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A RHETORICAL STUDY OF THE OPEN DEMOCRACY BILL - A PERELMANIAN APPROACH

BY

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CENTRE FOR RHETORIC STUDIES

FACULTY OF HUMANITIES

UNIVERSITY OF CAPE TOWN

2001

This work has not been previously submitted in whole, or in part, for the award of any degree. It is my own work. Each significant contribution to, and quotation in, this dissertation from the work, or works, of other people has been attributed, and has been cited and referenced.

SIGNATURE: . Signed by candidate DATE: 30/05/01

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APPENDIX ONE

THE OPEN DEMOCRACY BILL

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REPUBLIC OF SOUTH AFRICA

OPEN DEMOCRACY BILL

(As introduced in the National Council of Provinces)

(SELECT COMMITTEE ON SECURITY AND JUSTICE)

[B 67—98]

REPUBLIEK VAN SUID-AFRIKA

WETSONTWERP OP OOP DEMOKRASIE

(Soos ingedien in die Nasionale Raad van Provinsies)

(GEKOSE KOMITEE OOR VEILIGHEID EN JUSTISIE)

[W 67—98]

ISBN 0 621 28398 3

No. of copies printed 3 000

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BILL

To give effect to the constitutional right of access to any information held by the state; to make available to the public information about the functions of governmental bodies; to provide persons with access to their personal information held by private bodies; to provide for the correction of personal information held by governmental or private bodies and to regulate the use and disclosure of that information; to provide for the protection of persons disclosing evidence of contraventions of the law, serious maladministration or corruption in governmental bodies; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

CONTENTS OF ACT

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1. Interpretation
2. Application of Act
3. Objects of Act
4. Designation of information officers, and delegation of powers by information officer and head of governmental body

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5. Guide on how to use Act
6. Manuals on functions of, and index of records held by, governmental bodies
7. Information in telephone directory
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PART 3

ACCESS TO RECORDS OF GOVERNMENTAL BODIES

CHAPTER 1

RIGHT AND MANNER OF ACCESS

9. Right of access to records of governmental bodies
10. Use of Act for criminal or civil discovery of governmental bodies' records excluded

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WETSONTWERP

Om gevolg te gee aan die grondwetlike reg op toegang tot enige inligting wat deur die staat gehou word; om inligting oor die funksies van regeringsliggame aan die publiek beskikbaar te stel; om aan persone toegang tot hulle persoonlike inligting wat deur privaatliggame gehou word, te verskaf; om voorsiening te maak vir die regstelling van persoonlike inligting wat deur regerings- of privaatliggame gehou word en om die gebruik en openbaarmaking van daardie inligting te reguleer; om voorsiening te maak vir die beskerming van persone wat getuienis oor oortredings van die reg, ernstige wanadministrasie of korrupsie in regeringsliggame openbaar maak; en om voorsiening te maak vir aangeleenthede wat daarmee in verband staan.

DAAR WORD BEPAAL deur die Parlement van die Republiek van Suid-Afrika, soos volg:—

INHOUD VAN WET

Artikel

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PART 1

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Interpretation

1. (1) In this Act, unless the context otherwise indicates—

(i) **"access fee"** means a fee prescribed for the purposes of section 24; (xxvii)

(ii) **"application"** means an application to a High Court in terms of section 74 or 75, as the case may be; (i)

(iii) **"commercial requester"** means a requester other than a personal or non-commercial requester; (xv)

(iv) **"Constitution"** means the Constitution of the Republic of South Africa, 1996; (viii)

(v) **"governmental body"** means—

(a) any department of state or administration in the national, provincial or local sphere of government or any other functionary or institution exercising a power or performing a duty in terms of the Constitution or a provincial constitution or exercising a public power or performing a public duty in terms of any legislation, and includes, without limiting the generality of the foregoing, any body—

(i) of which the accounts and financial statements which are required by legislation to be audited by the Auditor-General;

(ii) of which the majority of the members are appointed, whether alone or on the advice or recommendation of, or in or after consultation with some other person or body, by the President, the Deputy President, a Minister, the Premier of a province, a member of the executive council of a province or of the municipal council of a municipality, another governmental body, or more than one of those authorities;

(iii) in which the state, a province or a municipality is the majority or controlling shareholder;

(iv) of which more than 50 per cent of its expenditure is defrayed directly or indirectly from funds voted by Parliament, a provincial legislature or a municipal council;

(v) which is or was dependent for more than 50 per cent of its total permanent capital needs, including share capital, loans or other forms of permanent capital, on funds voted by Parliament, a provincial legislature or a municipal council, and in which permanent capital the state, a province or a municipality still holds a direct or indirect interest of more than 50 per cent;

(vi) which supplies products or services in terms of monopolistic rights conferred on it by legislation;

(vii) in respect of which the state, a province or a municipality creates the probability through contingent liability that funds voted by Parliament, a provincial legislature or a municipal council will have to be used in future to defray more than 50 per cent of the body's expenditure or to provide more than 50 per cent of the body's permanent capital;

(viii) of which the funds, assets or other property are administered by the state, a province or a municipality on a trust basis on behalf of the inhabitants of the Republic or of a particular interest group; or

(b) any other body which was a body contemplated in paragraph *(a)*(vi) and which exercises in a monopolistic manner substantially the same functions as it performed when it was a body contemplated in paragraph *(a)*(vi),

but does not include the Cabinet, a court, a judicial officer or a body regarded as being part of another body as contemplated in subsection (2) or (3); (xxiv)

(vi) **"head"**, in relation to—

(a) a governmental body—

DEEL 1

INLEIDENDE BEPALINGS

Interpretasie

1. (1) In hierdie Wet, tensy uit die samehang anders blyk, beteken—

(i) **"aansoek"** 'n aansoek by 'n Hoë Hof ingevolge artikel 74 of 75, na gelang van die geval; (ii)

(ii) **"aansoek om dringende appèl"** 'n aansoek bedoel in artikel 71(1); (xxx)

(iii) **"aansoek om dringende versoek"** 'n aansoek bedoel in artikel 20(1); (xxxi)

(iv) **"amptenaar"**, met betrekking tot 'n regeringsliggaam, 'n persoon (permanent of tydelik en voltyds of deeltyds) in diens van daardie regeringsliggaam, insluitende die hoof van die liggaam, in sy of haar hoedanigheid as sodanig; (xv)

(v) **"derde party"**, met betrekking tot 'n versoek om toegang, 'n ander persoon (insluitende die regering van 'n vreemde staat, 'n internasionale organisasie of 'n orgaan van daardie regering of organisasie) as—

(a) die betrokke versoeker;

(b) 'n persoon beoog in artikel 13(5); of

(c) 'n regeringsliggaam; (xxvii)

(vi) **"doelstellings van hierdie Wet"** die doelstellings van hierdie Wet bedoel in artikel 3(1); (xiv)

(vii) **"foutief"** of **"foutiewe"**, met betrekking tot 'n rekord of inligting daarin vervat, verkeerd, onvolledig of misleidend; (viii)

(viii) **"Grondwet"** die Grondwet van die Republiek van Suid-Afrika, 1996; (iv)

(ix) **"hierdie Wet"** ook enige regulasie uitgevaardig en van krag ingevolge artikel 86; (xxviii)

(x) **"hoof"**, met betrekking tot—

(a) 'n regeringsliggaam—

(i) in die geval van 'n nasionale departement, provinsiale administrasie of organisasiekomponent vermeld in die eerste kolom van Bylae 1 of 2 van die Staatsdienswet, 1994 (Proklamasie No. 103 van 1994), die beampte wat die bekleër van die pos is met die benaming vermeld in die tweede kolom van gemelde Bylae 1 of 2 teenoor die naam van die tersaaklike departement, provinsiale administrasie of organisasiekomponent of die beampte wat as sodanig optree;

(ii) in die geval van enige ander regeringsliggaam, die hoof- uitvoerende beampte van daardie regeringsliggaam of die persoon wat as sodanig optree;

(b) 'n privaatliggaam—

(i) in die geval van 'n natuurlike persoon, daardie natuurlike persoon;

(ii) in die geval van enige ander privaatliggaam, die hoof- uitvoerende beampte van die privaatliggaam of die persoon wat as sodanig optree; (vi)

(xi) **"inligtingsbeampte"**, met betrekking tot 'n regeringsliggaam, die persoon wat ingevolge artikel 4(1)*(a)* as inligtingsbeampte van daardie regeringsliggaam aangestel is; (ix)

(xii) **"internasionale organisasie"** 'n internasionale organisasie—

(a) van state; of

(b) ingestel deur die regerings van state; (xi)

(xiii) **"interne appèl"** 'n interne appèl na die hoof van 'n regeringsliggaam ingevolge artikel 67(1); (x)

(xiv) **"kennisgewing"** skriftelike kennisgewing, en het **"kennis gee"**, **"kennis gegee"**, **"in kennis stel"** en **"in kennis gestel"** ooreenstemmende betekenisse; (xiii)

(xv) **"kommersiële versoeker"** 'n ander versoeker as 'n persoonlike of niekommersiële versoeker; (iii)

(xvi) **"Menseregtekommissie"** die Menseregtekommissie bedoel in artikel 181(1)*(b)* van die Grondwet; (vii)

(xvii) **"nie-kommersiële versoeker"** 'n versoeker wat toegang tot 'n rekord verlang met die oog op—

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(i) in the case of a national department, provincial administration or organisational component mentioned in the first column of Schedule 1 or 2 to the Public Service Act, 1994 (Proclamation No. 103 of 1994), means the officer who is the incumbent of the post bearing the designation mentioned in the second column of the said Schedule 1 or 2 opposite the name of the relevant department, provincial administration or organisational component or the officer who is acting as such;

(ii) in the case of any other governmental body, means the chief executive officer of that governmental body or the person who is acting as such;

(b) a private body—

(i) in the case of a natural person, that natural person;

(ii) in the case of any other private body, the chief executive officer of the private body or the person who is acting as such; (x)

(vii) **"Human Rights Commission"** means the Human Rights Commission referred to in section 181(1)*(b)* of the Constitution; (xvi)

(viii) **"inaccurate"**, in relation to a record or information contained therein, means incorrect, incomplete or misleading; (vii)

(ix) **"information officer"**, in relation to a governmental body, means the person appointed as information officer of that governmental body in terms of section 4(1)*(a)*; (xi)

(x) **"internal appeal"** means an internal appeal to the head of a governmental body in terms of section 67(1); (xiii)

(xi) **"international organisation"** means an international organisation—

(a) of states; or

(b) established by the governments of states; (xii)

(xii) **"non-commercial requester"** means a requester seeking access to a record for the purpose of—

(a) gathering news for the production of, or disseminating news by, a printed or electronic medium; or

(b) research or education by a non-profit or an educational body or a member or employee of that body in his or her capacity as such; (xvii)

(xiii) **"notice"** means notice in writing, and **"notify"** and **"notified"** have corresponding meanings; (xiv)

(xiv) **"objects of this Act"** means the objects of this Act referred to in section 3(1); (vi)

(xv) **"official"**, in relation to a governmental body, means any person in the employ (permanently or temporarily and full-time or part-time) of that governmental body, including the head of the body, in his or her capacity as such; (iv)

(xvi) **"person"** means an individual or a juristic person; (xix)

(xvii) **"personal information"** means information about an identifiable person; (xx)

(xviii) **"personal information bank"** means a collection or compilation of personal information that is organised or capable of being retrieved by using a person's name or an identifying number or another particular assigned to the person; (xxi)

(xix) **"personal requester"** means a requester seeking access to a record containing information about the requester; (xxii)

(xx) **"prescribed"** means prescribed by regulation in terms of section 86; (xxxi)

(xxi) **"private body"** means a person, other than a governmental body, in possession of or controlling a personal information bank; (xxiii)

(xxii) **"public safety or environmental risk"** includes the risk or potential risk to the environment or the public (including individuals in their place of work) associated with—

(a) a product or service which is available to the public;

(b) a substance which is released into the environment or workplace or is present in food for human or animal consumption;

(c) a form of public transport; or

(d) an installation or manufacturing process or substance which is used in that installation or process; (xxvi)

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(a) die versameling van nuus vir die produksie van, of verspreiding van nuus deur, 'n gedrukte of elektroniese medium; of

(b) navorsing of onderrig deur 'n liggaam sonder winsoogmerk of 'n onderrigliggaam of 'n lid of werknemer van daardie liggaam in sy of haar hoedanigheid as sodanig; (xii)

(xviii) **"oorplaas"**, met betrekking tot 'n rekord, oorgeplaas ingevolge artikel 15(1) of (2), en het **"oorgeplaas"** 'n ooreenstemmende betekenis; (xxix)

(xix) **"persoon"** 'n individu of 'n regspersoon; (xvi)

(xx) **"persoonlike inligting"** inligting oor 'n identifiseerbare persoon; (xvii)

(xxi) **"persoonlike inligtingsbank"** 'n versameling of samestelling van persoonlike inligting wat georganiseer word of herwin kan word deur die gebruik van 'n persoon se naam of 'n identifiserende nommer of ander besonderheid aan die persoon toegewys; (xviii)

(xxii) **"persoonlike versoeker"** 'n versoeker wat toegang verlang tot 'n rekord wat inligting oor die versoeker bevat; (xix)

(xxiii) **"privaatliggaam"** 'n persoon, uitgesonderd 'n regeringsliggaam, wat in besit is van of beheer uitoefen oor 'n persoonlike inligtingsbank; (xxi)

(xxiv) **"regeringsliggaam"**—

(a) enige staatsdepartement of administrasie in die nasionale, provinsiale of plaaslike regeringsfeer of enige ander funksionaris of instelling wat ingevolge die Grondwet of 'n provinsiale grondwet 'n bevoegdheid uitoefen of 'n plig verrig, of ingevolge wetgewing 'n openbare bevoegdheid uitoefen of 'n openbare plig verrig, en ook, sonder om die algemeenheid van die voorgaande in te kort, enige liggaam—

(i) waarvan die rekeninge en finansiële state ingevolge wetgewing deur die Ouditeur-generaal geouditeer moet word;

(ii) waarvan die meerderheid van die lede aangestel word, hetsy alleen of op advies of aanbeveling van of, in of na oorleg met 'n ander persoon of liggaam, deur die President, die Adjunkpresident, 'n Minister, die Premier van 'n provinsie, 'n lid van die uitvoerende raad van 'n provinsie of van die munisipale raad van 'n munisipaliteit, 'n ander regeringsliggaam, of meer as een van daardie owerhede;

(iii) waarin die Staat, 'n provinsie of 'n munisipaliteit die meerderheids- of beherende aandeelhouer is;

(iv) waarvan meer as 50 persent van sy uitgawes regstreeks of onregstreeks met fondse wat deur die Parlement, 'n provinsiale wetgewer of 'n munisipale raad bewillig is, bestry word;

(v) wat vir meer as 50 persent van sy totale permanente kapitaalbehoeftes, insluitende aandelekapitaal, lenings of ander vorme van permanente kapitaal, van fondse bewillig deur die Parlement, 'n provinsiale wetgewer of 'n munisipale raad afhanklik is of was, en in welke permanente kapitaal die Staat, 'n provinsie of 'n munisipaliteit steeds regstreeks of onregstreeks 'n belang van meer as 50 persent hou;

(vi) wat produkte of dienste lewer ingevolge monopolistiese regte by wetgewing aan hom verleen;

(vii) ten opsigte waarvan die Staat, 'n provinsie of 'n munisipaliteit by wyse van voorwaardelike aanspreeklikheid die moontlikheid skep dat fondse deur die Parlement, 'n Provinsiale Wetgewer of 'n Munisipale Raad bewillig in die toekoms aangewend sal moet word om meer as 50 persent van die liggaam se uitgawes te bestry of om meer as 50 persent van die liggaam se permanente kapitaal te voorsien;

(viii) waarvan die fondse, bates of ander eiendom op 'n trustgrondslag namens die inwoners van die Republiek of van 'n bepaalde belangegroep deur die Staat, 'n provinsie of 'n munisipaliteit geadministreer word; of

(b) enige ander liggaam wat 'n liggaam beoog in paragraaf *(a)*(vi) was en wat op 'n monopolistiese wyse wesenlik dieselfde funksies verrig as wat hy verrig het toe hy 'n liggaam bedoel in paragraaf *(a)*(vi) was,

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(xxiii) **"record"** means recorded information regardless of form or medium, and includes—

(a) a record which is capable of being produced by means of computer equipment (whether hardware or software or both) which is used for that purpose by a governmental body; or

(b) a part of a record,

and, in relation to—

(i) a governmental body, means a record in the possession or under the control of that governmental body or of an official of the body and whether or not the record was created by the body and whether it was created before or after the commencement of this section;

(ii) a private body, means a record in the possession or under the control of that private body or any person in the employ (permanently or temporarily and full-time or part-time) of the private body (including the head of the body) in his or her capacity as such, and whether or not it was created by the body and whether it was created before or after the commencement of this section; (xxv)

(xxiv) **"request fee"** means a fee prescribed for the purposes of section 17; (xxviii)

(xxv) **"request for access"** means a request for access to a record of a governmental body in terms of section 9, and **"requester"**, in relation to that request, means a person making that request; (xxx)

(xxvi) **"request for correction"** means a request for the correction of personal information in a record of a governmental body in terms of section 52(2), and **"requester"**, in relation to that request, means a person making that request; (xxix)

(xxvii) **"third party"**, in relation to a request for access, means any person (including the government of a foreign state, an international organisation or an organ of that government or organisation) other than—

(a) the requester concerned;

(b) a person contemplated in section 13(5); or

(c) a governmental body; (v)

(xxviii) **"this Act"** includes any regulation made and in force in terms of section 86; (ix)

(xxix) **"transfer"**, in relation to a record, means transferred in terms of section 15(1) or (2), and **"transferred"** has a corresponding meaning; (xviii)

(xxx) **"urgent appeal application"** means an application referred to in section 71(1); (ii).

(xxxi) **"urgent request application"** means an application referred to in section 20(1); (iii)

(xxxii) **"working day"** means any day other than a Saturday, Sunday or public holiday. (xxxii)

(2) For the purposes of this Act, a board, council, committee, commission or other body—

(a) established or constituted in terms of legislation; or

(b) wholly or partly constituted by appointment made by the President, the Deputy President, a Minister, the Premier of a province, a member of the Executive Council of a province or of the Municipal Council of a municipality, a governmental body, or more than one of those authorities,

to manage or administer any activity of, to exercise any power of, to perform any duty of, or to advise or assist, a body contemplated in paragraph *(a)* or *(b)* of the definition of "governmental body" in subsection (1) is regarded as being part of that body.

(3) For the purposes of this Act, the Human Rights Commission may, as prescribed, determine that a governmental body is to be regarded as being part of another governmental body.

Application of Act

2. This Act applies despite the provisions of any other legislation.

Objects of Act

3. (1) The objects of this Act are—

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maar nie ook die Kabinet, 'n hof, 'n regterlike beampte of 'n liggaam wat, soos beoog in subartikel (2) of (3), as deel van 'n ander liggaam geag word nie; (v)

(xxv) **"rekord"** opgetekende inligting, ongeag vorm of medium, en ook—

(a) 'n rekord wat geproduseer kan word deur middel van rekenaartoerusting (hetsy apparatuur of programmatuur of albei) wat vir daardie doel deur 'n regeringsliggaam gebruik word; of

(b) 'n gedeelte van 'n rekord,

en, met betrekking tot—

(i) 'n regeringsliggaam, 'n rekord in die besit van of onder die beheer van daardie regeringsliggaam of van 'n amptenaar van die liggaam en ongeag of dit deur die liggaam geskep is al dan nie en ongeag of dit voor of na die inwerkingtreding van hierdie artikel geskep is;

(ii) 'n privaatliggaam, 'n rekord in die besit van of onder die beheer van daardie privaatliggaam of van 'n persoon (permanent of tydelik en voltyds of deeltyds) in diens van die privaatliggaam (insluitende die hoof van die liggaam) in sy of haar hoedanigheid as sodanig, en ongeag of dit deur die liggaam geskep is al dan nie en ongeag of dit voor of na die inwerkingtreding van hierdie artikel geskep is; (xxiii)

(xxvi) **"risiko vir openbare veiligheid of die omgewing"** ook die risiko of potensiële risiko vir die omgewing of die publiek (insluitende individue in hulle werkplek) wat in verband staan met—

(a) 'n produk of diens wat vir die publiek beskikbaar is;

(b) 'n stof wat in die omgewing of werkplek vrygelaat word of wat in voedsel vir menslike of dierlike verbruik teenwoordig is;

(c) 'n vorm van openbare vervoer; of

(d) 'n installasie of vervaardigingsproses of stof wat in daardie installasie of proses gebruik word; (xxii)

(xxvii) **"toegangsgelde"** gelde voorgeskryf vir die doeleindes van artikel 24; (i)

(xxviii) **"versoekgelde"** gelde voorgeskryf vir die doeleindes van artikel 17; (xxiv)

(xxix) **"versoek om regstelling"** 'n versoek om die regstelling van persoonlike inligting in 'n rekord van 'n regeringsliggaam ingevolge artikel 52(2), en het **"versoeker"**, met betrekking tot daardie versoek, 'n persoon wat daardie aansoek doen; (xxvi)

(xxx) **"versoek om toegang"** 'n versoek om toegang tot 'n rekord van 'n regeringsliggaam ingevolge artikel 9, en het **"versoeker"**, met betrekking tot daardie versoek, 'n persoon wat daardie aansoek doen; (xxv)

(xxxi) **"voorgeskryf"** voorgeskryf by regulasie ingevolge artikel 86; (xx)

(xxxii) **"werkdag"** 'n ander dag as 'n Saterdag, Sondag of openbare vakansiedag. (xxxii)

(2) Vir die doeleindes van hierdie Wet word 'n raad, komitee, kommissie of ander liggaam—

(a) ingestel of saamgestel ingevolge wetgewing; of

(b) geheel en al of gedeeltelik saamgestel deur aanstelling gedoen deur die President, die Adjunkpresident, 'n Minister, die Premier van 'n provinsie, 'n lid van die Uitvoerende Raad van 'n provinsie of van die Munisipale Raad van 'n munisipaliteit, 'n regeringsliggaam, of meer as een van sodanige owerhede,

om enige aktiwiteit van 'n liggaam beoog in paragraaf *(a)* of *(b)* van die woordomskrywing van "regeringsliggaam" in subartikel (1) te bestuur of te administreer, 'n bevoegdheid van hom uit te oefen, 'n plig van hom te verrig, hom te adviseer of by te staan, geag deel van daardie liggaam te wees.

