Cutters CC v Minister for Post, Telecommunications and Broadcasting* 1996(3) SA 800 (T); *Goodman Bros (Pty) v Transnet Ltd* 1998(4) SA 989 (W); *Claase v Transnet Bpk* 1999(3) SA 1012 (T); *Lebowa Granite (Pty) Ltd v Lebowa Mineral Trust* 1999(8) BCLR 908 (T).

3.5 REASONABLE MEASURES

In terms of section 32(2) the national legislation that must be enacted to give effect to the right of access to information may provide for reasonable measures to alleviate the administrative and financial burden on the state. Clause 22 provides for the payment of access fees by a requester other than a personal requester. The PAIB provides specifically in clause 22(7) that the access fees must provide for a reasonable access fee for the cost of making a copy of a record or a transcription of the content of a record as well as the time reasonably required to search for the record and prepare the record for disclosure to the requester.

The search and preparation of the record inevitably places a financial burden on the state. It is submitted that the authority to impose a fee is sanctioned by the provisions of section 32(2) as a reasonable measure to alleviate the financial burden on the state. It is significant to note that clause 22(7) is only limited to the cost of making a copy of a record or a transcription of the content of a record. It does not deal with the reproduction of the record in the form of sound provided for in clause 29(2)(b)(ii).

In respect of private bodies, clause 54 similarly provides for the levying of an access fees for the cost of making a copy of a record or a transcription of the content of a record as well as the search and preparation of the record. The imposition of a fee in respect of records held by private bodies is not authorised by the provisions of section 32(2) of te Constitution. It is submitted however that an anomalous situation would have arisen where no fees would be payable in respect of a record requested

from a private body whereas the state would be entitled to impose a fee. It is submitted that the authority to impose such fees in respect of private bodies is not derived from section 32(2) of the Constitution but derives its statutory power from the general legislative authority conferred upon Parliament in terms of section 44 of the Constitution.

Clause 45(b) provides that the information officer of a public body may refuse a request for access to a record if the work involved in processing the request would substantially and unreasonably divert the resources of the public body. This is dealt with in Chapter 4 under grounds of refusal of access to records. It is submitted that clause 45(b) is in fact a reasonable measure to alleviate the administrative burden on the public body. It would be unreasonable for the public body to carry such an administrative burden. The imposition of such a measure is authorised by the express provisions of section 32(2) of the Constitution.

3.6 INFORMATION HELD BY ANOTHER PERSON REQUIRED FOR THE EXERCISE OF PROTECTION OF RIGHTS

The PAIB deals in Part 3 with access to information held by what is termed "*private bodies.*"[166] In view of the distinction drawn between the elements contained in section 32 of the Constitution as regards the enforcement of the right of access to information

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166 Clause 50(1)

in respect of the state, on the one hand, and persons other than the state, on the other hand, the same methodology in discussing the right of access to information insofar as it is enforceable against persons other than the state, under the headings set forth in 2.5 above, will be adopted.

3.6.1 held

It is submitted that the same considerations which were dealt with in the discussion [167] of the term "held" in the context of information held by the state applies with equal force to information held by private bodies.

3.6.2. by another person

The PAIB provides in Part 3 for access to records held by private bodies. A "private body" is defined as:

> "(a) a natural person who carries or has carried on any trade, business or professing but only in such capacity;
>
> (b) a partnership which carries or has carried on any trade, business or profession; or

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[167] paragraph 3.4.1 above

(c) any former or existing juristic person, but excludes a public body;"[168]

In respect of a natural person the definition of "private body" expressly limits it to commercial interests such as a trade, business or profession. It therefore does not include a request for information from a private individual who does not conduct any of these commercial activities. This narrows the scope of the right of access to information where such information is of a personal nature. It is submitted that this definition is inconsistent with the provisions of section 8 of the Constitution which makes the Bill of Rights, including the section 32 right of access to information provision, applicable to natural persons. Section 8 does not limit the definition of natural person to a person who conducts commercial activities.

There is a blanket exclusion of access to information held by persons who do not conduct commercial activities. This imposes a limitation on information of a personal nature. It is submitted that if the true interest - commercial and private - are weighed that no compelling reasons exist why records containing information of a commercial nature should be subject to disclosure but information of a personal nature is not similarly subject to disclosure. The nature of the personal information is not *per se* more private and worthy of protection. It is submitted that the PAIB unnecessarily affords greater protection to personal information and that such limitation is not justifiable in terms of section 36(1) of the Constitution.

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[168] Clause 1.

The definition of private body also includes former or existing juristic persons. It is a trite proposition of law that a trust is not a juristic person.[169] A trust, whether a family or business trust, is therefore excluded from the definition of "private body". It would therefore not be permissible to request information from a trust such as information relating to the financial affairs of the trust. It is submitted in this regard that the PAIB unjustifiably narrows the scope of the right of access to information and in fact gives preference to personal information.

3.6.3 required for the exercise or protection of rights

Clause 50(1)(a) provides that access must be given to a requester, *inter alia*, if the record is required for the protection of any rights.