(3) Vir die doeleindes van hierdie Wet kan die Menseregtekommissie soos voorgeskryf bepaal dat 'n regeringsliggaam as deel van 'n ander regeringsliggaam geag moet word.

Toepassing van Wet

2. Hierdie Wet is van toepassing ondanks die bepalings van enige ander wetgewing.

Doelstellings van Wet

3. (1) Die doelstellings van hierdie Wet is—

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(a) to give effect to the constitutional right of access to any information held by the state by providing public access, as swiftly, inexpensively and effortlessly as reasonably possible, to that information without jeopardising good governance, privacy and commercial confidentiality;

(b) to require governmental bodies to make information available that will assist the public in understanding the powers, duties and operation of governmental bodies;

(c) to provide persons with access to their personal information held by private bodies;

(d) to provide for the correction of inaccurate personal information held by governmental or private bodies;

(e) to regulate the use and disclosure of personal information held by governmental or private bodies;

(f) to protect persons disclosing evidence of contraventions of the law, maladministration or corruption in governmental bodies; and

(g) generally, to promote transparency and accountability of all organs of state by providing the public with timely, accessible and accurate information and by empowering the public to effectively scrutinise, and participate in, governmental decision making that affect them.

(2) When interpreting a provision of this Act, every court must prefer any reasonable interpretation of the provision that is consistent with the objects of this Act over any alternative interpretation that is inconsistent with those objects.

Designation of information officers, and delegation of powers by information officer and head of governmental body

4. (1) For the purposes of this Act, each governmental body must, subject to legislation governing the employment of personnel of the governmental body concerned, designate—

(a) a person as the information officer of the body; and

(b) such number of persons as deputy information officers as are necessary.

(2) The information officer of a governmental body has direction and control over every deputy information officer of that body.

(3) The information officer of a governmental body may delegate a power or duty conferred or imposed on that information officer by this Act to a deputy information officer of that governmental body.

(4) The head of a governmental body may delegate a power or duty conferred or imposed on the head by this Act to any official of that body who is—

(a) not the information officer or a deputy information officer of that body; and

(b) more senior than that information officer.

(5) Any power or duty delegated in terms of subsection (3) or (4) must be exercised or performed subject to such conditions as the person who made the delegation considers necessary.

(6) Any delegation in terms of subsection (3) or (4)—

(a) must be in writing;

(b) does not prohibit the person who made the delegation from exercising the power concerned or performing the duty concerned himself or herself;

(c) may at any time be withdrawn or amended in writing by that person.

(7) Any right or privilege acquired, or any obligation or liability incurred, as a result of a decision in terms of a delegation in terms of subsection (3) or (4) is not affected by any subsequent withdrawal or amendment of that decision.

PART 2

GUIDE ON ACT AND MANUALS ABOUT FUNCTIONS OF GOVERNMENTAL BODIES

Guide on how to use Act

5. (1) The Human Rights Commission must, within six months after the commence-

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(a) om gevolg te gee aan die grondwetlike reg op toegang tot enige inligting wat deur die staat gehou word, deur voorsiening te maak vir openbare toegang, so vinnig, goedkoop en moeitevry as wat redelikerwys moontlik is, tot daardie inligting, sonder om goeie landsbestuur, privaatheid en kommersiële vertroulikheid in gevaar te stel;

(b) om van regeringsliggame te vereis om inligting beskikbaar te stel as hulp vir die publiek om die bevoegdhede, pligte en werking van regeringsliggame te verstaan;

(c) om aan persone toegang te verleen tot inligting oor hulleself wat deur privaatliggame gehou word;

(d) om voorsiening te maak vir die resgtelling van foutiewe persoonlike inligting wat deur regerings- of privaatliggame gehou word;

(e) om die gebruik en openbaarmaking van persoonlike inligting wat deur regerings- of privaatliggame gehou word, te reguleer;

(f) om persone te beskerm wat getuienis van oortredings van die reg, wan-administrasie of korrupsie in regeringsliggame openbaar maak; en

(g) in die algemeen, om deursigtigheid en verantwoordingspligtigheid van alle staatsorgane te bevorder deur die publiek van tydige, toeganklike en korrekte inligting te voorsien, en deur die publiek te bemagtig om regeringsbesluitneming wat hulle raak, doeltreffend na te gaan en daaraan deel te neem.

(2) By die uitleg van 'n bepaling van hierdie Wet moet elke geregshof enige redelike uitleg van die bepaling wat met die doelstellings van hierdie Wet bestaanbaar is, voorkeur gee bo enige alternatiewe uitleg wat met daardie doelstellings onbestaanbaar is.

Aanwysing van inligtingsbeamptes, en delegering van bevoegdhede deur inligtingsbeampte en hoof van regeringsliggaam

4. (1) Vir die doeleindes van hierdie Wet moet elke regeringsliggaam, behoudens wetgewing wat die indiensneming van personeel van die betrokkke regeringsliggaam reël—

(a) 'n persoon as die inligtingsbeampte van die liggaam aanstel; en

(b) die getal persone as adjunkinligtingsbeamptes wat nodig mag wees, aanstel.

(2) Die inligtingsbeampte van 'n regeringsliggaam het bevel en beheer oor elke adjunkinligtingsbeampte van daardie liggaam.

(3) Die inligtingsbeampte van 'n regeringsliggaam kan 'n bevoegdheid of 'n plig wat by hierdie Wet aan daardie inligtingsbeampte verleen of opgelê, delegeer aan 'n adjunkinligtingsbeampte van daardie regeringsliggaam.

(4) Die hoof van 'n regeringsliggaam kan 'n bevoegdheid of 'n plig by hierdie Wet aan die hoof verleen of opgelê, delegeer aan 'n amptenaar van daardie liggaam wat—

(a) nie die inligtingsbeampte of 'n adjunkinligtingsbeampte van daardie liggaam is nie; en

(b) meer senior as daardie inligtingsbeampte is.

(5) Enige bevoegdheid of plig wat ingevolge subartikel (3) of (4) gedelegeer is, moet uitgeoefen of verrig word onderhewig aan die voorwaardes wat die persoon wat die delegering gedoen het, nodig ag.

(6) 'n Delegering ingevolge subartikel (3) of (4)—

(a) moet skriftelik wees;

(b) verhoed nie die persoon wat die delegering gedoen het om die betrokke bevoegdheid of plig self uit te oefen of te verrig nie;

(c) kan te eniger tyd skriftelik deur daardie persoon ingetrek of gewysig word.

(7) Enige reg of privilegie verkry, of enige verpligting of aanspreeklikheid opgedoen, as gevolg van 'n besluit ingevolge 'n delegering ingevolge subartikel (3) of (4) word nie geraak deur 'n daaropvolgende intrekking of wysiging van daardie besluit nie.

DEEL 2

GIDS OOR WET EN HANDLEIDINGS OOR FUNKSIES VAN REGERINGSLIGGAME

Gids oor hoe om Wet te gebruik

5. (1) Die Menseregtekommissie moet, binne ses maande na die inwerkingtreding

ment of this section, publish in each official language a guide containing such information, in an easily comprehensible form and manner, as may reasonably be required by a person who wishes to exercise any right contemplated in this Act.

(2) The guide must, without limiting the generality of subsection (1), include a description of—

(a) the objects of this Act;

(b) the postal and street address, phone and fax number and, if available, electronic mail address of—

(i) the information officer of every governmental body; and

(ii) every deputy information officer of every governmental body appointed in terms of section 4(1)*(b)*;

(c) the manner and form in which a request for—

(i) access to a record of a governmental body;

(ii) access to a record of a private body containing personal information; and

(iii) correction of personal information held by a private body and a governmental body,

contemplated in sections 9, 50, 51 and 52 must be made;

(d) the assistance available from the information officer of a governmental body and the Human Rights Commission in terms of this Act;

(e) the manner of lodging—

(i) an internal appeal with the head of a governmental body; and

(ii) an application with a High Court;

(f) all remedies in law available regarding an act or failure to act in respect of a right or duty conferred or imposed by this Act, except the remedies referred to in paragraph *(e)*;

(g) the manual to be published by every governmental body in terms of section 6, the information contained therein and how to obtain access to the manual; and

(h) the categories of records open to the public in terms of legislation as contemplated in section 43 and how to obtain access to those records.

(3) The Human Rights Commission must, if necessary, update and publish the guide at intervals of not more than one year.

(4) The guide must—

(a) if reasonably possible, be made available on the Internet by the Human Rights Commission; and

(b) otherwise be made available as prescribed.

Manual on functions of, and index of records held by, governmental body

6. (1) This section does not apply to a governmental body which is a public enterprise that operates a system of financial administration separate from the national, provincial and local spheres of government.

(2) Within 12 months after the commencement of this section or the coming into existence of a governmental body, the head of the governmental body concerned must publish in at least two official languages a manual containing—

(a) a description of its structure and functions;

(b) the postal and street address, phone and fax number and, if available, electronic mail address of the information officer of the body and of every deputy information officer of the body appointed in terms of section 4(1)*(b)*;

(c) a description of the guide referred to in section 5 and how to obtain access to it;

(d) in sufficient detail to facilitate a request for access to, and for correction of personal information in, a record of the body, a description of—

(i) the subjects on which the body holds records and the categories of records held on each subject;

(ii) every personal information bank held by the body, including, in respect of each bank—

(aa) the identification of the bank and a description of the categories of persons to whom or which the bank relates;

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van hierdie artikel, in elke amptelike taal 'n gids publiseer wat in 'n maklik verstaanbare vorm en wyse die inligting bevat wat redelikerwys benodig word deur 'n persoon wat enige reg beoog in hierdie Wet, wil uitoefen.

(2) Die gids moet, sonder om die algemeenheid van subartikel (1) in te kort, 'n beskrywing insluit van—

(a) die doelstellings van hierdie Wet;

(b) die pos- en straatadres, telefoon- en faksnommer en, indien beskikbaar, elektroniese posadres van—

(i) die inligtingsbeampte van elke regeringsliggaam; en

(ii) elke adjunkinligtingsbeampte van elke regeringsliggaam aangestel ingevolge artikel 4(1)*(b)*;

(c) die wyse waarop en vorm waarin 'n versoek om—

(i) toegang tot 'n rekord van 'n regeringsliggaam;

(ii) toegang tot 'n rekord van 'n privaatliggaam wat persoonlike inligting bevat; en

(iii) regstelling van persoonlike inligting gehou deur 'n privaatliggaam en 'n regeringsliggaam,

beoog in artikels 9, 50, 51 en 52 gerig moet word;

(d) die bystand beskikbaar vanaf die inligtingsbeampte van 'n regeringsliggaam en die Menseregtekommissie ingevolge hierdie Wet;

(e) die wyse waarop—

(i) 'n interne appèl by die hoof van 'n regeringsliggaam aangeteken moet word; en

(ii) 'n aansoek by 'n Hoë Hof ingedien moet word;

(f) alle regsmiddele beskikbaar betreffende 'n handeling of versuim om te handel ten opsigte van 'n reg verleen of plig opgelê by hierdie Wet, uitgesonderd die regsmiddele bedoel in paragraaf *(e)*;

(g) die handleiding wat elke regeringsliggaam ingevolge artikel 6 moet publiseer, die inligting daarin vervat en hoe om toegang tot die handleiding te verkry; en

(h) die kategorieë rekords oop vir die publiek ingevolge wetgewing soos beoog in artikel 43 en hoe om toegang tot daardie rekords te verkry.

(3) Die Menseregtekommissie moet, indien nodig, met tussenposes van hoogstens een jaar die gids bywerk en publiseer.

(4) Die gids moet—

(a) indien redelikerwys moontlik, op die Internet deur die Menseregtekommissie beskikbaar gestel word; en

(b) andersins soos voorgeskryf beskikbaar gestel word.

Handleiding oor funksies van, en register van rekords gehou deur, regeringsliggaam

6. (1) Hierdie artikel is nie van toepassing nie op 'n regeringsliggaam wat 'n openbare onderneming is wat 'n finansiële administrasiestelsel afsonderlik van die nasionale, provinsiale en plaaslike regeringsfere bedryf.

(2) Binne 12 maande na die inwerkingtreding van hierdie artikel of die totstandkoming van 'n regeringsliggaam moet die hoof van die betrokke regeringsliggaam in minstens twee amptelike tale 'n handleiding publiseer wat—

(a) 'n beskrywing van sy struktuur en funksies;

(b) die pos- en straatadres, telefoon- en faksnommer en, indien beskikbaar, elektroniese posadres van die inligtingsbeampte van die liggaam en van elke adjunkinligtingsbeampte van die liggaam aangestel ingevolge artikel 4(1)*(b)*;

(c) 'n beskrywing van die gids bedoel in artikel 5 en hoe om toegang daartoe te verkry;

(d) in voldoende besonderhede om 'n versoek om toegang tot, en om regstelling van persoonlike inligting in, 'n rekord van die liggaam te vergemaklik, 'n beskrywing van—

(i) die onderwerpe waaroor die liggaam rekords hou en die kategorieë rekords gehou oor elke onderwerp;

(ii) elke persoonlike inligtingsbank gehou deur die liggaam, insluitende, ten opsigte van elke bank—

(aa) die identifikasie van die bank en 'n beskrywing van die kategorieë persone op wie of wat die bank betrekking het;

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(bb) a statement of the purposes for which the information in the bank was obtained or the bank was compiled and a statement of the purposes consistent with those purposes for which the information in the bank is used or disclosed; and

(cc) a statement of the standards of retention and disposal applied to information in the bank as contemplated in section 62(1) and (3);

(e) a description of the categories of records of the body open to the public in terms of legislation as contemplated in section 43 and how to obtain access to those records;

(f) a description of the duty of the head of the body to disclose in terms of section 8 records revealing a serious public safety or environmental risk;

(g) a description of the services available to members of the public from the body and how to gain access to those services;

(h) a description of any arrangement or provision for a person (other than a governmental body) by consultation, making representations or otherwise, to participate in or influence—

(i) the formulation of policy; or

(ii) the exercise of powers or performance of duties,

by the body;

(i) a description of all remedies available in respect of an act or a failure to act by the body;

(j) a description of all remedies (including the procedure contemplated in section 63) available to a member of the public or an official of the body who wishes to report or otherwise remedy an impropriety contemplated in section 63 and the protection for an official of the body against reprisals provided for in section 65;

(k) such other information as may be prescribed.

(3) A governmental body must, if necessary, update and publish its manual referred to in subsection (2) at intervals of not more than one year.

(4) Each manual must—

(a) if reasonably possible, be made available on the Internet by the head of the governmental body concerned; and

(b) otherwise be made available as prescribed.

(5)*(a)* If the functions of two or more governmental bodies are closely connected, the Human Rights Commission may on request or of its own accord determine that the two or more bodies publish one manual only.

(b) The cost of that publication must be shared between the relevant bodies as determined by that Commission.

(6) The Human Rights Commission may on request or of its own accord by notice in the *Gazette* exempt any category of governmental bodies from any provision of this section for such period as it thinks fit.

Information in telephone directory

7. (1) The Director-General of the national department responsible for communications must at that department's cost ensure the publication of the postal and street address, phone and fax number and, if available, electronic mail address of the information officer of every governmental body in every telephone directory issued for general use by the public.

(2) The information contemplated in subsection (1) must be published in the first telephone directory to be issued after the expiry of a period of six months after the commencement of this section and thereafter in every telephone directory that is issued.

Announcement of public safety or environmental risk

8. (1) If there are reasonable grounds for believing that—

(a) a record of a governmental body reveals a serious public safety or environmental risk; and

(b) it is in the public interest to disclose the record to the public or persons affected,

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(bb) 'n verklaring van die doeleindes waarvoor die inligting in die bank verkry is of waarvoor die bank saamgestel is en 'n verklaring van die doeleindes wat bestaanbaar is met die doeleindes waarvoor die inligting in die bank gebruik of openbaar gemaak word; en

(cc) 'n verklaring van die standaarde van behoud en wegdoening toegepas op inligting in die bank soos beoog in artikel 62(1) en (3);

(e) 'n beskrywing van die kategorieë rekords van die liggaam wat oop is vir die publiek ingevolge wetgewing soos beoog in artikel 43 en hoe om toegang tot daardie rekords te verkry;

(f) 'n beskrywing van die plig van die hoof van die liggaam om ingevolge artikel 8 rekords openbaar te maak wat 'n ernstige risiko vir openbare veiligheid of die omgewing aan die lig bring;

(g) 'n beskrywing van die liggaam se dienste wat vir lede van die publiek beskikbaar is en hoe om toegang tot daardie dienste te verkry;

(h) 'n beskrywing van enige reëling of voorsiening vir 'n persoon (uitgesonderd 'n regeringsliggaam) om deur middel van oorlegpleging, die rig van vertoë of andersins deel te neem aan of invloed uit te oefen op—

(i) die formulering van beleid; of

(ii) die uitoefening van bevoegdhede of die verrigting van pligte,

deur die liggaam;

(i) 'n beskrywing van alle regsmiddele beskikbaar ten opsigte van 'n handeling of 'n versuim om te handel deur die liggaam;

(j) 'n beskrywing van alle regsmiddele (insluitende die prosedure beoog in artikel 63) beskikbaar vir 'n lid van die publiek of 'n beampte van die liggaam wat 'n onbehoorlikheid beoog in artikel 63 wil aanmeld of andersins wil goedmaak en die beskerming vir 'n beampte van die liggaam teen vergelding waarvoor daar in artikel 65 voorsiening gemaak word;

(k) die ander inligting wat voorgeskryf mag word,

bevat.

(3) 'n Regeringsliggaam moet, indien nodig, sy handleiding bedoel in subartikel (2) met tussenposes van hoogstens een jaar bywerk en publiseer.

(4) Elke handleiding moet—

(a) indien redelikerwys moontlik, op die Internet deur die hoof van die betrokke regeringsliggaam beskikbaar gestel word; en

(b) andersins soos voorgeskryf beskikbaar gestel word.

(5)*(a)* Indien die funksies van twee of meer regeringsliggame nou verband hou, kan die Menseregtekommissie op versoek of uit eie beweging bepaal dat die twee of meer liggame slegs een handleiding publiseer.

(b) Die koste van daardie publikasie moet tussen die tersaaklike liggame soos deur die Kommissie bepaal, gedeel word.

(6) Die Menseregtekommissie kan op versoek of uit eie beweging by kennisgewing in die *Staatskoerant* enige kategorie regeringsliggame van enige bepaling van hierdie artikel vir die tydperk wat dit goed ag, vrystel.

Inligting in telefoongids

7. (1) Die Direkteur-generaal van die nasionale departement verantwoordelik vir kommunikasiewese moet op daardie departement se koste die publikasie van die pos- en straatadres, telefoon- en faksnommer en, indien beskikbaar, elektroniese posadres van die inligtingsbeampte van elke regeringsliggaam in elke telefoongids wat vir algemene gebruik deur die publiek uitgegee word, verseker.

(2) Die inligting bedoel in subartikel (1) moet gepubliseer word in die eerste telefoongids wat na verstryking van 'n tydperk van ses maande na die inwerkingtreding van hierdie artikel uitgegee word en daarna in elke telefoongids wat uitgegee word.

Aankondiging van risiko vir openbare veiligheid of die omgewing

8. (1) Indien daar redelike gronde is om te glo dat—

(a) 'n rekord van 'n regeringsliggaam 'n ernstige risiko vir openbare veiligheid of die omgewing aan die lig bring; en

(b) dit in die openbare belang is om die rekord aan die publiek of persone wat geraak word, openbaar te maak,

the head of the body must, subject to this section, as soon as reasonably possible, so disclose the record.

(2) If the record referred to in subsection (1) contains information contemplated in section 29(1) or 31(1) (in this section referred to as "third person information"), the head of the governmental body concerned must, before disclosing the record, inform by the fastest means reasonably possible, the person to whom or which the information relates (in this section referred to as the "third person") of the intended disclosure, unless all necessary steps to locate the third person within a reasonable period have been unsuccessful.

(3) When informing a third person in terms of subsection (2), the head of the governmental body concerned must—

(a) state that he or she intends disclosing a record that contains third person information and describe that information; and

(b) inform the third person that he or she may, within the period referred to in subsection (4) after he or she is informed, make written or oral representations to the head of the body why the third person information should not be disclosed.

(4) A third person informed in terms of subsection (2) of an intended disclosure may, within such reasonable period as the head of the relevant governmental body determines, make written or oral representations to that head why the third person information should not be disclosed.

(5)*(a)* The head of the governmental body concerned must—

(i) after due regard to any representations made by a third person in terms of subsection (4) and the grounds for disclosure contemplated in subsection (1)*(a)* and *(b)*, decide whether the third person information should be disclosed or not; and

(ii) notify the third person informed in terms of subsection (2) and a third person not located as contemplated in that subsection, but that can be located by taking all necessary steps before the decision is taken, of the decision.

(b) If a third person cannot be located as contemplated in subsection (2), any decision whether to disclose the third person information must be made with due regard to the fact that the third person did not have the opportunity to make representations why the information should not be disclosed.

(6) If the head of a governmental body decides in terms of subsection (5) to disclose the third person information, the notice in terms of that subsection must state—

(a) the findings on all material questions of fact, referring to the material on which those findings were based;

(b) the reasons for the decision in such manner as to enable the third person—

(i) to understand the justification for the decision of the head of the body; and

(ii) to make an informed decision about whether to lodge an application with a High Court or to utilise any other remedy in law available to the third person;

(c) that the third person may lodge an application with a High Court against the decision of the head of that body within 10 working days after notice is given, and the procedure for lodging that application; and

(d) that the third person information will be disclosed after the expiry of 10 working days after notice is given, unless such an application is lodged within that period.

(7) If the head of a governmental body decides in terms of subsection (5) to disclose the third person information, the head must disclose that information after the expiry of 10 working days after notice is given in terms of that subsection, unless an application with a High Court is lodged against the decision within that period or an extended period granted in terms of section 73(3).

PRIVILEGED AND CONFIDENTIAL

moet die hoof van die liggaam, behoudens hierdie artikel, die rekord so gou as redelikerwys moontlik aldus openbaar maak.

(2) Indien die rekord bedoel in subartikel (1) inligting beoog in artikel 29(1) of 31(1) bevat (in hierdie artikel "derdepersoon-inligting" genoem), moet die hoof van die betrokke regeringsliggaam, voordat die rekord openbaar gemaak word, die persoon op wie die inligting betrekking het (in hierdie artikel die "derde persoon" genoem), op die vinnigste redelikerwys moontlike wyse oor die beoogde openbaarmaking inlig, tensy alle nodige stappe om die derde persoon binne 'n redelike tydperk op te spoor, onsuksesvol was.

(3) Wanneer 'n derde persoon ingevolge subartikel (2) ingelig word, moet die hoof van die betrokke regeringsliggaam—

(a) meld dat hy of sy van voorneme is om 'n rekord openbaar te maak wat derdepersoon-inligting bevat en daardie inligting beskryf; en

(b) die derde persoon inlig dat hy of sy, binne die tydperk bedoel in subartikel (4) nadat hy of sy ingelig is, skriftelike of mondelinge vertoë tot die hoof van die liggaam kan rig waarom die derdepersoon-inligting nie openbaar gemaak moet word nie.

(4) 'n Derde persoon wat ingevolge subartikel (2) omtrent 'n beoogde openbaarmaking ingelig is, kan, binne die redelike tydperk wat die hoof van die tersaaklike regeringsliggaam bepaal, skriftelike of mondelinge vertoë tot daardie hoof rig waarom die derdepersoon-inligting nie openbaar gemaak moet word nie.

(5)*(a)* Die hoof van die betrokke regeringsliggaam moet—

(i) na behoorlike inagneming van enige vertoë gerig deur 'n derde persoon ingevolge subartikel (4) en die gronde vir openbaarmaking bedoel in subartikel (1)*(a)* en *(b)*, besluit of die derdepersoon-inligting openbaar gemaak moet word al dan nie; en

(ii) die derde party wat ingevolge subartikel (2) ingelig is en 'n derde party wat nie opgespoor is nie soos beoog in daardie subartikel maar wat opgespoor kan word deur alle nodige stappe te doen voor die besluit geneem word, van die besluit in kennis stel.

(b) Indien 'n derde person nie opgespoor kan word nie soos beoog in subartikel (2), moet enige besluit oor die openbaarmaking al dan nie van die derdepersoon-inligting geneem word met behoorlike inagneming van die feit dat die derde persoon nie die geleentheid gehad het om vertoë te rig waarom die inligting nie openbaar gemaak moet word nie.

(6) Indien die hoof van 'n regeringsliggaam besluit om ingevolge subartikel (5) derdepersoon-inligting openbaar te maak, moet die kennisgewing ingevolge daardie subartikel—

(a) die bevindings oor alle wesenlike feitevrae, met verwysing na die gegewens waarop daardie bevindings gebaseer is, meld;

(b) die redes vir die besluit op 'n wyse wat die derde persoon in staat stel—

(i) om die regverdiging vir die besluit van die hoof van die liggaam te begryp; en

(ii) om 'n ingeligte besluit te neem oor of 'n aansoek by 'n Hoë Hof ingedien moet word, en of enige ander regsmiddel wat vir die derde persoon beskikbaar is, benut moet word,

meld;

(c) meld dat die derde persoon binne 10 werkdae nadat kennis gegee is, 'n aansoek by die Hoë Hof kan indien teen die besluit van die hoof van daardie liggaam, en die prosedure vir die indien van daardie aansoek meld; en

(d) meld dat die derdepersoon-inligting openbaar gemaak sal word na verstryking van 10 werkdae nadat kennis gegee is, tensy so 'n aansoek binne daardie tydperk ingedien word.

(7) Indien die hoof van 'n regeringsliggaam besluit om ingevolge subartikel (5) die derdepersoon-inligting openbaar te maak, moet die hoof daardie inligting openbaar maak na verstryking van 10 werkdae nadat kennis gegee is ingevolge daardie subartikel, tensy 'n aansoek binne daardie tydperk, of 'n verlengde tydperk ingevolge artikel 73(3) verleen, by 'n Hoë Hof teen die besluit ingedien word.

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PART 3

ACCESS TO RECORDS OF GOVERNMENTAL BODIES

CHAPTER 1

RIGHT AND MANNER OF ACCESS

Right of access to records of governmental bodies

9. Any person must, on request, but subject to this Act, be given access to any record of a governmental body.

Use of Act for criminal or civil discovery of governmental bodies' records excluded

10. No request for access to a record of a governmental body may be made in terms of this Act for the purpose of criminal or civil discovery provided for in any other law.

Right of disclosure of record to which access is given

11. Subject to the common law, any person, whether or not he or she is the relevant requester, may publish, broadcast or otherwise disclose information contained in a record of a governmental body to which access is given in terms of this Act.

Access to records in terms of other law

12. Nothing in this Act, except section 56, prevents a governmental body from giving access to a record of that body in accordance with any other law.

Form of requests

13. (1) A request for access must be made in the prescribed form to the information officer of the governmental body concerned at his or her address or fax number or electronic mail address.

(2) The form for a request of access prescribed for the purposes of subsection (1) must at least require from the requester concerned—

(a) to provide sufficient particulars to enable an official of the governmental body concerned to identify the record or records requested;

(b) to indicate which applicable form of access referred to in section 25(2) is required;

(c) to state whether the record concerned is preferred in a particular language;

(d) to state whether the requester is a personal, non-commercial or commercial requester and, in the case of a commercial requester, to include the request fee;

(e) to specify a postal address or fax number and, if the request includes an urgent request application, a phone number, for the requester in the Republic;

(f) if, in addition to a written reply, the requester wishes to be informed of the decision on the request in any other manner, to state that manner and the necessary particulars to be so informed; and

(g) in the case of a request for access to a record containing personal information, to state the capacity contemplated in subsection (5) in which the requester is making the request and to submit—

(i) the requester's identity document or a certified copy thereof or any other reasonable proof of the requester's identity; or

(ii) if the requester is not the person to whom or which the personal information relates, reasonable proof of the capacity in which the requester is making the request.

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DEEL 3

TOEGANG TOT REKORDS VAN REGERINGSLIGGAME

HOOFSTUK 1

REG OP EN WYSE VAN TOEGANG

Reg op toegang tot rekords van regeringsliggame

9. 'n Persoon moet, op versoek, maar onderworpe aan hierdie Wet, toegang tot enige rekord van 'n regeringsliggaam gegee word.

Gebruik van Wet vir strafregtelike of siviele blootlegging van regeringsliggame se rekords uitgesluit

10. Geen versoek om toegang tot 'n rekord van 'n regeringsliggaam mag ingevolge hierdie Wet gedoen word nie vir die doel van strafregtelike of sivielregtelike blootlegging waarvoor in enige ander reg voorsiening gemaak word.

Reg op openbaarmaking van rekord waartoe toegang verleen word

11. Behoudens die gemenereg kan 'n persoon, ongeag of hy of sy die tersaaklike versoeker is al dan nie, inligting vervat in 'n rekord van 'n regeringsliggaam waartoe toegang gegee word ingevolge hierdie Wet, publiseer, uitsaai of andersins openbaar maak.

Toegang tot rekords ingevolge ander reg

12. Niks in hierdie Wet, behalwe artikel 56, verhoed 'n regeringsliggaam om toegang tot 'n rekord van daardie liggaam ooreenkomstig enige ander reg te gee nie.

Vorm van versoeke

13. (1) 'n Versoek om toegang moet in die voorgeskrewe vorm gerig word aan die inligtingsbeampte van die betrokke regeringsliggaam by sy of haar adres of faksnommer of elektroniese posadres.

(2) Die vorm vir 'n versoek om toegang voorgeskryf vir die doeleindes van subartikel (1), moet van die betrokke versoeker minstens vereis—

(a) om voldoende besonderhede te verskaf om 'n amptenaar van die betrokke regeringsliggaam in staat te stel om die rekord of rekords wat versoek is, te identifiseer;

(b) om aan te dui watter toepaslike vorm van toegang bedoel in artikel 25(2) verlang word;

(c) om te meld of die betrokke rekord in 'n spesifieke taal verkies word;

(d) om te meld of die versoeker 'n persoonlike, nie-kommersiële of kommersiële versoeker is en, in die geval van 'n kommersiële versoeker, om die versoekgelde in te sluit;

(e) om 'n posadres of faksnommer te meld en, indien die versoek 'n aansoek om dringende versoek insluit, 'n telefoonnommer vir die versoeker in die Republiek;

(f) om, indien die versoeker, benewens 'n skriftelike antwoord, op enige ander wyse oor die besluit oor die versoek ingelig wil word, daardie wyse en die nodige besonderhede om aldus ingelig te word, te meld; en

(g) in die geval van 'n versoek om toegang tot 'n rekord wat persoonlike inligting bevat, om te meld in watter hoedanigheid beoog in subartikel (5) die versoeker die versoek rig en om—

(i) die versoeker se identiteitsdokument of 'n gewaarmerkte afskrif daarvan, of enige ander redelike bewys van die versoeker se identiteit; en

(ii) indien die versoeker nie die persoon is op wie die persoonlike inligting betrekking het nie, redelike bewys van die hoedanigheid waarin die versoeker die versoek rig,

in te dien.

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(3) If a requester can, according to the purposes for which access is sought, be classified as a personal, non-commercial and commercial requester or as any two of those requesters, that requester is regarded, for the purposes of this Act, to be that type of requester who would, upon the request for access being granted, be liable to pay the higher or highest access fee in respect of the request.

(4)*(a)* An individual who because of illiteracy, poor literacy or a physical disability is unable to make a request for access to a record of a governmental body in accordance with subsection (1), may make that request orally.

(b) The information officer of that body must reduce that oral request to writing in the prescribed form and provide a copy thereof to the requester.

(5) A request for access to a record containing personal information may be made—

(a) by the person to whom or which the personal information relates or that person's authorised representative;

(b) if the individual contemplated in paragraph *(a)* is—

(i) under the age of 16 years, by a person having parental responsibility for the individual;

(ii) incapable of managing his or her own affairs, by a person appointed by the court to manage those affairs; or

(iii) deceased, by the executor of his or her estate.

Duty to assist requesters

14. (1) If a requester informs the information officer of a governmental body that he or she wishes to make a request for access to a record of that or another governmental body, the information officer must render such assistance, free of charge, as is necessary to enable that requester to comply with section 13(1).

(2) If a requester has made a request for access that does not comply with section 13(1), the information officer concerned may not refuse the request because of that non-compliance unless the information officer has—

(a) notified that requester of an intention to refuse the request and stated in the notice—

(i) the reasons for the contemplated refusal; and

(ii) that the information officer or another official identified by the information officer would assist that requester in order to make the request in a form that would remove the grounds for refusal;

(b) given the requester a reasonable opportunity to seek such assistance;

(c) as far as reasonably possible, furnished the requester with any information (including information about the records, other than information on the basis of which a request for access is required or permitted by this Act to be refused, held by the body which are relevant to the request) that would assist the making of the request in that form; and

(d) given the requester a reasonable opportunity to confirm the request or alter it to comply with section 13(1).

(3) When computing any period referred to in section 19(1) or 20(2) or (3), the period commencing on the date on which notice is given in terms of subsection (2) and ending on the date on which the person confirms or alters the request for access concerned must be disregarded.

(4) If it is apparent on receipt of a request for access that it should have been made to another governmental body, the information officer of the governmental body concerned must—

(a) render such assistance as is necessary to enable the person to make the request, to the information officer of the appropriate governmental body; or

(b) transfer the request in accordance with section 15 to the last-mentioned information officer,

whichever will result in the request being dealt with earlier.

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(3) Indien 'n versoeker, volgens die doeleindes waarvoor toegang verlang word, geklassifiseer kan word as 'n persoonlike, nie-kommersiële en kommersiële versoeker of as enige twee van daardie versoekers, word daardie versoeker, vir die doeleindes van hierdie Wet, geag die tipe versoeker te wees wat, nadat die versoek om toegang toegestaan is, die hoër of hoogste toegangsgelde ten opsigte van die versoek sal moet betaal.

(4)*(a)* 'n Individu wat vanweë ongeletterdheid, swak geletterdheid of 'n fisiese gebrek nie in staat is om 'n versoek om toegang tot 'n rekord van 'n regeringsliggaam ooreenkomstig subartikel (1) in te dien nie, kan daardie versoek mondeling rig.

(b) Die inligtingsbeampte van daardie liggaam moet daardie mondelinge versoek omskep in skrif in die voorgeskrewe vorm en 'n afskrif daarvan aan die versoeker verskaf.

(5) 'n Versoek om toegang tot 'n rekord wat persoonlike inligting bevat, kan gerig word—

(a) deur die persoon op wie die persoonlike inligting betrekking het of daardie persoon se gemagtigde verteenwoordiger;

(b) indien die individu beoog in paragraaf *(a)*—

(i) onder die ouderdom van 16 jaar is, deur 'n persoon wat ouerlike verantwoordelikheid vir die individu het;

(ii) nie in staat is om sy of haar eie sake te hanteer nie, deur 'n persoon deur die hof aangestel om daardie sake te hanteer; of

(iii) oorlede is, deur die eksekuteur van sy of haar boedel.

Plig om bystand aan versoekers te verleen

14. (1) Indien 'n versoeker die inligtingsbeampte van 'n regeringsliggaam inlig dat hy of sy 'n versoek om toegang tot 'n rekord van daardie of 'n ander regeringsliggaam wil rig, moet die inligtingsbeampte die bystand wat nodig is om die versoeker in staat te stel om aan artikel 13(1) te voldoen, gratis verleen.

(2) Indien 'n versoeker 'n versoek om toegang gerig het wat nie aan artikel 13(1) voldoen nie, mag die betrokke inligtingsbeampte nie die versoek vanweë daardie nie-nakoming weier nie, tensy die inligtingsbeampte—

(a) daardie versoeker in kennis gestel het van 'n voorneme om die versoek te weier en in die kennisgewing gemeld het—

(i) die redes vir die beoogde weiering; en

(ii) dat die inligtingsbeampte of 'n ander amptenaar geïdentifiseer deur die inligtingsbeampte bystand aan daardie versoeker sal verleen ten einde die versoek te rig in 'n vorm wat die gronde vir weiering sal ophef;

(b) aan die versoeker 'n redelike geleentheid gegee het om om sodanige bystand te vra;

(c) so ver as wat redelikerwys moontlik is, die versoeker voorsien het van enige inligting (insluitende inligting oor die rekords, uitgesonderd inligting op grond waarvan 'n versoek om toegang ingevolge hierdie Wet geweier moet of mag word, gehou deur die liggaam wat ter sake is vir die versoek) wat van hulp sal wees om die versoek in daardie vorm te rig; en

(d) aan die versoeker 'n redelike geleentheid gegee het om die versoek te bevestig of dit te wysig ten einde aan artikel 13(1) te voldoen.

(3) By die berekening van enige tydperk bedoel in artikel 19(1) of 20(2) of (3), moet die tydperk wat begin op die datum waarop kennis gegee word ingevolge subartikel (2) en eindig op die datum waarop die persoon die betrokke versoek om toegang bevestig of wysig, buite rekening gelaat word.

(4) Indien dit by ontvangs van 'n versoek om toegang duidelik is dat dit aan 'n ander regeringsliggaam gerig moes gewees het, moet die inligtingsbeampte van die betrokke regeringsliggaam—

(a) die bystand verleen wat nodig is om die persoon in staat te stel om die versoek aan die inligtingsbeampte van die toepaslike regeringsliggaam te rig; of

(b) die versoek in ooreenstemming met artikel 15 na laasgenoemde inligtingsbeampte oorplaas,

na gelang van watter een daartoe sal lei dat die versoek vroeër gehanteer word.

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Transfer of requests

15. (1) If a request for access is made to the information officer of a governmental body in respect of which—

(a) the record is not in the possession or under the control of that body but is in the possession of another governmental body;

(b) the record's subject matter is more closely connected with the functions of another governmental body than those of the governmental body of the information officer to whom the request is made; or

(c) the record contains commercial information contemplated in section 38(2) in which any other governmental body has a greater commercial interest,

the information officer to whom the request is made must as soon as reasonably possible, but in any event within 14 days after the request is received—

(i) transfer the request to the information officer of the other governmental body or, if there is in the case of paragraph *(c)* more than one other governmental body having a commercial interest, the other governmental body with the greatest commercial interest; and

(ii) if the governmental body of the information officer to whom the request is made is in possession of the record and considers it helpful to do so to enable the information officer of the other governmental body to deal with the request, send the record or a copy of the record to that information officer.

(2) If a request for access is made to the information officer of a governmental body in respect of which—

(a) the record is not in the possession or under the control of the governmental body of that information officer and the information officer does not know which governmental body has possession or control of the record;

(b) the record's subject matter is not closely connected to the functions of the governmental body of that information officer and the information officer does not know whether the record is more closely connected with the functions of another governmental body than those of the governmental body of the information officer to whom the request is made; and

(c) the record—

(i) was created by or for another governmental body; or

(ii) was not so created by or for any governmental body, but was received first by another governmental body,

the information officer to whom the request is made, must as soon as reasonably possible, but in any event within 14 days after the request is received, transfer the request to the information officer of the governmental body by or for which the record was created or which received it first, as the case may be.

(3) If a request for access which is to be transferred includes an urgent request application, the request must be so transferred immediately or, if that is not reasonably possible, as soon as reasonably possible, but in any event, within five working days after it is received.

(4) Subject to subsection (5), the information officer to whom a request for access is transferred, must give priority to that request in relation to other requests as if it were received by him or her on the date it was received by the information officer who transferred the request.

(5) If a request for access is transferred, any period referred to in section 19(1) or 20(2) or (3) must be computed from the date the request is received by the information officer to whom the request is transferred.

(6) Upon the transfer of a request for access, the information officer making the transfer must immediately notify the requester of—

(a) the transfer;

(b) the reasons for the transfer; and

(c) the period within which the request must be dealt with.

Preservation of records until final decision on request

16. If the information officer of a governmental body has received a request for access to a record of the body, the head of the body must take the steps that are reasonably necessary to preserve the record, without deleting any information contained in it, until

Oorplasing van versoeke

15. (1) Indien 'n versoek om toegang gerig word aan die inligtingsbeampte van 'n regeringsliggaam ten opsigte waarvan—

(a) die rekord nie in besit of onder beheer van daardie liggaam is nie maar in besit van 'n ander regeringsliggaam is;

(b) die rekord se onderwerp nouer verband hou met die funksies van 'n ander regeringsliggaam as dié van die regeringsliggaam van die inligtingsbeampte aan wie die versoek gerig word; of

(c) die rekord kommersiële inligting beoog in artikel 38(2) bevat waarin 'n ander regeringsliggaam 'n groter kommersiële belang het,

moet die inligtingsbeampte aan wie die versoek gerig word, so gou as wat redelikerwys moontlik is, maar in elk geval binne 14 dae nadat die versoek ontvang is—

(i) die versoek na die inligtingsbeampte van die ander regeringsliggaam oorplaas of, indien daar in die geval van paragraaf *(c)* meer as een ander regeringsliggaam is wat 'n kommersiële belang het, die ander regeringsliggaam wat die grootste kommersiële belang het; en

(ii) indien die regeringsliggaam van die inligtingsbeampte aan wie die versoek gerig word, in besit is van die rekord en dit nuttig ag om dit te doen ten einde die inligtingsbeampte van die ander regeringsliggaam in staat te stel om die versoek te hanteer, die rekord of 'n afskrif van die rekord aan daardie inligtingsbeampte stuur.

(2) Indien 'n versoek om toegang aan die inligtingsbeampte van 'n regeringsliggaam gerig word ten opsigte waarvan—

(a) die rekord nie in besit of onder beheer van die regeringsliggaam van daardie inligtingsbeampte is nie en die inligtingsbeampte nie weet in watter regeringsliggaam se besit of onder watter regeringsliggaam se beheer die rekord is nie;

(b) die onderwerp van die rekord nie nóú verband hou met die funksies van die regeringsliggaam van daardie inligtingsbeampte nie en die inligtingsbeampte nie weet of die rekord nouer verband hou met die funksies van 'n ander regeringsliggaam as dié van die regeringsliggaam van die inligtingsbeampte aan wie die versoek gerig word nie; en

(c) die rekord—

(i) deur of vir 'n ander regeringsliggaam geskep is; of

(ii) nie aldus deur of vir 'n regeringsliggaam geskep is nie maar eerste deur 'n ander regeringsliggaam ontvang is,

moet die inligtingsbeampte aan wie die versoek gerig word, so gou as wat redelikerwys moontlik is, maar in elk geval binne 14 dae nadat die versoek ontvang is, die versoek oorplaas na die inligtingsbeampte van die regeringsliggaam deur of vir wie die rekord geskep is of wat dit eerste ontvang het, na gelang van die geval.