It is a restatement of the provisions of section 32(1)(b) of the Constitution. The clause does not define the meaning of "required for the exercise or protection" and it is submitted that guidance in this regard should be sought from the case law developed in the interpretation of that requirement. It is submitted that "required" should be afforded the predominant wide meaning adopted by the case law as meaning "reasonably required."[170]

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169 *Commissioner for Inland Revenue v Friedman and Others NNO* 1993(1) SA 353 (A) 370 E-G.

170 *Aquafund* 1997(9) BCLR 097 (C); *ABBM Printing and Publishing v Transnet* 1998(2) SA 109 (W) *Van Niekerk v Pretoria City Council* 1997(3) SA 839 (T) *Lebowa Granite (Pty) Ltd v Lebowa Mineral Trust 1999(8) BCLR 908 (T); Le Roux v Direkteur van Handel en Nywerheid* 1997(4) SA 174 (T).

3.6.4 any rights

Clause 50(1)(a) requires that the record must be required for the exercise or protection of any rights "but does not give any definition as to what rights are contemplated in the clause.

The weight of legal authority developed by our courts favours the view that "any rights" should not be confined to the fundamental rights set out in the Bill of Rights but that it also includes common law rights, arising from contract or delict as well as legislative rights.[171]

4. CONCLUSION

The Promotion of Access to Information Bill ("PAIB") is a new, and welcome, entrant into the South African statute law. Its introduction into the South African legal system is unprecedented and it ushers in a new era of openness and transparency in the South African legal history. It deals with one of the most important fundamental human rights and places South Africa amongst foreign jurisdictions with similar legislation.

As a whole the PAIB achieves the objects of the national legislation contemplated in section 32(2) of the Constitution and provides for generous access to information not only in the hands of the state but also in the hands of private persons. The PAIB has both positive and negative aspects.

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[171] *Van Niekerk v Pretoria City Council* 1997(3) SA 839 (T); *ABBM Printing and Publishing v Transnet* 1998(2) SA 109 (W); *Le Roux v Direkteur van Handel en Nywerheid* 1997(4) SA 174 (T); *Uni Windows v East London Municipality* 1995(8) BCLR 1091 (E).

The PAIB affords generous access and does not only limit access to records in written form. It also affords access to records contained in a video, audio or electronic form and in this regard does justice to the stated objective of providing access to information.

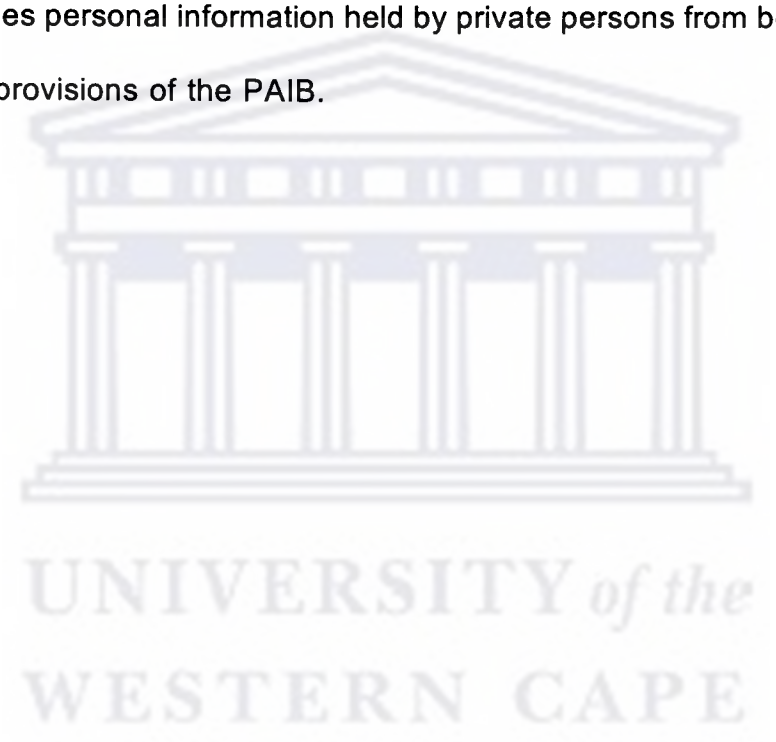
The PAIB protects the legal professional privilege which is a fundamental cornerstone of the South African judicial system. It provides that access to a record which is privileged from production in legal proceedings must be refused.

The PAIB also adopts a laudable approach in not relying too heavily on the authority in section 32(2) of the Constitution which entitles the state to impose reasonable measures to alleviate the financial and administrative burden on the state. These measures have been used to a minimum and can only serve to maximise the right of access to information by society at large.

The PAIB only covers information in a recorded form and therefore excludes information which is not in recorded form but which can be readily ascertained and reduced to recorded form to be supplied to the requester of such information. A positive aspect of the PAIB is that it does not limit the extent of the information sought and defines "a record" in broad and generous terms.

The biggest criticism against the PAIB is that it provides for the exclusion of the Cabinet and its committees as well as an individual member of Parliament or of a provincial legislature from the provisions of the PAIB.

A further criticism that can be levelled at the PAIB is that it defines and (confines) the definition of "private body" to entities which conduct commercial activities. In so doing, the PAIB excludes personal information held by private persons from being disclosed in terms of the provisions of the PAIB.



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