(3) Indien 'n versoek om toegang wat oorgeplaas moet word, 'n aansoek om dringende versoek insluit, moet die versoek onmiddellik aldus oorgeplaas word of, indien dit nie redelikerwys moontlik is nie, so gou as wat redelikerwys moontlik is, maar in elk geval binne vyf werkdae nadat dit ontvang is.

(4) Behoudens subartikel (5) moet die inligtingsbeampte na wie 'n versoek om toegang oorgeplaas word, prioriteit verleen aan daardie versoek in verhouding tot ander versoeke asof dit deur hom of haar ontvang is op die datum waarop dit deur die inligtingsbeampte wat die versoek oorgeplaas het, ontvang is.

(5) Indien 'n versoek om toegang oorgeplaas word, moet enige tydperk bedoel in artikel 19(1) of 20(2) of (3) bereken word vanaf die datum waarop die versoek ontvang word deur die inligtingsbeampte na wie die versoek oorgeplaas word.

(6) By die oorplasing van 'n versoek om toegang moet die inligtingsbeampte wat die oorplasing doen, onmiddellik die versoeker in kennis stel van—

(a) die oorplasing;

(b) die redes vir die oorplasing; en

(c) die tydperk waarbinne die versoek hanteer moet word.

Bewaring van rekords tot finale besluit oor versoek

16. Indien die inligtingsbeampte van 'n regeringsliggaam 'n versoek om toegang tot 'n rekord van die liggaam ontvang het, moet die hoof die stappe doen wat redelikerwys nodig is om die rekord te bewaar, sonder uitwissing van enige inligting daarin vervat,

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the information officer has notified the requester concerned of his or her decision in terms of section 19 and—

(a) the periods for lodging an internal appeal with that head, an application with a High Court or an appeal against a decision of that Court have expired; or

(b) that internal appeal, application or appeal against a decision of that Court or other legal proceedings in connection with the request has been finally determined,

whichever is the later.

Payment of request fee

17. (1) A commercial requester must, when making his or her request for access, pay the prescribed request fee.

(2) If—

(a) there are reasonable grounds for believing that a requester is a commercial requester; and

(b) that requester has not paid the prescribed request fee,

the information officer of the governmental body concerned must by notice require the requester to pay that fee.

(3) That notice must state—

(a) that the requester may lodge an internal appeal with the head of the body against the payment of the fee; and

(b) the procedure (including the period) for lodging the internal appeal.

(4) If the prescribed request fee is payable in respect of a request for access, the decision on the request in terms of section 19 may be deferred until the fee is paid.

Payment of deposit

18. (1) If—

(a) the search for a record of a governmental body in respect of which a request for access by a non-commercial or commercial requester has been made; and

(b) the preparation of the record for disclosure (including any arrangements contemplated in section 25(2)*(a)* and *(b)*(i) and (ii)*(aa)*),

would, in the opinion of the information officer of the body, require more than the hours prescribed for this purpose for non-commercial or commercial requesters, as the case may be, the information officer must by notice require the requester to pay as a deposit the prescribed portion (being not more than one third) of the access fee which would be payable if the request is granted.

(2) No deposit is payable in respect of a request for access by—

(a) a personal requester; or

(b) a member of Parliament, a provincial legislature or a municipal council in connection with the member's official duties.

(3) The notice referred to in subsection (1) must state—

(a) the amount of the deposit; and

(b) that the requester may lodge an internal appeal with the head of the governmental body concerned against the payment of a deposit, and the procedure (including the period) for lodging the internal appeal.

(4) If a deposit is payable in respect of a request for access, the decision on the request in terms of section 19 may be deferred until the deposit is paid.

(5) If a deposit has been paid in respect of a request for access which is refused, the information officer concerned must repay the deposit to the requester.

Decision on request and notice thereof

19. (1) The information officer to whom a request for access is made or transferred, must, subject to sections 20 and 21 and Chapter 3 of this Part, as soon as reasonably possible, but in any event, within 30 days, after the request is received or transferred—

(a) decide in accordance with this Act whether to grant the request; and

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totdat die inligtingsbeampte die betrokke versoeker in kennis gestel het van sy of haar besluit ingevolge artikel 19 en—

(a) die tydperke vir die aanteken van 'n interne appèl by daardie hoof, die indien van 'n aansoek by 'n Hoë Hof of die aanteken van 'n appèl teen 'n beslissing van daardie Hof verstryk het; of

(b) daardie interne appèl, aansoek of appèl teen 'n beslissing van daardie Hof of ander geregtelike verrigtinge in verband met die versoek finaal beslis is,

na gelang van watter een die laatste is.

Betaling van versoekgelde

17. (1) 'n Kommersiële versoeker moet, wanneer sy of haar versoek om toegang gerig word, die voorgeskrewe versoekgelde betaal.

(2) Indien—

(a) daar redelike gronde is om te glo dat 'n versoeker 'n kommersiële versoeker is; en

(b) daardie versoeker nie die voorgeskrewe versoekgelde betaal het nie,

moet die inligtingsbeampte van die betrokke regeringsliggaam by kennisgewing die versoeker versoek om daardie gelde te betaal.

(3) Daardie kennisgewing moet—

(a) meld dat die versoeker 'n interne appèl teen die betaling van die gelde kan aanteken by die hoof van die liggaam; en

(b) die prosedure (insluitende die tydperk) vir die aanteken van die interne appèl meld.

(4) Indien die voorgeskrewe versoekgelde betaalbaar is ten opsigte van 'n versoek om toegang, kan die besluit oor die versoek ingevolge artikel 19 uitgestel word totdat die gelde betaal is.

Betaling van deposito

18. (1) Indien—

(a) die soek na 'n rekord van 'n regeringsliggaam ten opsigte waarvan 'n versoek om toegang deur 'n nie-kommersiële of kommersiële versoeker gerig is; en

(b) die voorbereiding van die rekord vir openbaarmaking (insluitende enige reëlings beoog in artikel 25(2)*(a)* en *(b)*(i) en (ii)*(aa)*),

na die mening van die inligtingsbeampte van die liggaam meer as die ure voorgeskryf vir hierdie doel vir nie-kommersiële of kommersiële versoekers, na gelang van die geval, sal benodig, moet die inligtingsbeampte by kennisgewing van die versoeker verlang om die voorgeskrewe gedeelte (synde hoogstens een derde) van die toegangsgelde wat betaalbaar sou wees indien die versoek toegestaan word, as 'n deposito te betaal.

(2) Geen deposito is betaalbaar nie ten opsigte van 'n versoek om toegang deur—

(a) 'n persoonlike versoeker; of

(b) 'n lid van die Parlement, 'n provinsiale wetgewer of 'n munisipale raad in verband met die lid se amptelike pligte.

(3) Die kennisgewing bedoel in subartikel (1) moet meld—

(a) die bedrag van die deposito; en

(b) dat die versoeker 'n interne appèl teen die betaling van 'n deposito kan aanteken by die hoof van die betrokke regeringsliggaam, en die prosedure (insluitende die tydperk) vir die aanteken van die interne appèl.

(4) Indien 'n deposito betaalbaar is ten opsigte van 'n versoek om toegang, kan die besluit oor die versoek ingevolge artikel 19 uitgestel word totdat die deposito betaal is.

(5) Indien 'n deposito betaal is ten opsigte van 'n versoek om toegang wat geweier word, moet die betrokke inligtingsbeampte die deposito aan die versoeker terugbetaal.

Besluit oor versoek en kennisgewing daarvan

19. (1) Die inligtingsbeampte aan wie 'n versoek om toegang gerig of oorgeplaas word, moet, behoudens artikels 20 en 21 en Hoofstuk 3 van hierdie Deel, sou gou as wat redelikerwys moontlik is, maar in elk geval binne 30 dae, nadat die versoek ontvang of oorgeplaas is—

(a) ooreenkomstig hierdie Wet besluit om die versoek toe te staan al dan nie; en

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(b) notify the requester of the decision and, if the requester stated as contemplated in section 13(2)*(f)* that he or she wishes to be informed of the decision in any other manner, inform him or her in that manner if it is reasonably possible.

(2) If the request for access is granted, the notice in terms of subsection (1)*(b)* must state—

(a) the access fee (if any) to be paid upon access;

(b) the form in which access will be given; and

(c) that the requester may lodge an internal appeal with the head of the governmental body concerned against the access fee to be paid or the form of access granted, and the procedure (including the period) for lodging the internal appeal.

(3) If the request for access is refused, the notice in terms of subsection (1)*(b)* must state—

(a) the findings on all material questions of fact, referring to the material on which those findings were based;

(b) the reasons for the refusal (including the provisions of this Act relied upon to justify the refusal) in such manner as to enable the requester—

(i) to understand the justification for the refusal; and

(ii) to make an informed decision about whether to lodge an internal appeal with the head of the governmental body concerned or to utilise any other remedy in law available to the requester; and

(c) that the requester may lodge an internal appeal with the head of the governmental body against the refusal of the request, and the procedure (including the period) for lodging the internal appeal.

Urgent requests

20. (1) A requester who wishes to obtain access to a record of a governmental body urgently must include an application to that effect in the request for access, and give reasons for the urgency.

(2) If a request for access includes an urgent request application, the information officer concerned must, subject to Chapter 3 of this Part, immediately or, if that is not reasonably possible, as soon as reasonably possible, but in any event within five working days, after the request for access has been received or transferred, decide on the request and give notice of the decision in accordance with section 19, unless there are reasonable grounds for believing that—

(a) the nature of the reasons for the urgency furnished by the requester is such that the requester will suffer no prejudice if the request is decided upon within the applicable period contemplated in section 19(1); or

(b) it is impractical to decide on the request within five working days after the request has been received or transferred.

(3) If the information officer refuses an urgent request application on grounds referred to in subsection (2)*(a)* or *(b)*, he or she must immediately or, if that is not reasonably possible, as soon as reasonably possible, but in any event, within five working days, after the request for access has been received or transferred, notify the requester of the refusal.

(4) The notice in terms of subsection (3) must state—

(a) the findings on all material questions of fact, referring to the material on which those findings were based;

(b) the reasons for the refusal (including the provisions of this section relied upon to justify the refusal) in such manner as to enable the requester—

(i) to understand the justification for the refusal; and

(ii) to make an informed decision about whether to lodge an internal appeal with the head of the governmental body concerned or an application with a High Court or to utilise any other remedy in law available to the requester; and

(c) that the requester may lodge an internal appeal with the head of the

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(b) die versoeker van die besluit in kennis stel en, indien die versoeker gemeld het dat hy of sy soos beoog in artikel 13(2)*(f)* op 'n ander wyse oor die besluit ingelig wil word, hom of haar op daardie wyse inlig indien dit redelikerwys moontlik is.

(2) Indien die versoek om toegang toegestaan word, moet die kennisgewing ingevolge subartikel (1)*(b)*—

(a) die toegangsgeld (indien daar is) wat by toegang betaalbaar is, meld;

(b) die vorm waarin toegang verleen sal word, meld; en

(c) meld dat die versoeker 'n interne appèl teen die toegangsgelde wat betaal moet word of die vorm van toegang wat toegestaan is, kan aanteken by die hoof van die betrokke regeringsliggaam, en die prosedure (insluitende die tydperk) vir die aanteken van die interne appèl.

(3) Indien die versoek om toegang geweier word, moet die kennisgewing ingevolge subartikel (1)*(b)*—

(a) die bevindings oor alle wesenlike feitevrae, met verwysing na die gegewens waarop daardie bevindings gebaseer is, meld;

(b) die redes vir die weiering (insluitende die bepalings van hierdie Wet waarop gesteun is om die weiering te regverdig) op die wyse wat die versoeker in staat stel—

(i) om die regverdiging vir die weiering te begryp; en

(ii) om 'n ingeligte besluit te neem oor of 'n interne appèl by die hoof van die betrokke regeringsliggaam aangeteken moet word, en of enige ander regsmiddel wat vir die versoeker beskikbaar is, benut moet word,

meld; en

(c) meld dat die versoeker 'n interne appèl teen die weiering van die versoek by die hoof van die regeringsliggaam kan aanteken, en die prosedure (insluitende die tydperk) vir die aanteken van die interne appèl.

Dringende versoeke

20. (1) 'n Versoeker wat dringend toegang tot 'n rekord van 'n regeringsliggaam verlang, moet 'n aansoek te dien effekte in die versoek om toegang insluit, en redes vir die dringendheid gee.

(2) Indien 'n versoek om toegang 'n aansoek om dringende versoek insluit, moet die betrokke inligtingsbeampte, behoudens Hoofstuk 3 van hierdie Deel, onmiddellik of, indien dit nie redelikerwys moontlik is nie, so gou as wat dit redelikerwys moontlik is, maar in elk geval binne vyf werkdae, nadat die versoek om toegang ontvang of oorgeplaas is, oor die versoek besluit en ooreenkomstig artikel 19 die versoeker in kennis stel van die besluit, tensy daar redelike gronde is om te glo dat—

(a) die aard van die redes vir die dringendheid wat deur die versoeker verskaf is, sodanig is dat dit nie tot nadeel van die versoeker sal wees nie indien daar binne die toepaslike tydperk beoog in artikel 19(1) oor die versoek besluit word; of

(b) dit onprakties is om binne vyf werkdae nadat die versoek ontvang of oorgeplaas is, oor die versoek te besluit.

(3) Indien die inligtingsbeampte 'n aansoek om dringende versoek op die gronde bedoel in subartikel (2)*(a)* of *(b)* weier, moet hy of sy onmiddellik of, indien dit nie redelikerwys moontlik is nie, so gou as wat dit redelikerwys moontlik is, maar in elk geval binne vyf werkdae, nadat die versoek om toegang ontvang of oorgeplaas is, die versoeker van die weiering in kennis stel.

(4) Die kennisgewing ingevolge subartikel (3) moet—

(a) die bevindings oor alle wesenlike feitevrae, met verwysing na die gegewens waarop daardie bevindings gebaseer is, meld;

(b) die redes vir die weiering (insluitende die bepalings van hierdie artikel waarop gesteun is om die weiering te regverdig) op die wyse wat die versoeker in staat stel—

(i) om die regverdiging vir die weiering te begryp; en

(ii) om 'n ingeligte besluit te neem oor of 'n interne appèl by die hoof van die betrokke regeringsliggaam aangeteken of 'n aansoek by 'n Hoë Hof ingedien moet word, en of enige ander regsmiddel wat vir die versoeker beskikbaar is, benut moet word,

meld; en

(c) meld dat die versoeker 'n interne appèl by die hoof van die regeringsliggaam

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governmental body, or an application with a High Court, against the refusal of that urgent request application, and the procedure (including the periods) for lodging the internal appeal and the application with a High Court.

(5) If the notice in terms of subsection (2) or (3) of a decision is not given by fax, the requester must be informed by phone of the decision.

Extension of period to deal with request

21. (1) Subject to section 20, the information officer to whom a request for access has been made or transferred, may extend the period of 30 days referred to in section 19(1) (in this section referred to as the "original period") once for a further period of not more than 30 days, if—

(a) the request is for a large number of records or requires a search through a large number of records and compliance with the original period would unreasonably interfere with the activities of the governmental body concerned;

(b) the request requires a search for records in, or collection thereof from, an office of the governmental body not situated in the same town or city as the office of the information officer that cannot reasonably be completed within the original period;

(c) consultation among divisions of the governmental body or with another governmental body is necessary or desirable to decide upon the request that cannot reasonably be completed within the original period; or

(d) more than one of the circumstances contemplated in paragraphs *(a)*, *(b)* and *(c)* exist in respect of the request making compliance with the original period not reasonably possible.

(2) If a period is extended in terms of subsection (1), the information officer must, as soon as reasonably possible, but in any event, within 30 days, after the request is received or transferred, notify the requester of that extension.

(3) The notice in terms of subsection (2) must state—

(a) the period of the extension;

(b) the reasons for the extension (including the provisions of this Act relied upon to justify the refusal) in such manner as to enable the requester—

(i) to understand the justification for the extension; and

(ii) to make an informed decision about whether to lodge an internal appeal with the head of the governmental body concerned or to utilise any other remedy in law available to the requester; and

(c) that the requester may lodge an internal appeal with the head of the governmental body against the extension, and the procedure (including the period) for lodging the internal appeal.

Deemed refusal of request

22. If an information officer fails to give his or her decision on a request for access within the period contemplated in section 19(1), the information officer is, for the purposes of this Act, regarded to have refused the request.

Severability

23. (1) If a request for access to a record of a governmental body containing information which is required by section 29 or 31, or permitted by section 30, 32, 33, 34, 36, 37, 38, 39 or 42, to be refused, is made, every part of the record which—

(a) does not contain; and

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

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

(2) If a request for access to—

(a) a part of a record is granted; and

(b) the other part of the record is refused,

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kan aanteken, of 'n aansoek by 'n Hoë Hof kan indien, teen die weiering van daardie aansoek om dringende versoek, en die prosedure (insluitende die tydperke) vir die aanteken van die interne appèl en die indien van die aansoek by 'n Hoë Hof.

(5) Indien die kennisgewing ingevolge subartikel (2) of (3) van 'n besluit nie per faks gegee word nie, moet die versoeker telefonies oor die besluit ingelig word.

Verlenging van tydperk om die versoek af te handel

21. (1) Behoudens artikel 20 kan die inligtingsbeampte aan wie 'n versoek om toegang gerig is of na wie dit oorgeplaas is, die tydperk van 30 dae bedoel in artikel 19(1) (in hierdie artikel die "oorspronklike tydperk" genoem) een maal verleng vir 'n verdere tydperk van hoogstens 30 dae, indien—

(a) die versoek om 'n groot aantal rekords is of die soek deur 'n groot aantal rekords verg, en nakoming van die oorspronklike tydperk onredelik met die aktiwiteite van die betrokke regeringsliggaam sou inmeng;

(b) die versoek 'n soek verg na rekords in, of die afhaal daarvan by, 'n kantoor van die regeringsliggaam wat nie in dieselfde dorp of stad as die kantoor van die inligtingsbeampte geleë is nie, welke versoek nie redelikerwys binne die oorspronklike tydperk afgehandel kan word nie;

(c) oorlegpleging tussen afdelings van die regeringsliggaam of met 'n ander regeringsliggaam nodig of wenslik is ten einde te besluit oor die versoek wat nie redelikerwys binne die oorspronklike tydperk afgehandel kan word nie; of

(d) meer as een van die omstandighede beoog in paragrawe *(a)*, *(b)* en *(c)* ten opsigte van die versoek bestaan, wat dit redelikerwys onmoontlik maak om die oorspronklike tydperk na te kom.

(2) Indien 'n tydperk verleng word ingevolge subartikel (1), moet die inligtingsbeampte so gou as wat redelikerwys moontlik is, maar in elk geval binne 30 dae, nadat die versoek ontvang of oorgeplaas is, die versoeker van daardie verlenging in kennis stel.

(3) Die kennisgewing ingevolge subartikel (2) moet—

(a) die tydperk van die verlenging meld;

(b) die redes vir die verlenging (insluitende die bepalings van hierdie Wet waarop gesteun is om die weiering te regverdig) op die wyse wat die versoeker in staat stel—

(i) om die regverdiging vir die verlenging te begryp; en

(ii) om 'n ingeligte besluit te neem oor of 'n interne appèl by die hoof van die betrokke regeringsliggaam aangeteken moet word, en of enige ander regsmiddel wat vir die versoeker beskikbaar is, benut moet word,

meld; en

(c) meld dat die versoeker 'n interne appèl by die hoof van die regeringsliggaam teen die verlenging kan aanteken, en die prosedure (insluitende die tydperk) vir die aanteken van die interne appèl.

Versoek wat geweier geag word

22. Indien 'n inligtingsbeampte versuim om sy of haar besluit oor 'n versoek om toegang binne die tydperk beoog in artikel 19(1) te gee, word die inligtingsbeampte, vir die doeleindes van hierdie Wet, geag die versoek te geweier het.

Skeibaarheid

23. (1) Indien 'n versoek om toegang tot 'n rekord van 'n regeringsliggaam gerig word wat inligting bevat wat ingevolge artikel 29 of 31 geweier moet word of ingevolge artikel 30, 32, 33, 34, 36, 37, 38, 39 of 42 geweier kan word, moet elke deel van die rekord wat—

(a) geen sodanige inligting bevat nie; en

(b) redelikerwys geskei kan word van enige deel wat sodanige inligting bevat,

ondanks enige ander bepaling van hierdie Wet, openbaar gemaak word.

(2) Indien 'n versoek om toegang tot—

(a) 'n gedeelte van 'n rekord toegestaan word; en

(b) die ander gedeelte van die rekord geweier word,

as contemplated in subsection (1), the provisions of section 19(2), apply to paragraph *(a)* of this section and the provisions of section 19(3) to paragraph *(b)* of this section.

Access fees

24. (1) A requester whose request for access to a record of a governmental body has been granted may be given access to the record only if he or she has paid the applicable prescribed access fee (if any).

(2) Access fees prescribed for the purposes of subsection (1) must provide for a reasonable access fee for—

(a) the cost of making a copy of a record, or of a transcription of the content of a record, as contemplated in section 25(2)*(a)* and *(b)*(i), (ii)*(bb)*, (iii), (iv) and (v) and, if applicable, the postal fee (in this section referred to as an "access fee for reproduction"); and

(b) the time reasonably required to search for the record and prepare (including making any arrangements contemplated in section 25(2)*(a)* and *(b)*(i) and (ii)*(aa)*) the record for disclosure to the requester (in this section referred to as an "access fee for search and preparation").

(3) A personal requester must pay an access fee for reproduction only.

(4) A non-commercial requester must pay an access fee for reproduction and for search and preparation for any time reasonably required in excess of the prescribed hours to search for and prepare (including making any arrangements contemplated in section 25(2)*(a)* and *(b)*(i) and (ii)*(aa)*) the record for disclosure.

(5) A commercial requester must pay an access fee for reproduction and for search and preparation.

(6) A member of Parliament, a provincial legislature or a municipal council who makes a request for access in connection with his or her work as such member does not have to pay any access fee in respect of the request.

Access and forms of access

25. (1) If a requester has been given notice in terms of section 19(1) that his or her request for access has been granted, that requester must, subject to subsections (3), (9) and (10)—

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

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

be given access in the applicable forms referred to in subsection (2) as the requester indicated in the request, and in the language contemplated in section 26.

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

(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 governmental 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 governmental body concerned—

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

(bb) if the governmental 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

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soos beoog in subartikel (1), is die bepalings van artikel 19(2), op paragraaf *(a)* van hierdie artikel van toepassing en die bepalings van artikel 19(3) op paragraaf *(b)* van hierdie artikel.

Toegangsgelde

24. (1) 'n Versoeker wie se versoek om toegang tot 'n rekord van 'n regeringsliggaam toegestaan is, kan toegang tot die rekord verleen word slegs indien hy of sy die toepaslike voorgeskrewe toegangsgelde (indien daar is) betaal het.

(2) Toegangsgelde voorgeskryf vir die doeleindes van subartikel (1), moet voorsiening maak vir redelike toegangsgelde vir—

(a) die koste van die maak van 'n afskrif van 'n rekord, of van 'n transkripsie van die inhoud van 'n rekord, soos beoog in artikel 25(2)*(a)* en *(b)*(i), (ii)*(bb)*, (iii), (iv) en (v) en, indien toepaslik, die posgelde (in hierdie artikel "toegangsgelde vir reproduksie" genoem); en

(b) die tyd wat redelikerwys benodig word om na die rekord te soek en dit voor te berei (insluitende die tref van enige reëlings bedoel in artikel 25(2)*(a)* en *(b)*(i) en (ii)*(aa)*) vir openbaarmaking aan die versoeker (in hierdie artikel "toegangsgelde vir soek en voorbereiding" genoem).

(3) 'n Persoonlike versoeker moet slegs toegangsgelde vir reproduksie betaal.

(4) 'n Nie-kommersiële versoeker moet toegangsgelde vir reproduksie en vir soek en voorbereiding betaal vir enige tydperk van langer as die voorgeskrewe ure wat redelikerwys benodig word vir die soek na en voorbereiding van (insluitende die tref van enige reëlings bedoel in artikel 25(2)*(a)* en *(b)*(i) en (ii)*(aa)*) die rekord vir openbaarmaking.

(5) 'n Kommersiële versoeker moet toegangsgelde vir reproduksie en vir soek en voorbereiding betaal.

(6) 'n Lid van die Parlement, 'n provinsiale wetgewer of 'n munisipale raad wat 'n versoek om toegang rig in verband met sy of haar werk as sodanige lid, hoef nie enige toegangsgelde ten opsigte van die versoek te betaal nie.

Toegang en vorme van toegang

25. (1) Indien 'n versoeker ingevolge artikel 19(1) kennis gegee is dat sy of haar versoek om toegang toegestaan is, moet daardie versoeker, behoudens subartikels (3), (9) en (10)—

(a) indien toegangsgelde betaalbaar is, by betaling van daardie gelde; of

(b) indien geen toegangsgelde betaalbaar is nie, onmiddellik,

toegang verleen word in die toepaslike vorme bedoel in subartikel (2) soos wat die versoeker in die versoek aangedui het, en in die taal beoog in artikel 26.

(2) Die vorme van toegang tot 'n rekord ten opsigte waarvan 'n versoek van toegang toegestaan is, is die volgende:

(a) Indien die rekord in skriftelike of gedrukte vorm is, deur die verskaffing van 'n afskrif van die rekord of deur die tref van reëlings vir insae in die rekord;

(b) indien die rekord nie in skriftelike of gedrukte vorm is nie—

(i) in die geval van 'n rekord waarvan visuele afbeeldings of gedrukte transkripsies van daardie afbeeldings gereproduseer kan word deur middel van toerusting wat normaalweg vir die betrokke regeringsliggaam beskikbaar is, deur die tref van reëlings om daardie afbeeldings te besigtig of om van afskrifte of transkripsies daarvan voorsien te word;

(ii) in die geval van 'n rekord waarin woorde of inligting op 'n wyse opgeneem is wat in die vorm van klank gereproduseer kan word deur toerusting wat normaalweg vir die betrokke regeringsliggaam beskikbaar is—

(aa) deur die tref van reëlings om daardie klanke te hoor; of

(bb) indien die regeringsliggaam in staat is om 'n skriftelike of gedrukte transkripsie van daardie klanke te produseer deur die gebruik van toerusting wat normaalweg vir hom beskikbaar is, deur die verskaffing van so 'n transkripsie;

(iii) in die geval van 'n rekord wat op rekenaar gehou word, of in elektroniese of masjienleesbare vorm, en waarvan die betrokke regeringsliggaam in staat is om 'n gedrukte afskrif van—

(aa) die rekord, of 'n gedeelte daarvan; of

(bb) information derived from the record,
by using computer equipment and expertise ordinarily available to the governmental 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;

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

(3) If a requester has requested access in a particular form, access must, subject to section 23, be given in that form, unless to do so would—

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

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

(c) amount to an infringement of copyright not owned by the state or the governmental body concerned.

(4) If a requester has requested access in a particular form and for a reason referred to in subsection (3) access in that form is refused but access is given in another form, the fee charged may not exceed what would have been charged if that requester had been given access in the form requested.

(5) If a requester with a visual or auditory disability is prevented by that disability from reading, viewing or listening to the record concerned in the form in which it is held by the governmental body concerned, the information officer of the body must, if that requester so requests, take reasonable steps to make the record available in a form in which it is capable of being read, viewed or heard by the requester.

(6) If a record is made available in accordance with subsection (5), the requester may not be required to pay an access fee which is more than the fee which he or she would have been required to pay but for the disability.

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

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

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

(c) amount to an infringement of copyright not owned by the state or the governmental body concerned.

(8) If the supply to a requester of a copy of a record is required by this section, the copy must, if so requested, be supplied by posting it to him or her.

(9) If an internal appeal with the head of a governmental body or an application with a High Court is lodged against the granting of a request for access to a record, access to the record may be given only when the decision to grant the request is finally confirmed.

(10) If a request for access to a record is granted, but a request for correction is pending in respect thereof or a part thereof, access to the record or part thereof, as the case may be, may be given only when the decision on the request for correction has been finally determined.

Language of access

26. A requester whose request for access to a record of a governmental body has been granted must, if the record—

(a) exists in the language that the requester prefers, be given access in that language; or

(b) does not exist in the language so preferred or the requester has no preference, be given access in any language the record exists in.

Reports to Human Rights Commission

27. The head of each governmental body must annually submit to the Human Rights Commission a report stating in relation to the governmental body—

(a) the number of requests for access received;

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(bb) inligting uit die rekord afgelei,
te produseer deur van rekenaartoerusting en vakkundigheid gebruik te maak wat normaalweg vir die regeringsliggaam beskikbaar is, deur die verskaffing van so 'n afskrif;

(iv) in die geval van 'n rekord wat in rekenaarleesbare vorm beskikbaar is of gestel kan word, deur die verskaffing van 'n afskrif in daardie vorm;

(v) in enige ander geval, deur die verskaffing van 'n afskrif van die rekord.

(3) Indien 'n versoeker toegang in 'n bepaalde vorm versoek het, moet toegang, behoudens artikel 23, in daardie vorm gegee word, tensy, indien dit gedoen word, dit—

(a) onredelik met die doeltreffende administrasie van die betrokkke regeringsliggaam sal inmeng;

(b) nadelig vir die bewaring van die rekord sal wees; of

(c) sal neerkom op 'n skending van outeursreg wat nie aan die staat of aan die betrokke regeringsliggaam behoort nie.

(4) Indien 'n versoeker toegang in 'n bepaalde vorm versoek het en om 'n rede bedoel in subartikel (3) toegang in daardie vorm geweier word maar toegang in 'n ander vorm toegestaan word, mag die gelde gehef, nie die gelde te bowe gaan nie wat gehef sou gewees het indien daardie versoeker toegang toegestaan was in die vorm wat hy of sy versoek het.

(5) Indien 'n versoeker met 'n gesigs- of gehoorgestremdheid deur daardie gestremdheid verhinder word om die betrokke rekord te lees, te besigtig of daarna te luister in die vorm waarin dit deur die betrokke regeringsliggaam gehou word, moet die inligtingsbeampte van die liggaam, indien daardie versoeker aldus versoek, redelike stappe doen om die rekord beskikbaar te stel in 'n vorm waarin dit deur die versoeker gelees, besigtig of gehoor kan word.

(6) Indien 'n rekord beskikbaar gestel word ooreenkomstig subartikel (5), mag daar nie van die versoeker verlang word om toegangsgelde te betaal wat meer is as die gelde wat hy of sy sou moes betaal het as dit nie vir die gestremdheid was nie.

(7) Indien 'n rekord ingevolge hierdie artikel aan 'n versoeker beskikbaar gestel word vir insae, besigtiging of aanhoring, kan die versoeker afskrifte maak of die rekord transkribeer deur die versoeker se toerusting te gebruik, tensy, indien dit gedoen word, dit—

(a) onredelik met die doeltreffende administrasie van die betrokke regeringsliggaam sal inmeng;

(b) nadelig vir die bewaring van die rekord sal wees; of

(c) sal neerkom op 'n skending van outeursreg wat nie aan die staat of die betrokke regeringsliggaam behoort nie.

(8) Indien die verskaffing aan 'n versoeker van 'n afskrif van 'n rekord deur hierdie artikel vereis word, moet die afskrif, indien aldus versoek, verskaf word deur dit aan die versoeker te pos.

(9) Indien 'n interne appèl by die hoof van 'n regeringsliggaam aangeteken word of 'n aansoek by 'n Hoë Hof ingedien word teen die toestaan van 'n versoek om toegang tot 'n rekord, kan toegang tot die rekord verleen word slegs wanneer die besluit om die versoek toe te staan, finaal bevestig is.

(10) Indien 'n versoek tot toegang tot 'n rekord verleen word, maar 'n versoek tot regstelling is hangende ten opsigte daarvan of 'n gedeelte daarvan, kan toegang tot die rekord of gedeelte daarvan, na gelang van die geval, slegs verleen word wanneer die versoek om regstelling finaal beslis is.

Taal van toegang

26. 'n Versoeker wie se versoek om toegang tot 'n rekord van 'n regeringsliggaam toegestaan is, moet, indien daardie rekord—

(a) in die taal bestaan wat die versoeker verkies, in daardie taal toegang verleen word; of

(b) nie in die taal aldus verkies bestaan nie of die versoeker geen voorkeur het nie, in enige taal waarin die rekord bestaan, toegang verleen word.

Verslae aan Menseregtekommissie

27. Die hoof van elke regeringsliggaam moet jaarliks aan die Menseregtekommissie 'n verslag voorlê wat met betrekking tot die regeringsliggaam meld—

(a) die getal versoeke om toegang wat ontvang is;

(b) the number of requests for access granted in full;
(c) the number of requests for access granted in terms of section 44;
(d) the number of requests for access refused in full and refused partially and the number of times each provision of this Act relied on to refuse access was invoked to justify refusal in full and partial refusal;
(e) the number of requests for correction and the number of cases in which a correction was made;
(f) the number of cases in which the periods stipulated in sections 19(1) and 52(7), respectively, were extended in terms of section 21(1) and that section, read with section 52(6), respectively;
(g) the number of urgent request applications and urgent appeal applications made and the number of cases in which those applications were granted;
(h) the number of internal appeals lodged with the head of the body and the number of cases in which, as a result of an internal appeal, access was given to a record or a part thereof or a correction of inaccurate personal information was made;
(i) the number of internal appeals which were lodged on the ground that—
(i) a request for access was regarded to have been refused in terms of section 22; and
(ii) a request for correction was regarded to have been refused in terms of section 52(8);
(j) the number of applications to a High Court which were lodged on the ground that an internal appeal was regarded to have been dismissed in terms of section 70(7); and
(k) such other matters as may be prescribed.

CHAPTER 2

GROUNDS FOR REFUSAL OF ACCESS TO RECORDS

Mandatory and discretionary grounds for refusal

28. The information officer of a governmental body—
(a) must refuse a request for access to a record contemplated in section 29(1) or 31(1), unless the provisions of section 44(1) apply;
(b) may refuse a request for access to a record contemplated in—
(i) section 30(2), 33*(a)*, 34(1)*(c)*(ii), (iii) or (vi) or *(d)* or 35, unless the provisions of section 44(1) apply;
(ii) section 32(1) or (3), 33*(b)*, 34(1)*(a)*, *(b)* or *(c)*(i), (iv) or (v), 36, 37(1), 38(1) or (2) or 39(1), unless the provisions of section 44(2) apply;
(iii) section 40, 41(1), 42(1) or 43.

Mandatory protection of privacy

29. (1) Subject to subsection (2), the information officer of a governmental body must refuse a request for access to a record of the body if its disclosure would constitute an invasion of the privacy of an identifiable person (including an individual who died less than 20 years before the request is received) other than the requester concerned or other person contemplated in section 13(5).

(2) Subsection (1) does not apply to a record in so far as it consists of information—
(a) already publicly available;
(b) about a person that has, in accordance with section 46*(b)*, consented to its disclosure to the requester concerned;
(c) about an individual's physical or mental health, or well-being, who is—
(i) under the age of 18 years;
(ii) under the care of the requester; and
(iii) is incapable of understanding the nature of the request,
and if giving access would be in the individual's best interests;
(d) about an individual who is deceased and the requester is, or is requesting with the written consent of, the individual's next of kin; or
(e) about an individual who is or was an official of a governmental body and

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(b) die getal versoeke om toegang ten volle toegestaan;
(c) die getal versoeke om toegang toegestaan ingevolge artikel 44;
(d) die getal versoeke om toegang ten volle geweier en gedeeltelik geweier en die getal kere dat elke bepaling van hierdie Wet waarop gesteun is om toegang te weier, gebruik is om weiering ten volle en gedeeltelike weiering te regverdig;
(e) die getal versoeke om regstelling en die getal gevalle waarin 'n regstelling aangebring is;
(f) die getal gevalle waarin die tydperke gestipuleer in onderskeidelik artikels 19(1) en 52(7), verleng is ingevolge onderskeidelik artikel 21(1) en daardie artikel, saamgelees met artikel 52(6);
(g) die getal aansoeke om dringende versoeke en aansoeke om dringende appèlle gerig en die getal gevalle waarin daardie aansoeke toegestaan is;
(h) die getal interne appèlle aangeteken by die hoof van die liggaam en die aantal gevalle waarin, as gevolg van 'n interne appèl, toegang verleen is tot 'n rekord of 'n gedeelte daarvan of 'n regstelling van foutiewe persoonlike inligting aangebring is;
(i) die getal interne appèlle wat aangeteken is op grond daarvan dat—
(i) 'n versoek om toegang geag geweier te gewees het ingevolge artikel 22; en
(ii) 'n versoek om regstelling geag geweier te gewees het ingevolge artikel 52(8);
(j) die getal aansoeke by 'n Hoë Hof wat ingedien is op grond daarvan dat 'n interne appèl geag afgewys te gewees het ingevolge artikel 70(7); en
(k) sodanige ander aangeleenthede as wat voorgeskryf word.

HOOFSTUK 2

GRONDE VIR WEIERING VAN TOEGANG TOT REKORDS

Verpligte en diskresionêre gronde vir weiering

28. Die inligtingsbeampte van 'n regeringsliggaam—
(a) moet 'n versoek om toegang tot 'n rekord beoog in artikel 29(1) of 31(1) weier, tensy die bepalings van artikel 44(1) van toepassing is;
(b) kan 'n versoek om toegang tot 'n rekord beoog in—
(i) artikel 30(2), 33*(a)*, 34(1)*(c)*(ii), (iii) of (vi) of *(d)* of 35 weier, tensy die bepalings van artikel 44(1) van toepassing is;
(ii) artikel 32(1) of (3), 33*(b)*, 34(1)*(a)*, *(b)* of *(c)*(i), (iv) of (v), 36, 37(1), 38(1) of (2) of 39(1) weier, tensy die bepalings van artikel 44(2) van toepassing is;
(iii) artikel 40, 41(1), 42(1) of 43 weier.

Verpligte beskerming van privaatheid

29. (1) Behoudens subartikel (2) moet die inligtingsbeampte van 'n regeringsliggaam 'n versoek om toegang tot 'n rekord van die liggaam weier indien die openbaarmaking daarvan sal neerkom op inbreuk op die privaatheid van 'n ander identifiseerbare persoon (insluitende 'n individu wat minder as 20 jaar voordat die versoek ontvang word, gesterf het) as die betrokke versoeker of die ander persoon beoog in artikel 13(5).

(2) Subartikel (1) is nie van toepassing nie op 'n rekord vir sover dit bestaan uit inligting—
(a) reeds in die openbaar beskikbaar;
(b) oor 'n persoon wat ooreenkomstig artikel 46*(b)* tot die openbaarmaking daarvan aan die betrokke versoeker toegestem het;
(c) oor die fisiese of geestelike gesondheid, of welsyn, van 'n individu wat—
(i) onder die ouderdom van 18 jaar is;
(ii) onder die sorg van die versoeker is; en
(iii) nie in staat is om die aard van die versoek te verstaan nie,
en indien die verlening van toegang in die individu se beste belang sal wees;
(d) oor 'n individu wat oorlede is en die versoeker die individu se naasbestaande is of met die naasbestaande se skriftelike toestemming 'n versoek rig; of
(e) oor 'n individu wat 'n amptenaar van 'n regeringsliggaam is of was en wat

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which relates to the position or functions of the individual, including, but not limited to—

(i) the fact that the individual is or was an official of that governmental body;

(ii) the title, work address, work phone number of the individual and other similar particulars of the individual;

(iii) the classification, salary scale or remuneration and responsibilities of the position held or services performed by the individual;

(iv) the name of the individual on a record prepared by the individual in the course of employment.

(3) In subsection (2)*(d)* "individual's next of kin" means—

(a) an individual to whom the individual was married, with whom the individual lived as if they were married or with whom the individual cohabited, immediately before the individual's death;

(b) a parent, child, brother or sister of the individual; or

(c) if—

(i) there is no next of kin referred to in paragraphs *(a)* and *(b)*; or

(ii) the requester concerned took all reasonable steps to locate such next of kin, but was unsuccessful,

an individual who is related to the individual in the second degree of affinity or consanguinity.

Health of requester

30. (1) In this section "health practitioner" means an individual who carries on, and is registered in terms of legislation to carry on, an occupation which involves the provision of care or treatment for the physical or mental health or for the well-being of individuals.

(2) The information officer of a governmental body may refuse a request for access to a record of the body about the requester's physical or mental health, or well-being, which was provided by a health practitioner in his or her capacity as such if—

(a) the disclosure of the record to that requester would be likely to cause serious harm to his or her physical or mental health, or well-being; and

(b) the information officer has disclosed the record to, and consulted with, a health practitioner who—

(i) carries on an occupation of the same kind as the health practitioner who provided the record; and

(ii) has been nominated by the requester or his or her authorised representative; and

(c) that health practitioner so consulted is of the opinion that the serious harm contemplated in paragraph *(a)* is likely to result.

(3) If the requester is—

(a) under the age of 16 years, a person having parental responsibilities for the requester must make the nomination contemplated in subsection (2)*(b)*(ii); or

(b) incapable of managing his or her affairs, a person appointed by the court to manage those affairs must make that nomination.

(4) If—

(a) access has been given to a record of a governmental body containing information about the requester's physical or mental health, or well-being, which was provided by, or originated from, a health practitioner;

(b) that access was given without that health practitioner's knowledge; and

(c) that health practitioner can be located by taking all necessary steps,

the information officer concerned must notify that health practitioner that access has been so given.

Mandatory protection of third party commercial information

31. (1) Subject to subsection (2), the information officer of a governmental body must refuse a request for access to a record of the body if the record contains—

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verband hou met die posisie of funksies van die individu, insluitende, maar nie beperk nie tot—

(i) die feit dat die individu 'n amptenaar van daardie regeringsliggaam is of was;

(ii) die titel, werkadres en werktelefoonnommer van die individu en ander soortgelyke besonderhede van die individu;

(iii) die klassifikasie, salarisskaal of besoldiging en verantwoordelikhede van die posisie beklee of dienste verrig deur die individu;

(iv) die naam van die individu op 'n rekord opgestel deur die individu in die loop van sy of haar diens.

(3) In subartikel 2*(d)* beteken die "individu se naasbestaande"—

(a) 'n individu met wie die individu getroud was, saamgeleef het asof hulle getroud was of uit gewoonte saamgewoon het, onmiddellik voor die individu se dood;

(b) 'n ouer, kind, broer of suster van die individu; of

(c) indien—

(i) daar geen naasbestaandes bedoel in paragrawe *(a)* en *(b)* is nie; of

(ii) die betrokke versoeker alle redelike stappe gedoen het om sodanige naasbestaande op te spoor, maar onsuksesvol was,

'n individu wat aan die individu verwant is in die tweede graad van aan- of bloedverwantskap.

Gesondheid van versoeker

30. (1) In hierdie artikel beteken "gesondheidspraktisyn" 'n individu wat 'n beroep beoefen, en ingevolge wetgewing geregistreer is om die beroep te beoefen, wat die verskaffing van sorg of behandeling vir die fisiese of geestelike gesondheid of vir die welsyn van individue behels.

(2) Die inligtingsbeampte van 'n regeringsliggaam kan 'n versoek om toegang tot 'n rekord van die liggaam oor die versoeker se fisiese of geestelike gesondheid, of welsyn, wat deur 'n gesondheidspraktisyn in sy of haar hoedanigheid as sodanig verskaf is, weier indien—

(a) die openbaarmaking van die rekord aan daardie versoeker waarskynlik ernstige skade aan sy of haar fisiese of geestelike gesondheid of welsyn sal veroorsaak; en

(b) die inligtingsbeampte die rekord openbaar gemaak het aan, en oorleg gepleeg het met, 'n gesondheidspraktisyn wat—

(i) 'n beroep beoefen van dieselfde tipe as die gesondheidspraktisyn wat die rekord verskaf het; en

(ii) deur die versoeker of sy of haar gemagtigde verteenwoordiger benoem is; en

(c) die gesondheidspraktisyn wat aldus geraadpleeg is, van mening is dat die ernstige skade beoog in paragraaf *(a)* waarskynlik sal volg.

(3) Indien die versoeker—

(a) onder die ouderdom van 16 jaar is, moet 'n persoon wat ouerlike verantwoordelikheid vir die versoeker het die benoeming beoog in subartikel (2)*(b)*(ii) doen; of

(b) nie in staat is om sy of haar sake te bestuur nie, moet 'n persoon wat deur die hof aangewys is om daardie sake te bestuur daardie benoeming doen.

(4) Indien—

(a) toegang verleen is tot 'n rekord van 'n regeringsliggaam wat inligting bevat oor die versoeker se fisiese of geestelike gesondheid, of welsyn, wat verskaf is deur, of ontstaan het by, 'n gesondheidspraktisyn;

(b) daardie toegang verleen is sonder daardie gesondheidspraktisyn se medewete; en

(c) daardie gesondheidspraktisyn opgespoor kan word deur alle nodige stappe te doen,

moet die betrokke inligtingsbeampte daardie gesondheidspraktisyn in kennis stel dat toegang aldus verleen is.

Verpligte beskerming van kommersiële inligting van derde party

31. (1) Behoudens subartikel (2) moet die inligtingsbeampte van 'n regeringsliggaam 'n versoek om toegang tot 'n rekord van die liggaam weier indien die rekord—

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(a) trade secrets of a third party;

(b) financial, commercial, scientific or technical information, other than trade secrets, supplied in confidence by a third party and treated consistently as confidential by that third party, the disclosure of which could reasonably be expected to cause harm to the commercial or financial interests of that third party; or

(c) information supplied by a third party the disclosure of which would be likely to put that third party at a disadvantage in contractual or other negotiations or cause it prejudice in commercial competition.

(2) Subsection (1) does not apply to a record in so far as it consists of information—

(a) already publicly available;

(b) about a third party who has, in accordance with section 46*(b)*, consented to its disclosure to the requester concerned;

(c) about the safety of goods or services supplied by a third party, and the disclosure of the information would be likely to result in better informed choices by persons seeking to acquire those goods or services; or

(d) supplied to, or about the results of any test or other investigation carried out by, a governmental body regarding a public safety or environmental risk.

(3) If a request for access to a record contemplated in subsection (2)*(d)* is granted, the information officer must at the same time as access to the record is given, direct the requester to the source of the original test or other investigation to enable the requester to obtain an explanation of the methods used in conducting the test or other investigation.

Records supplied in confidence

32. (1) Subject to subsection (2), the information officer of a governmental body may refuse a request for access to a record of that body containing information supplied in confidence to any governmental body by a third party if—

(a) the disclosure of the record would be likely to prejudice the future supply of similar records, or records from the same source;

(b) the last-mentioned governmental body has no right to demand, or that third party has no obligation to supply, the record; and

(c) it is in the public interest that similar records, or records from the same source, should continue to be supplied.

(2) Subsection (1) does not apply to a record—

(a) if it has been supplied to the governmental body concerned for the purpose of—

(i) securing some advantage, grant, permit, contract or concession from any governmental body; or

(ii) persuading any governmental body not to take any action against the person that supplied the record or on whose or which behalf the record was supplied;

(b) in so far as it consists of information independently obtained by the body or already publicly available; or

(c) if the third party concerned has consented in writing to its disclosure to the requester concerned.

(3) The information officer of a governmental body may refuse a request for access to a record of the body if the record—

(a) is held by a governmental body for the purpose of enforcing legislation imposing a tax, duty or levy; and

(b) was supplied in confidence to a governmental body by a third party or another governmental body.

Safety of individuals and security of structures and systems

33. The information officer of a governmental body may refuse a request for access to a record of the body if its disclosure would be likely—

(a) to endanger the life or physical safety of an individual; or

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(a) handelsgeheime van 'n derde party bevat;

(b) finansiële, kommersiële, wetenskaplike of tegniese inligting, uitgesonderd handelsgeheime, bevat, wat vertroulik deur 'n derde party verskaf is en deurgaans as vertroulik deur daardie derde party hanteer word, waarvan daar redelikerwys verwag kan word dat die openbaarmaking daarvan skade aan die kommersiële of finansiële belange van daardie derde party sal veroorsaak; of

(c) inligting bevat wat deur 'n derde party verskaf is waarvan die openbaarmaking daardie derde party waarskynlik sal benadeel in kontraktuele en ander onderhandelinge of vir hom benadeling in kommersiële mededinging sal veroorsaak.

(2) Subartikel (1) is nie van toepassing nie op 'n rekord vir sover dit bestaan uit inligting—

(a) reeds in die openbaar beskikbaar;

(b) oor 'n derde party wat ooreenkomstig artikel 46*(b)* tot die openbaarmaking daarvan aan die betrokke versoeker toegestem het;

(c) oor die veiligheid van goedere of dienste deur 'n derde party gelewer, en die openbaarmaking van die inligting waarskynlik sal lei tot beter ingeligte keuses deur persone wat daardie goedere of dienste wil bekom; of

(d) verskaf aan, of oor die resultate van enige toets of ander ondersoek uitgevoer deur, 'n regeringsliggaam betreffende 'n risiko vir openbare veiligheid of die omgewing.

(3) Indien 'n versoek om toegang tot 'n rekord beoog in subartikel (2)*(d)* toegestaan word, moet die inligtingsbeampte terselfdertyd as wat toegang tot die rekord verleen word, die versoeker verwys na die bron van die oorspronklike toets of ander ondersoek om die versoeker in staat te stel om 'n verduideliking van die metodes wat by die uitvoering van die toets of ander ondersoek gebruik is, te verkry.

Rekords wat vertroulik verskaf is

32. (1) Behoudens subartikel (2) kan die inligtingsbeampte van 'n regeringsliggaam 'n versoek om toegang tot 'n rekord van daardie liggaam wat inligting bevat wat deur 'n derde party vertroulik aan enige regeringsliggaam verskaf is, weier indien—

(a) die openbaarmaking van die rekord waarskynlik die toekomstige verskaffing van soortgelyke rekords, of rekords uit dieselfde bron, sal benadeel;

(b) laasgenoemde regeringsliggaam geen reg het om die rekord te eis of daardie derde party geen verpligting het om die rekord te verskaf nie; en

(c) dit in openbare belang is dat daar met die verskaffing van soortgelyke rekords, of rekords uit dieselfde bron, voortgegaan word.

(2) Subartikel (1) is nie van toepassing nie op 'n rekord—

(a) indien dit aan die betrokke regeringsliggaam verskaf is met die doel om—

(i) die een of ander voordeel, toekenning, permit, kontrak of vergunning van 'n regeringsliggaam te verkry; of

(ii) 'n regeringsliggaam te oorreed om nie stappe te doen nie teen die persoon wat die rekord verskaf het of namens wie die rekord verskaf is;

(b) vir sover dit bestaan uit inligting wat onafhanklik bekom is deur die liggaam of reeds in die openbaar beskikbaar is; of

(c) indien die betrokke derde party skriftelik toegestem het tot die openbaarmaking daarvan aan die betrokke versoeker.

(3) Die inligtingsbeampte van 'n regeringsliggaam kan 'n versoek om toegang tot 'n rekord van die liggaam weier indien die rekord—

(a) deur 'n regeringsliggaam gehou word met die doel om wetgewing wat 'n belasting, aksyns of heffing oplê, toe te pas; en

(b) vertroulik aan 'n regeringsliggaam deur 'n derde party of 'n ander regeringsliggaam verskaf is.

Veiligheid van individue en sekuriteit van strukture en stelsels

33. Die inligtingsbeampte van 'n regeringsliggaam kan 'n versoek om toegang tot 'n rekord van die liggaam weier indien die openbaarmaking daarvan waarskynlik—

(a) die lewe of fisiese veiligheid van 'n individu in gevaar sal stel; of

(b) seriously to endanger the maintenance or enforcement of methods for the security of a particular building, installation or information storage, computer or communication system.

Law enforcement

34. (1) The information officer of a governmental body may refuse a request for access to a record of the body if—

(a) the record contains methods, techniques, procedures or guidelines for—
  (i) the prevention, detection, suppression or investigation of offences; or
  (ii) the prosecution of alleged offenders,
  and the disclosure of those methods, techniques, procedures or guidelines would be likely 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;

(b) the prosecution of an alleged offender is being prepared or about to commence or pending and the disclosure of the record would be likely—
  (i) to impede that prosecution; or
  (ii) to result in a miscarriage of justice in that prosecution;

(c) the disclosure of the record would be likely—
  (i) to prejudice the investigation of any offence or possible offence which is about to commence or is in progress or, if it has been suspended or terminated, is likely to be resumed;
  (ii) to reveal, or enable a person to ascertain, the identity of a confidential source of information in respect of a law enforcement matter;
  (iii) 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 or other proceedings to enforce the law, or to endanger the life or physical safety of that witness or person;
  (iv) to result in the commission of an offence;
  (v) subject to subsection (2), to facilitate escape from lawful detention; or
  (vi) to deprive a person of a right to a fair trial or an impartial adjudication; or

(d) the record contains arrangements for the protection of an individual in accordance with a witness protection scheme.

(2) Subsection (1)*(c)*(v) does not apply to a record in so far as it consists of information about the general conditions of detention of persons in custody.

(3)*(a)* If a request for access to a record of a governmental body may be refused in terms of subsection (1), or could, if it existed, be so refused, and the disclosure of the existence or non-existence of the record would be likely to cause the harm contemplated in any provision of subsection (1), the information officer concerned may refuse to confirm or deny the existence or non-existence of the record.

(b) If the information officer so refuses to confirm or deny the existence or non-existence of the record, the notice referred to in section 19(3), must—
  (i) state that fact;
  (ii) identify the provision of subsection (1) in terms of which access would have been refused if the record had existed;
  (iii) state the findings and the reasons for the refusal, as required by section 19(3)*(a)* and *(b)*, in so far as they can be given without causing the harm contemplated in any provision of subsection (1); and
  (iv) state that the requester concerned may lodge an internal appeal with the head of the governmental body concerned against the refusal as required by section 19(3)*(c)*.

Privileged from production in legal proceedings

35. The information officer of a governmental body may refuse a request for access to

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(b) ernstige gevaar sal inhou vir die handhawing of toepassing van metodes vir die sekuriteit van 'n bepaalde gebou, installasie of inligtingbergings-, rekenaar- of kommunikasiestelsel.

Regstoepassing

34. (1) Die inligtingsbeampte van 'n regeringsliggaam kan 'n versoek om toegang tot 'n rekord van die liggaam weier indien—

(a) die rekord metodes, tegnieke, prosedures of riglyne bevat vir—
(i) die voorkoming, opsporing, onderdukking of ondersoek van misdrywe; of
(ii) die vervolging van vermeende oortreders,
en die openbaarmaking van daardie metodes, tegnieke, prosedures of riglyne waarskynlik die doeltreffendheid van daardie metodes, tegnieke, prosedures of riglyne sal benadeel of tot die omseiling van die reg sal lei of die pleeg van 'n misdryf sal vergemaklik;

(b) die vervolging van 'n vermeende oortreder dan voorberei word of 'n aanvang staan te neem of hangende is en die openbaarmaking van die rekord waarskynlik—
(i) daardie vervolging sal belemmer; of
(ii) daartoe sal lei dat geregtigheid nie tydens daardie vervolging geskied nie;

(c) die openbaarmaking van die rekord waarskynlik—
(i) die ondersoek sal benadeel na enige misdryf of moontlike misdryf wat 'n aanvang gaan neem of aan die gang is of, indien dit opgeskort of beëindig is, waarskynlik hervat gaan word;
(ii) die identiteit van 'n vertroulike bron van inligting ten opsigte van 'n regstoepassingsaangeleentheid aan die lig sal bring of 'n persoon in staat sal stel om dit vas te stel;
(iii) sal lei tot intimidering van of dwang op 'n getuie of 'n persoon wat moontlik 'n getuie mag wees of as getuie opgeroep is, in strafregtelike of ander verrigtinge vir regstoepassing, of die lewe of fisiese veiligheid van daardie getuie of persoon in gevaar sal stel;
(iv) tot die pleeg van 'n misdryf sal lei;
(v) behoudens subartikel (2), ontvlugting uit regmatige aanhouding sal vergemaklik; of
(vi) 'n persoon van 'n reg op 'n billike verhoor of 'n onpartydige uitspraak sal ontneem; of

(d) die rekord reëlings bevat vir die beskerming van 'n individu in ooreenstemming met 'n getuiebeskermingskema.

(2) Subartikel (1)*(c)*(v) is nie van toepassing nie op 'n rekord vir sover dit bestaan uit inligting oor die algemene toestande van aanhouding van persone in bewaring.

(3)*(a)* Indien 'n versoek om toegang tot 'n rekord van 'n regeringsliggaam geweier kan word ingevolge subartikel (1), of, indien dit bestaan het, aldus geweier kon word, en die openbaarmaking van die bestaan of nie-bestaan van die rekord waarskynlik die skade beoog in enige bepaling van subartikel (1) sal veroorsaak, kan die betrokke inligtingsbeampte weier om die bestaan of nie-bestaan van die rekord te bevestig of te ontken.

(b) Indien die inligtingsbeampte aldus weier om die bestaan of nie-bestaan van die rekord te bevestig of te ontken, moet die kennisgewing bedoel in artikel 19(3)—
(i) daardie feit meld;
(ii) die bepaling van subartikel (1) identifiseer ingevolge waarvan toegang geweier sou gewees het indien die rekord bestaan het;
(iii) die bevindings en die redes vir die weiering meld, soos vereis deur artikel 19(3)*(a)* en *(b)*, vir sover dit verstrek kan word sonder om die skade beoog in enige bepaling van subartikel (1) te veroorsaak; en
(iv) meld dat die betrokke versoeker by die hoof van die betrokke regeringsliggaam 'n interne appèl teen die weiering kan aanteken, soos deur artikel 19(3)*(c)* vereis.

Geprivilegieerd van voorlegging in geregtelike verrigtinge

35. Die inligtingsbeampte van 'n regeringsliggaam kan 'n versoek om toegang tot 'n

a record of the body if the record is privileged from production in legal proceedings unless—

(a) the person entitled to the privilege has waived the privilege; or

(b) the legal proceedings to which the record relates have been finally determined.

Republic's defence and security, including intelligence matters

36. (1) The information officer of a governmental body may refuse a request for access to a record of the body if its disclosure would be likely substantially to harm the defence or security of the Republic by—

(a) frustrating any measure for the prevention, detection or suppression of—

(i) aggression against the Republic;

(ii) sabotage or terrorism aimed at the people of the Republic or a strategic asset of the Republic, whether inside or outside the Republic;

(iii) an activity aimed at changing the constitutional order of the Republic by the use of force or violence; or

(iv) a foreign or hostile intelligence operation;

(b) jeopardising the effectiveness of a governmental body, branch of that body or person responsible for the prevention, detection or suppression of an activity contemplated in paragraph *(a)*(i), (ii), (iii) or (iv) by disclosing its or his or her capabilities, deployment or performance;

(c) jeopardising the effectiveness of—

(i) arms; or

(ii) other equipment, including, but not limited to, communication or cryptographic systems,

used, or intended to be used, or being developed, designed, produced or investigated for preventing, detecting or suppressing an activity contemplated in paragraph *(a)*(i), (ii), (iii) or (iv) by disclosing their or its capabilities, quantity, deployment or performance;

(d) jeopardising the effectiveness of methods or equipment for collecting, assessing or handling information used for the prevention, detection or suppression of an activity contemplated in paragraph *(a)*(i), (ii), (iii) or (iv); or

(e) disclosing the identity of a confidential source of information used for the prevention, detection or suppression of an activity contemplated in paragraph *(a)*(i), (ii), (iii) or (iv).

(2)*(a)* If a request for access to a record of a governmental body may be refused in terms of subsection (1), or could, if it existed, be so refused, and the disclosure of the existence or non-existence of the record would be likely to cause the harm contemplated in any provision of subsection (1), the information officer concerned may refuse to confirm or deny the existence or non-existence of the record.

(b) If the information officer so refuses to confirm or deny the existence or non-existence of the record, the notice referred to in section 19(3), must—

(i) state that fact;

(ii) identify the provision of subsection (1) in terms of which access would have been refused if the record had existed;

(iii) state the findings and the reasons for the refusal, as required by section 19(3)*(a)* and *(b)*, in so far as they can be given without causing the harm contemplated in any provision of subsection (1); and

(iv) state that the requester may lodge an internal appeal with the head of the governmental body concerned against the refusal as required by section 19(3)*(c)*.

International relations

37. (1) The information officer of a governmental body may refuse a request for access to a record of the body if its disclosure would be—

(a) in contravention of an obligation imposed on the Republic by international law; or

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rekord van die liggaam weier indien die rekord van voorlegging in geregtelike verrigtinge geprivilegieerd is, tensy—

(a) die persoon wat op die privilegie geregtig is, daarvan afstand gedoen het; of

(b) die geregtelike verrigtinge waarmee die rekord verband hou, finaal afgehandel is.

Republiek se verdediging en sekuriteit, insluitende intelligensie-aangeleenthede

36. (1) Die inligtingsbeampte van 'n regeringsliggaam kan 'n versoek om toegang tot 'n rekord van die liggaam weier indien die openbaarmaking daarvan waarskynlik die verdediging of sekuriteit van die Republiek wesenlik sal benadeel deur—

(a) die verydeling van enige maatreël vir die voorkoming, opsporing of onderdrukking van—

(i) aggressie teen die Republiek;

(ii) sabotasie of terrorisme gerig teen die mense van die Republiek of 'n strategiese bate van die Republiek, hetsy binne of buite die Republiek;

(iii) 'n aktiwiteit gerig op verandering van die grondwetlike orde van die Republiek deur die gebruik van dwang of geweld; of

(iv) 'n buitelandse of vyandelike intelligensie-operasie;

(b) die doeltreffendheid in gevaar te stel van 'n regeringsliggaam, tak van daardie liggaam of persoon verantwoordelik vir die voorkoming, opsporing of onderdrukking van 'n aktiwiteit beoog in paragraaf *(a)*(i), (ii), (iii) of (iv) deur die openbaarmaking van sy of haar vermoëns, ontplooiing of prestasie;

(c) die doeltreffendheid in gevaar te stel van—

(i) wapens; of

(ii) ander toerusting, insluitende, maar nie beperk nie tot, kommunikasie- of kriptografiese stelsels,

wat gebruik word of bedoel is om gebruik te word, of wat ontwikkel, ontwerp, geproduseer of ondersoek word, vir die voorkoming, opsporing of onderdrukking van 'n aktiwiteit beoog in paragraaf *(a)*(i), (ii), (iii) of (iv), deur die openbaarmaking van hulle of sy vermoëns, hoeveelheid, ontplooiing of prestasie;

(d) die doeltreffendheid in gevaar te stel van metodes of toerusting vir die inwin, evaluering of hantering van inligting wat gebruik word vir die voorkoming, opsporing of onderdrukking van 'n aktiwiteit beoog in paragraaf *(a)*(i), (ii), (iii) of (iv); of

(e) die openbaarmaking van die identiteit van 'n vertroulike bron van inligting wat gebruik word vir die voorkoming, opsporing of onderdrukking van 'n aktiwiteit beoog in paragraaf *(a)*(i), (ii), (iii) of (iv).

(2)*(a)* Indien 'n versoek om toegang tot 'n rekord van 'n regeringsliggaam geweier kan word ingevolge subartikel (1), of, indien dit bestaan het, aldus geweier kon word, en die openbaarmaking van die bestaan of nie-bestaan van die rekord waarskynlik tot die skade beoog in enige bepaling van subartikel (1) sal lei, kan die betrokke inligtingsbeampte weier om die bestaan of nie-bestaan van die rekord te bevestig of te ontken.

(b) Indien die inligtingsbeampte aldus weier om die bestaan of nie-bestaan van die rekord te bevestig of te ontken, moet die kennisgewing bedoel in artikel 19(3)—

(i) daardie feit meld;

(ii) die bepaling van subartikel (1) identifiseer ingevolge waarvan toegang geweier sou gewees het indien die rekord bestaan het;

(iii) die bevindings en die redes vir die weiering meld, soos vereis deur artikel 19(3)*(a)* en *(b)*, vir sover dit gegee kan word sonder om die skade beoog in enige bepaling van subartikel (1) te veroorsaak; en

(iv) meld dat die versoeker by die hoof van die betrokke regeringsliggaam 'n interne appèl teen die weiering kan aanteken, soos deur artikel 19(3)*(c)* vereis.

Internasionale betrekkinge

37. (1) Die inligtingsbeampte van 'n regeringsliggaam kan 'n versoek om toegang tot 'n rekord van die liggaam weier indien die openbaarmaking daarvan—

(a) strydig sal wees met 'n verpligting wat die Republiek by internasionale reg opgelê is; of

(b) subject to subsection (2), likely to cause substantial harm to the capacity of the Republic to maintain or conduct relations in the best interests of the Republic with another state or an international organisation.

(2) Subsection (1)*(b)* does not apply to a record if it came into existence more than 20 years before the request.

Economic interests of Republic and commercial activities of governmental bodies

38. (1) The information officer of a governmental body may refuse a request for access to a record of the body if its disclosure would be likely substantially to jeopardise the financial welfare of the Republic or any part thereof or the ability of the government to manage the economy of the Republic or any part thereof effectively in the best interests of the Republic by prematurely disclosing—

(a) a contemplated change in, or maintenance of, a policy substantially affecting the currency, coinage, legal tender, exchange rates or foreign investment;

(b) a contemplated change in or decision not to change—

(i) credit or interest rates;

(ii) customs or excise duties, taxes or any other source of revenue;

(iii) the regulation or supervision of financial institutions;

(iv) government borrowing; or

(v) the regulation of prices of goods or services, rents or wages, salaries or other incomes; or

(c) a contemplated—

(i) sale or acquisition of immovable or movable property; or

(ii) international trade agreement.

(2) Subject to subsection (3), the information officer of a governmental body may refuse a request for access to a record of the body if the record contains—

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

(b) financial, commercial, scientific or technical information, other than trade secrets, held by a governmental body for the purpose of conducting a commercial activity which it is authorised by law to conduct and which it does conduct or is about to conduct, the disclosure of which could reasonably be expected to cause harm to the commercial or financial interests of the state or a governmental body;

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

(d) the results of original research undertaken by an official of a governmental body the disclosure of which could reasonably be expected to deprive that governmental body or official of the benefit of first publication of those results; or

(e) a computer program, as defined in section 1(1) of the Copyright Act, 1978 (Act No. 98 of 1978), 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 this Act.

(3) Subsection (2) does not apply to a record in so far as it consists of information—

(a) already publicly available;

(b) about or owned by a governmental body which has consented in writing to its disclosure to the requester concerned;

(c) about the safety of goods or services supplied by a governmental body and the disclosure of the information would be likely to result in better informed choices by persons seeking to acquire those goods or services; or

(d) supplied to, or about the results of any test or other investigation carried out by, a governmental body regarding a public safety or environmental risk.

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(b) behoudens subartikel (2), waarskynlik wesenlike skade sal veroorsaak aan die vermoë van die Republiek om in die beste belang van die Republiek betrekkinge met 'n ander staat of 'n internasionale organisasie te handhaaf of te voer.

(2) Subartikel (1)*(b)* is nie op 'n rekord van toepassing nie indien dit meer as 20 jaar voor die versoek ontstaan het.

Ekonomiese belange van Republiek en kommersiële aktiwiteite van regeringsliggame

38. (1) Die inligtingsbeampte van 'n regeringsliggaam kan 'n versoek om toegang tot 'n rekord van die liggaam weier indien die openbaarmaking daarvan waarskynlik die finansiële welsyn van die Republiek of enige deel daarvan of die vermoë van die regering om die ekonomie van die Republiek of enige deel daarvan doeltreffend in die beste belang van die Republiek te bestuur, wesenlik in gevaar sal stel deur die voortydige openbaarmaking van—

(a) 'n beoogde verandering in, of handhawing van, 'n beleid wat die valuta, muntstelsel, wettige betaalmiddele, wisselkoerse of buitelandse belegging wesenlik raak;

(b) 'n beoogde verandering in, of 'n besluit oor nie-verandering van—

(i) krediet- of rentekoerse;

(ii) doeane- of aksynsregte, belastings of enige ander bron van inkomste;

(iii) die regulering van of toesig oor finansiële instellings;

(iv) die aangaan van lenings deur die regering; of

(v) die regulering van pryse van goedere of dienste, huurgelde of lone, salarisse of ander inkomste; of

(c) 'n beoogde—

(i) verkoping of verkryging van onroerende of roerende eiendom; of

(ii) internasionale handelsooreenkoms.

(2) Behoudens subartikel (3) kan die inligtingsbeampte van 'n regeringsliggaam 'n versoek om toegang tot 'n rekord van die liggaam weier indien die rekord—

(a) handelsgeheime van die staat of 'n regeringsliggaam bevat;

(b) finansiële, kommersiële, wetenskaplike of tegniese inligting, uitgesonderd handelsgeheime, bevat, gehou deur 'n regeringsliggaam met die doel om 'n kommersiële aktiwiteit uit te voer wat hy regtens gemagtig is om uit te voer en wat hy wel uitvoer of van plan is om uit te voer, waarvan daar redelikerwys verwag kan word dat die openbaarmaking daarvan skade aan die kommersiële of finansiële belange van die staat of 'n regeringsliggaam sal veroorsaak;

(c) inligting bevat waarvan die openbaarmaking 'n regeringsliggaam waarskynlik sal benadeel in kontraktuele of ander onderhandelinge of vir hom benadeling in kommersiële mededinging sal veroorsaak;

(d) die resultate van oorspronklike navorsing, onderneem deur 'n amptenaar van 'n regeringsliggaam, bevat waarvan daar redelikerwys verwag kan word dat die openbaarmaking daarvan daardie regeringsliggaam of amptenaar van die voordeel van eerste publikasie van daardie resultate sal ontneem; of

(e) 'n rekenaarprogram, soos omskryf in artikel 1(1) van die Wet op Outeursreg, 1978 (Wet No. 98 van 1978), bevat, wat aan die staat of 'n regeringsliggaam behoort, uitgesonderd vir sover dit benodig word om toegang te verleen tot 'n rekord waartoe toegang ingevolge hierdie Wet verleen word.

(3) Subartikel (2) is nie van toepassing nie op 'n rekord vir sover dit bestaan uit inligting—

(a) wat reeds in die openbaar beskikbaar is;

(b) betreffende of wat behoort aan 'n regeringsliggaam wat skriftelik toegestem het tot die openbaarmaking daarvan aan die betrokke versoeker;

(c) betreffende die veiligheid van goedere of dienste wat verskaf is deur 'n regeringsliggaam en vir sover die openbaarmaking van die inligting waarskynlik sal lei tot beter ingeligte keuses deur persone wat daardie goedere of dienste wil bekom; of

(d) verskaf aan, of betreffende die resultate van enige toets of ander ondersoek uitgevoer deur, 'n regeringsliggaam betreffende 'n risiko vir openbare veiligheid of die omgewing.

(4) If a request for access to a record contemplated in subsection (3)*(d)* is granted, the information officer must at the same time as access to the record is given, direct the requester to the source of original test or other investigation to enable the requester to obtain an explanation of the methods used in conducting the test or other investigation.

Operations of governmental bodies

39. (1) Subject to subsections (3) and (4), the information officer of a governmental body may refuse a request for access to a record of the body—

(a) if the record contains an opinion, advice or recommendation obtained or prepared, or 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 and if—

(i) the knowledge that disclosure of the record were possible could reasonably be expected to frustrate the deliberative process in a governmental body or between governmental bodies by inhibiting the candid—

(aa) communication of that opinion, advice or recommendation; or

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

(ii) the disclosure of the record would, by premature disclosure of a policy or contemplated policy, be likely substantially to frustrate the success of that policy;

(b) if the disclosure of the record would be likely to jeopardise the effectiveness of a testing, examining or auditing procedure or method used by a governmental body;

(c) if 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

(d) if the record contains a working draft or note of an official of a governmental body.

(2) In subsection (1)*(c)* "evaluative material" means an evaluation or opinion prepared—

(a) for the purpose of determining the suitability, eligibility or qualifications of the person to whom or which the evaluation or opinion relates—

(i) for employment or for appointment to office;

(ii) for promotion in employment or office or for continuance in employment or office;

(iii) for removal from employment or office; or

(iv) for the awarding of a scholarship, award, bursary, honour or similar benefit; or

(b) for the purpose of determining whether any scholarship, award, bursary, honour or similar benefit should be continued, modified, cancelled or renewed.

(3) Subsection (1) does not apply to a record in so far as it consists of an account of, or a statement of reasons for, a decision taken in the exercise of a power or performance of a duty conferred or imposed by law.

(4) Subsection (1)*(a)* does not apply to a record—

(a) if the record came into existence more than 15 years before the request concerned; or

(b) in so far as it consists of—

(i) factual material, including, but not limited to, any statistical data;

(ii) the analysis, interpretation or evaluation of, or any projection based on, factual material referred to in subparagraph (i);

(iii) a report on the performance or efficiency of a governmental body or any part thereof, or any programme, project or other activity under its supervision;

(iv) a report of a scientific or technical expert; or

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(4) Indien 'n versoek om toegang tot 'n rekord beoog in subartikel (3)*(d)* toegestaan word, moet die inligtingsbeampte terselfdertyd as wat toegang tot die rekord verleen word, die versoeker verwys na die bron van die oorspronklike toets of ander ondersoek ten einde die versoeker in staat te stel om 'n verduideliking van die metodes wat by die uitvoering van die toets of ander ondersoek gebruik is, te verkry.

Werking van regeringsliggame

39. (1) Behoudens subartikels (3) en (4) kan die inligtingsbeampte van 'n regeringsliggaam 'n versoek om toegang tot 'n rekord van die liggaam weier—

(a) indien die rekord 'n mening, advies of aanbeveling verkry of opgestel, of 'n verslag oor 'n oorlegpleging, bespreking of beraadslaging wat plaasgevind het, insluitende, maar nie beperk nie tot,'n notule van 'n vergadering, bevat met die doel om as hulp te dien by die formulering van 'n beleid of die neem van 'n besluit by die uitoefening van 'n bevoegdheid of verrigting van 'n plig regtens verleen of opgelê en indien—

(i) daar redelikerwys verwag kan word dat die wete dat die openbaarmaking van die rekord moontlik sou wees, die proses van beraadslaging in 'n regeringsliggaam of tussen regeringsliggame sal verydel deur inhibering van die openhartige—

(aa) kommunikasie van daardie mening, advies of aanbeveling; of

(bb) voer van daardie oorlegpleging, bespreking of beraadslaging; of

(ii) die openbaarmaking van die rekord, deur voortydige openbaarmaking van 'n beleid of beoogde beleid, die sukses van daardie beleid waarskynlik wesenlik sal verydel;

(b) indien die openbaarmaking van die rekord waarskynlik die doeltreffendheid van 'n toets-, ondersoek- of ouditeringsprosedure of -metode wat deur 'n regeringsliggaam gebruik word, in gevaar sal stel;

(c) indien die rekord evalueringsgegewens bevat, ongeag of die persoon wat dit verskaf het, in die rekord geïdentifiseer word al dan nie, en die openbaarmaking van die gegewens 'n skending sou wees van 'n uitdruklike of geïmpliseerde belofte wat—

(i) gemaak is aan die persoon wat die gegewens verskaf het; en

(ii) ten effekte was dat die gegewens of die identiteit van die persoon wat dit verskaf het, of albei, vertroulik gehou sal word; of

(d) indien die rekord 'n werkkonsep of -nota van 'n amptenaar van 'n regeringsliggaam bevat.

(2) In subartikel (1)*(c)* beteken "evalueringsgegewens" 'n evaluering of mening opgestel—

(a) met die doel om die geskiktheid, aanvaarbaarheid of kwalifikasies van die persoon met wie of waarmee die evaluering of mening verband hou, te bepaal—

(i) vir indiensneming of vir aanstelling in 'n amp;

(ii) vir bevordering in diens of amp of vir voortsetting van diens of amp;

(iii) vir ontslag uit diens of amp; of

(iv) vir die toeken van 'n studiebeurs, toekenning, beurs, eerbewys of soortgelyke voordeel; of

(b) met die doel om te bepaal of 'n studiebeurs, toekenning, beurs, eerbewys of soortgelyke voordeel voortgesit, gewysig, gekanselleer of hernu moet word.

(3) Subartikel (1) is nie van toepassing nie op 'n rekord vir sover dit bestaan uit 'n verslag oor, of 'n opgaaf van redes vir, 'n besluit geneem in die uitoefening van 'n bevoegdheid of verrigting van 'n plig wat regtens verleen of opgelê is.

(4) Subartikel (1)*(a)* is nie van toepassing nie op 'n rekord—

(a) indien die rekord meer as 15 jaar voor die betrokke versoek ontstaan het; of

(b) vir sover dit bestaan uit—

(i) feitelike gegewens, insluitende, maar nie beperk nie tot, enige statistiese data;

(ii) die ontleding, vertolking of evaluering van, of enige projeksie gebaseer op, feitelike gegewens bedoel in subparagraaf (i);

(iii) 'n verslag oor die prestasie of doeltreffendheid van 'n regeringsliggaam of enige deel daarvan, of 'n program, projek of ander aktiwiteit onder sy toesig;

(vi) 'n verslag van 'n wetenskaplike of tegniese deskundige; of

(v) the results of, or report on, any test or other investigation regarding a public safety or environmental risk.

(5) If a request for access to a record contemplated in subsection (4)*(b)*(v) is granted, the information officer must at the same time as access to the record is given, direct the requester to the source of the original test or other investigation to enable the requester to obtain an explanation of the methods used in conducting the test or other investigation.

Frivolous or vexatious requests

40. The information officer of a governmental body may refuse a request for access to a record of the body if the request is manifestly frivolous or vexatious.

Records that cannot be found or do not exist

41. (1) The information officer of a governmental body may refuse a request for access to a record of the body if—

(a) a thorough search to find the record has been conducted, but it cannot be found; or

(b) there are reasonable grounds for believing that the record does not exist.

(2) If an information officer refuses a request for access to a record in terms of subsection (1), he or she must, in the notice referred to in section 19(1)*(b)*, give a full account of all steps taken to find the record or to determine whether the record exists, as the case may be, including all communications with every person who conducted the search on behalf of the information officer.

Published records and records to be published

42. (1) Subject to this section, the information officer of a governmental body may refuse a request for access to a record of the body if—

(a) the record is to be published within 60 days after the receipt or transfer of the request or such further period as is reasonably necessary for printing and translating the record for the purpose of publishing it;

(b) the record can be copied at a library to which the public has access at a fee no greater than would be charged for access in terms of this Act;

(c) the record is available for purchase by the public in accordance with arrangements made by or on behalf of a governmental body at a fee no greater than would be charged for access in terms of this Act;

(d) the publication of the record is required by law, within 90 days after the receipt or transfer of the request; or

(e) the record has been prepared for submission to Parliament unless a period of 90 days after such preparation has expired and the record has not been so submitted.

(2) The information officer concerned must, in the notice referred to in section 19(1)*(b)*, in the case of a refusal of a request for access in terms of—

(a) subsection (1)*(a)* or *(d)*, state the date on which the record concerned is to be published;

(b) subsection (1)*(b)* and if such information is ordinarily available to the governmental body concerned, identify the title and publisher of the record and the library concerned nearest to the requester concerned;

(c) subsection (1)*(c)* and if such information is ordinarily available to the governmental body concerned, identify the title and publisher of the record and state where it can be purchased; or

(d) subsection (1)*(e)*, state the date on which the record is to be submitted to Parliament.

(3) If an information officer is considering to refuse a request for access to a record in terms of subsection (1)*(a)*, *(d)* or *(e)*, he or she must notify the requester concerned—

(a) of such consideration; and

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(v) die resultate van, of verslag oor, 'n toets of ander ondersoek betreffende 'n risiko vir openbare veiligheid of die omgewing.

(5) Indien 'n versoek om toegang tot 'n rekord bedoel in subartikel (4)*(b)*(v) toegestaan word, moet die inligtingsbeampte terselfdertyd as wat toegang tot die rekord verleen word, die versoeker verwys na die bron van die oorspronklike toets of ander ondersoek ten einde die versoeker in staat te stel om 'n verduideliking van die metodes wat by die uitvoering van die toets of ander ondersoek gebruik is, te verkry.

Beuselagtige of kwelsugtige versoeke

40. Die inligtingsbeampte van 'n regeringsliggaam kan 'n versoek om toegang tot 'n rekord van die liggaam weier indien die versoek klaarblyklik beuselagtig of kwelsugtig is.

Rekords wat nie gevind kan word nie of nie bestaan nie

41. (1) Die inligtingsbeampte van 'n regeringsliggaam kan 'n versoek om toegang tot 'n rekord van die liggaam weier indien—

(a) 'n deeglike soektog om die rekord te vind, uitgevoer is maar dit nie gevind kon word nie; of

(b) daar redelike gronde is om te glo dat die rekord nie bestaan nie.

(2) Indien 'n inligtingsbeampte 'n versoek om toegang tot 'n rekord weier ingevolge subartikel (1), moet hy of sy in die kennisgewing bedoel in artikel 19(1)*(b)*, ten volle verslag doen oor alle stappe wat gedoen is om die rekord te vind of om vas te stel of die rekord bestaan, na gelang van die geval, insluitende alle kommunikasie met elke persoon wat die soektog namens die inligtingsbeampte onderneem het.

Gepubliseerde rekords en rekords wat gepubliseer moet word

42. (1) Behoudens hierdie artikel kan die inligtingsbeampte van 'n regeringsliggaam 'n versoek om toegang tot 'n rekord van die liggaam weier indien—

(a) die rekord gepubliseer gaan word binne 60 dae na ontvangs of oorplasing van die versoek of die verdere tydperk wat redelikerwys nodig is vir die druk en vertaal van die rekord met die doel om dit te publiseer;

(b) die rekord gekopieer kan word by 'n biblioteek waartoe die publiek toegang het, teen gelde wat nie meer is nie as wat vir toegang ingevolge hierdie Wet gehef sou word;

(c) die rekord beskikbaar is vir aankoop deur die publiek ooreenkomstig reëlings getref deur of namens 'n regeringsliggaam teen gelde wat nie meer is nie as wat vir toegang ingevolge hierdie Wet gehef sou word;

(d) die publikasie van die rekord, binne 90 dae na ontvangs of oorplasing van die versoek, regtens vereis word; of

(e) die rekord vir voorlegging aan die Parlement opgestel is, tensy 'n tydperk van 90 dae na sodanige opstelling verstryk het en die rekord nie aldus voorgelê is nie.

(2) Die betrokke inligtingsbeampte moet in die kennisgewing bedoel in artikel 19(1)*(b)* in die geval van 'n weiering van 'n versoek om toegang ingevolge—

(a) subartikel (1)*(a)* of *(d)*, die datum meld waarop die betrokke rekord gepubliseer moet word;

(b) subartikel (1)*(b)* en indien sodanige inligting normaalweg aan die betrokke regeringsliggaam beskikbaar is, die titel en uitgewer van die rekord identifiseer en die betrokke biblioteek naaste aan die betrokke versoeker identifiseer;

(c) subartikel (1)*(c)* en indien sodanige inligting normaalweg aan die betrokke regeringsliggaam beskikbaar is, die titel en uitgewer van die rekord identifiseer en meld waar dit aangekoop kan word; of

(d) subartikel (1)*(e)*, die datum meld waarop die rekord aan die Parlement voorgelê gaan word.

(3) Indien die inligtingsbeampte van 'n regeringsliggaam dit oorweeg om 'n versoek om toegang tot 'n rekord te weier ingevolge subartikel (1)*(a)*, *(d)* of *(e)*, moet hy of sy die betrokke versoeker in kennis stel—

(a) van sodanige oorweging; en

(b) that the requester may, within 30 days after that notice is given, make representations to the information officer why the record is required before publication or submission to Parliament.

(4) If notice is given to a requester in terms of subsection (3), the information officer must, after due consideration of any representations made in response to the notice, grant the request, unless there are reasonable grounds for believing that the requester will suffer no substantial prejudice if access to the record is deferred until the record is published or submitted to Parliament.

(5) If the record in respect of which a request for access has been refused in terms of subsection (1)*(a)* is not published within 60 days after receipt or transfer of the request or such further period as is reasonably necessary for printing and translating the record for the purpose of publishing it, the requester must be given access to the record.

Records already open to public

43. The information officer of a governmental body may refuse a request for access to a record of the body if the record is open to public access in accordance with any other legislation, unless the Human Rights Commission determines that the manner in which access may be obtained and the fee payable for access in terms of the other legislation concerned is more onerous than the request fee and access fee payable in terms of this Act.

Mandatory disclosure in public interest

44. (1) Despite any other provision of this Act, but subject to Chapter 3 of this Part, the information officer of a governmental body must grant a request for access to a record contemplated in section 29(1), 30(2), 31(1), 33*(a)*, 34(1)*(c)*(ii), (iii) or (vi) or *(d)* or 35 if—

(a) disclosure of the record would reveal evidence of substantial—

(i) abuse of authority, illegality or neglect in the exercise of a power or performance of a duty of an official of a governmental body;

(ii) injustice to a person, including a deceased individual;

(iii) danger to the environment or the health or safety of an individual or the public; or

(iv) unauthorised use of the funds or other assets of a governmental body; and

(b) giving due weight to the importance of open, accountable and participatory administration, the public interest in the disclosure of the record clearly outweighs the need for non-disclosure contemplated in the provision concerned.

(2) Despite any other provision of this Act, but subject to Chapter 3 of this Part, the information officer of a governmental body must grant a request for access to a record contemplated in section 32(1) or (3), 33*(b)*, 34(1)*(a)*, *(b)*, *(c)*(i), (iv) or (v), 36(1), 37(1), 38(1) or (2) or 39(1), if giving due weight to the importance of open, accountable and participatory administration, the public interest in the disclosure of the record clearly outweighs the need for non-disclosure contemplated in the provision concerned.

CHAPTER 3

THIRD PARTY INTERVENTION

Notice to third parties

45. (1) If the information officer of a governmental body is considering a request for access to a record contemplated in section 29(1) or 31(1), the information officer must inform a third party to whom or which the record relates of the request, unless all necessary steps to locate that third party have been unsuccessful.

(2) The information officer must inform a third party in terms of subsection (1)—

(a) as soon as reasonably possible, but in any event, within 21 days or, if an urgent request application has been granted, within five working days, after that request is received or transferred; and

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(b) dat die versoeker, binne 30 dae nadat kennis gegee is, vertoë tot die inligtingsbeampte kan rig oor die rede waarom die rekord voor publikasie of voorlegging aan die Parlement benodig word.

(4) Indien aan 'n versoeker kennis gegee word ingevolge subartikel (3), moet die inligtingsbeampte, na behoorlike oorweging van enige vertoë gerig in antwoord op die kennisgewing, die versoek toestaan, tensy daar redelike gronde is om te glo dat die versoeker nie wesenlik benadeel sal word nie indien toegang tot die rekord uitgestel word totdat die rekord gepubliseer of aan die Parlement voorgelê is.

(5) Indien die rekord ten opsigte waarvan 'n versoek om toegang ingevolge subartikel (1)*(a)* geweier is, nie gepubliseer word binne 60 na ontvangs of oorplasing van die versoek of die verdere tydperk wat redelikerwys nodig is vir die druk en vertaal van die rekord met die doel om dit te publiseer nie, moet die versoeker toegang tot die rekord verleen word.

Rekords reeds oop vir publiek

43. Die inligtingsbeampte van 'n regeringsliggaam kan 'n versoek om toegang tot 'n rekord van die liggaam weier indien die rekord oop is vir openbare toegang ooreenkomstig enige ander wetgewing, tensy die Menseregtekommissie bepaal dat die wyse waarop toegang verkry kan word en die gelde betaalbaar vir toegang ingevolge die ander betrokke wetgewing meer beswarend is as die versoekgelde en toegangsgelde betaalbaar ingevolge hierdie Wet.

Verpligte openbaarmaking in openbare belang

44. (1) Ondanks enige ander bepaling van hierdie Wet, maar behoudens Hoofstuk 3 van hierdie Deel, moet die inligtingsbeampte van 'n regeringsliggaam 'n versoek om toegang tot 'n rekord beoog in artikel 29(1), 30(2), 31(1), 33*(a)*, 34(1)*(c)*(ii), (iii) of (vi) of *(d)* of 35 toestaan indien—

(a) openbaarmaking van die rekord bewys aan die lig sal bring van wesenlike—

(i) misbruik van gesag, onwettigheid of versuim in die uitoefening van 'n bevoegdheid of verrigting van 'n plig van 'n amptenaar van 'n regeringsliggaam;

(ii) onreg teenoor 'n persoon, insluitende 'n oorledene;

(iii) gevaar vir die omgewing of die gesondheid of veiligheid van 'n individu of die publiek; of

(iv) ongemagtigde gebruik van die fondse of ander bates van 'n regeringsliggaam; en

(b) met behoorlike inagneming van die belangrikheid van oop, verantwoordingspligtige en deelnemende administrasie, die openbare belang by die openbaarmaking van die rekord duidelik swaarder weeg as die behoefte aan nie-openbaarmaking beoog in die betrokke bepaling.

(2) Ondanks enige ander bepaling van hierdie Wet, maar behoudens Hoofstuk 3 van hierdie Deel, moet die inligtingsbeampte van 'n regeringsliggaam 'n versoek om toegang tot 'n rekord beoog in artikel 32(1) of (3), 33*(b)*, 34(1)*(a)*, *(b)*, *(c)*(i), (iv) of (v), 36(1), 37(1), 38(1) of (2) of 39(1) toestaan indien, met behoorlike inagneming van die belangrikheid van oop, verantwoordingspligtige en deelnemende administrasie, die openbare belang by die openbaarmaking van die rekord duidelik swaarder weeg as die behoefte aan nie-openbaarmaking beoog in die betrokke bepaling.

HOOFSTUK 3

DERDEPARTY-INGRYPING

Kennisgewing aan derde partye

45. (1) Indien die inligtingsbeampte van 'n regeringsliggaam 'n versoek om toegang tot 'n rekord beoog in artikel 29(1) of 31(1) oorweeg, moet die inligtingsbeampte 'n derde party met wie of waarmee die rekord verband hou, omtrent die versoek inlig, tensy alle nodige stappe om daardie derde party op te spoor, onsuksesvol was.

(2) Die inligtingsbeampte moet 'n derde party ingevolge subartikel (1) inlig—

(a) so gou as wat redelikerwys moontlik is, maar in elk geval, binne 21 dae of, indien 'n aansoek om dringende versoek toegestaan is, binne vyf werkdae, nadat daardie versoek ontvang of oorgeplaas is; en

(b) by the fastest means reasonably possible.

(3) When informing a third party in terms of subsection (1), the information officer must—

(a) state that he or she is considering a request for access to a record contemplated in section 29(1) or 31(1), as the case may be, and describe the content of the record;

(b) furnish the name of the requester;

(c) in the case of a record contemplated in—

(i) section 29(1), describe the provisions of section 29; or

(ii) section 31(1), describe the provisions of section 31;

(d) in any case where the information officer believes that the provisions of section 44(1) might apply, describe those provisions, specify which of the circumstances referred to in section 44(1)*(a)*(i) to (iv) in the opinion of the information officer might apply and state the reasons why he or she is of the opinion that section 44(1) might apply; and

(e) state that the third party may, within 21 days or, if an urgent request application has been granted, within 10 working days, after the third party is informed—

(i) make written or oral representations to the information officer why the request for access should be refused; or

(ii) give written consent for the disclosure of the record to the requester.

(4) If a third party is not informed in writing of a request for access in terms of subsection (1), the information officer must, on request, give a written notice stating the matters referred to in subsection (3) to the third party.

Representations by third parties

46. A third party that is informed in terms of section 45(1) of a request for access, may, within 21 days or, if an urgent request application has been granted, within 10 working days after the third party has been informed—

(a) make written or oral representations to the information officer concerned why the request should be refused; or

(b) give written consent for the disclosure of the record to the requester concerned.

Decision on representations for refusal and notice thereof

47. (1) The information officer of a governmental body must, as soon as reasonably possible, but in any event within 30 days or, if an urgent request application has been granted, within 15 working days, after every third party is informed as required by section 45—

(a) decide, after giving due regard to any representations made by a third party in terms of section 46*(a)*, whether to grant the request for access; and

(b) notify the third party so informed and a third party not located as contemplated in section 45(1), but that can, after taking all necessary steps, be located before the decision is taken, of the decision.

(2) If a third party cannot be located as contemplated in section 45(1), any decision whether to grant the request for access must be made with due regard to the fact that the third party did not have the opportunity to make representations in terms of section 46*(a)* why the request should be refused.

(3) If the request for access is granted, the notice in terms of subsection (1)*(b)* must state—

(a) the findings on all material questions of fact, referring to the material on which those findings were based;

(b) the reasons for granting the request (including the provisions of this Act relied upon to justify the granting) in such manner as to enable the third party—

(i) to understand the justification for the granting of the request; and

(ii) to make an informed decision about whether to lodge an internal appeal

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(b) op die vinnigste metode wat redelikerwys moontlik is.

(3) Wanneer 'n derde party ingevolge subartikel (1) ingelig word, moet die inligtingsbeampte—

(a) meld dat hy of sy 'n versoek om toegang tot 'n rekord beoog in artikel 29(1) of 31(1), na gelang van die geval, oorweeg en die inhoud van die rekord beskryf;

(b) die naam van die versoeker verskaf;

(c) in die geval van 'n rekord beoog in—

(i) artikel 29(1), die bepalings van artikel 29 beskryf; of

(ii) artikel 31(1), die bepalings van artikel 31 beskryf;

(d) in enige geval waar die inligtingsbeampte meen dat die bepalings van artikel 44(1) van toepassing kan wees, daardie bepalings beskryf, meld watter van die omstandighede bedoel in artikel 44(1)*(a)*(i) tot (iv) na die mening van die inligtingsbeampte van toepassing kan wees en die redes meld waarom hy of sy van mening is dat artikel 44(1) van toepassing kan wees; en

(e) meld dat die derde party binne 21 dae of, indien 'n aansoek om dringende versoek toegestaan is, binne 10 werkdae, nadat die derde party ingelig is—

(i) skriftelike of mondelinge vertoë tot die inligtingsbeampte kan rig waarom die versoek om toegang geweier behoort te word; of

(ii) skriftelike toestemming vir die openbaarmaking van die rekord aan die versoeker kan gee.

(4) Indien 'n derde party nie skriftelik oor 'n versoek om toegang ingevolge subartikel (1) ingelig word nie, moet die inligtingsbeampte, op versoek, 'n skriftelike kennisgewing wat die aangeleenthede bedoel in subartikel (3) meld aan die derde party gee.

Vertoë deur derde partye

46. 'n Derde party wat ingevolge artikel 45(1) omtrent 'n versoek om toegang ingelig moet word, kan binne 21 dae of, indien 'n aansoek om dringende versoek toegestaan is, binne 10 werkdae, nadat die derde party ingelig is—

(a) skriftelike of mondelinge vertoë tot die betrokke inligtingsbeampte rig waarom die versoek geweier behoort te word; of

(b) skriftelike toestemming vir die openbaarmaking van die rekord aan die betrokke versoeker gee.

Besluit oor vertoë vir weiering en kennisgewing daarvan

47. (1) Die inligtingsbeampte van 'n regeringsliggaam moet, so spoedig as wat redelikerwys moontlik is, maar in elk geval binne 30 dae of, indien 'n aansoek om dringende versoek toegestaan is, binne 15 werkdae, nadat elke derde party ingelig is soos vereis deur artikel 45—

(a) na behoorlike oorweging van enige vertoë deur 'n derde party gerig ingevolge artikel 46*(a)*, besluit om die versoek om toegang toe te staan al dan nie; en

(b) die derde party aldus ingelig en 'n derde party wat nie opgespoor is nie soos beoog in artikel 45(1), maar wat nadat alle nodige stappe gedoen is, opgespoor kan word voordat die besluit geneem word, omtrent die besluit in kennis stel.

(2) Indien 'n derde party nie opgespoor kan word nie soos beoog in artikel 45(1), moet enige besluit oor die vraag of die versoek om toegang toegestaan moet word al dan nie, geneem word met behoorlike inagneming van die feit dat die derde party nie die geleentheid gehad het nie om ingevolge artikel 46*(a)* vertoë te rig waarom die versoek geweier moet word.

(3) Indien die versoek om toegang toegestaan word, moet die kennisgewing ingevolge subartikel (1)*(b)*—

(a) die bevindings oor alle wesenlike feitevrae, met verwysing na die gegewens waarop daardie bevindings gebaseer is, meld;

(b) die redes vir die toestaan van die versoek (insluitende die bepalings van hierdie Wet waarop gesteun is om die toestaan te regverdig) op die wyse wat die derde party in staat stel—

(i) om die regverdiging vir die toestaan van die versoek te begryp; en

(ii) om 'n ingeligte besluit te neem oor of 'n interne appèl by die hoof van

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with the head of the governmental body concerned or to utilise any other remedy in law available to the third party; and

(c) that the third party may lodge an internal appeal against the decision with the head of the governmental body—

(i) within 30 days; or

(ii) if an urgent request application has been granted, within 10 working days,

after notice is given, and the procedure for lodging the internal appeal; and

(d) that the requester will be given access to the record after the expiry of the applicable period contemplated in paragraph *(c)*(i) or (ii), unless an internal appeal is lodged within that period.

(4) If the information officer of a governmental body decides in terms of subsection (1) to grant the request for access concerned, he or she must give the requester access to the record concerned after the expiry of—

(a) 30 days; or

(b) if an urgent request application has been granted, 10 working days,

after notice is given in terms of subsection (1)*(b)*, unless an internal appeal with the head of the governmental body is lodged against the decision within the applicable period contemplated in paragraph *(a)* or *(b)* of this subsection.

PART 4

ACCESS TO, CORRECTION OF AND CONTROL OVER PERSONAL INFORMATION HELD BY PRIVATE AND GOVERNMENTAL BODIES

Application of Part

48. This Part, except sections 50, 51 and 52, does not apply to personal information—

(a) already publicly available;

(b) created or acquired and preserved solely for public reference or exhibition purposes in a library or museum;

(c) placed by or on behalf of a person other than a governmental body in—

(i) an archives repository established in terms of—

(aa) section 11(1) of the National Archives of South Africa Act, 1996 (Act No. 43 of 1996); or

(bb) an equivalent provision of provincial legislation regarding the custody of the records of governmental bodies in the relevant provincial sphere of government; or

(ii) a library or museum controlled by a governmental body;

(d) about an individual who is or was an official of a governmental body if the information relates to the position or functions of that official, including—

(i) the fact that the individual is or was an official of that governmental body;

(ii) the title, work address, work phone number and other similar particulars of the individual;

(iii) the classification, remuneration and responsibilities of the position held or services performed by the individual; or

(iv) the name of the individual on a record prepared by the individual in the course of such employment.

Use of Act for criminal or civil discovery of private bodies' records excluded

49. No request for access to a record of a private body may be made in terms of this Act for the purpose of criminal or civil discovery provided for in any other law.

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die betrokke regeringsliggaam aangeteken moet word, en of om enige ander regsmiddel wat vir die derde party beskikbaar is, te benut,

meld; en

(c) meld dat die derde party by die hoof van die regeringsliggaam 'n interne appèl teen die besluit kan aanteken—

(i) binne 30 dae; of

(ii) indien 'n aansoek om dringende versoek toegestaan is, binne 10 werkdae,

nadat kennis gegee is, en die prosedure vir die aanteken van die interne appèl; en

(d) meld dat die versoeker toegang tot die rekord verleen sal word na verstryking van die toepaslike tydperk beoog in paragraaf *(c)*(i) of (ii), tensy 'n interne appèl binne daardie tydperk aangeteken word.

(4) Indien die inligtingsbeampte van 'n regeringsliggaam ingevolge subartikel (1) besluit om die versoek om toegang toe te staan, moet hy of sy aan die versoeker toegang tot die rekord verleen na verstryking van—

(a) 30 dae; of

(b) indien 'n aansoek om dringende versoek toegestaan is, 10 werkdae,

nadat daar ingevolge subartikel (1)*(b)* kennis gegee is, tensy 'n interne appèl by die hoof van daardie regeringsliggaam teen die besluit aangeteken word binne die toepaslike tydperk beoog in paragraaf *(a)* of *(b)* van hierdie subartikel.

DEEL 4

TOEGANG TOT, REGSTELLING VAN EN BEHEER OOR PERSOONLIKE INLIGTING GEHOU DEUR PRIVAAT- EN REGERINGSLIGGAME

Toepassing van Deel

48. (1) Hierdie Deel, uitgesonderd artikels 50, 51 en 52, is nie van toepassing nie op persoonlike inligting—

(a) reeds in die openbaar beskikbaar;

(b) geskep of verkry en bewaar slegs vir openbare naslaan- of uitstallingsdoeleindes in 'n biblioteek of museum;

(c) geplaas deur of namens 'n ander persoon as 'n regeringsliggaam in—

(i) 'n argiefbewaarplek ingestel ingevolge—

(aa) artikel 11(1) van die Wet op die Nasionale Argief van Suid-Afrika, 1996 (Wet No. 43 van 1996); of

(bb) 'n ekwivalente bepaling van provinsiale wetgewing betreffende die bewaring van rekords van regeringsliggame in die tersaaklike provinsiale regeringsfeer; of

(ii) 'n biblioteek of museum wat deur 'n regeringsliggaam beheer word;

(d) oor 'n individu wat 'n amptenaar van 'n regeringsliggaam is of was indien die inligting verband hou met die posisie of funksies van daardie amptenaar, insluitende—

(i) die feit dat die individu 'n amptenaar van daardie regeringsliggaam is of was;

(ii) die titel, werkadres, werktelefoonnommer en ander soortgelyke besonderhede van die individu;

(iii) die klassifikasie, besoldiging en verantwoordelikhede van die posisie beklee of dienste verrig deur die individu; of

(iv) die naam van die individu op 'n rekord opgestel deur die individu in die loop van sodanige diens.

Gebruik van Wet vir strafregtelike of siviele blootlegging van private liggame se rekords uitgesluit

49. Geen versoek om toegang tot 'n rekord van 'n private liggaam mag ingevolge hierdie Wet gedoen word nie vir die doel van strafregtelike of sivielregtelike blootlegging waarvoor in enige ander reg voorsiening gemaak word.

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Access to personal information held by private bodies

50. (1) Subject to section 49 and this section, a person (in this section referred to as "the requester") must, on request (in this section referred to as "the request"), be given access to any record of a private body containing personal information about that person.

(2) The request must—

(a) be made orally or in writing to the head of the private body concerned at his or her address, fax number or electronic mail address;

(b) provide sufficient particulars to enable the head of the private body to identify the record requested;

(c) specify a postal address or phone number for the requester in the Republic; and

(d) state the capacity contemplated in subsection (3) in which the requester is making the request and include—

(i) the requester's identity document or a certified copy thereof or any other reasonable proof of his or her identity; and

(ii) if the requester is not the person to whom or which the personal information relates, reasonable proof of the capacity in which the requester is making the request.

(3) The request may be made—

(a) by the person to whom or which the personal information in the record relates or that person's authorised representative;

(b) if an individual contemplated in paragraph (*a*) is—

(i) under the age of 16 years, by a person having parental responsibility for the individual;

(ii) incapable of managing his or her affairs, by a person appointed by the court to manage those affairs; or

(iii) deceased, by the executor of his or her estate.

(4) The head of the private body to whom the request is made, must, subject to subsection (6), give access to the record to the person as soon as reasonably possible, but in any event, within 30 days, after the request has been received.

(5) If, in accordance with this section, access is given to a record containing personal information—

(a) the head of the private body must inform the person concerned that a request for the correction of the information may be made in terms of section 51; and

(b) the form of access is as the head of the private body determines, provided that a copy of the record must, on request of the requester, be provided at a reasonable fee.

(6)*(a)* Subject to this subsection, the provisions requiring or permitting the refusal or granting of a request for access to a record, or part thereof, of a governmental body contained in sections 23(1) and (2), 29, 30(1), (2) and (3), 31(1) and (2), 32, 33, 34 (except subsection (3)*(b)*(iv)), 35, 36 (except subsection (2)*(b)*(iv)), 37, 38(1), (2) and (3), 39(1) to (4), 40, 41, 42(1), (2) and (5) and 43 apply, with the changes required by the context, to the request.

(b) Any reference in a provision contemplated in paragraph *(a)* to—

(i) the information officer of a governmental body;

(ii) a record of a governmental body; and

(iii) a notice in terms of section 19,

must be construed as a reference to the head of a private body, a record of a private body and a notice in terms of paragraph *(c)* of this subsection, respectively.

(c) If the request is refused in accordance with paragraph *(a)*, the head of the private body must notify the requester of the refusal and the reasons for the refusal as soon as reasonably possible, but in any event, within 30 days, after the request has been received.

(7) The head of a private body may, subject to the conditions determined by the head, delegate a power conferred or duty imposed on the head by this Part to any employee of the private body.

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Toegang tot persoonlike inligting gehou deur privaatliggame

50. (1) Behoudens artikel 49 en hierdie artikel moet 'n persoon (in hierdie artikel "die versoeker" genoem), op versoek (in hierdie artikel "die versoek" genoem), toegang verleen word tot enige rekord van 'n privaatliggaam wat persoonlike inligting oor daardie persoon bevat.

(2) Die versoek moet—

(a) mondeling of skriftelik gerig word aan die hoof van die betrokke privaatliggaam by sy of haar adres, faksnommer of elektroniese posadres;

(b) voldoende besonderhede verskaf om die hoof van die privaatliggaam in staat te stel om die rekord wat versoek word, te identifiseer;

(c) 'n posadres of telefoonnommer vir die versoeker in die Republiek meld; en

(d) die hoedanigheid beoog in subartikel (3) waarin die versoeker die versoek rig, meld en moet—

(i) die versoeker se identiteitsdokument of 'n gewaarmerkte afskrif daarvan; of enige ander redelike bewys van die versoeker se identiteit; en

(ii) indien die versoeker nie die persoon is op wie die persoonlike inligting betrekking het nie, redelike bewys van die hoedanigheid waarin die versoeker die versoek rig,

insluit.

(3) Die versoek kan gerig word—

(a) deur die persoon met wie die persoonlike inligting in die rekord verband hou of daardie persoon se gemagtigde verteenwoordiger;

(b) indien die individu beoog in paragraaf *(a)*—

(i) onder die ouderdom van 16 jaar is, deur 'n persoon wat ouerlike verantwoordelikheid vir die individu het;

(ii) nie in staat is om sy of haar sake te bestuur nie, deur 'n persoon wat deur die hof aangestel is om daardie sake te bestuur; of

(iii) oorlede is, deur die eksekuteur van die boedel van die individu.

(4) Die hoof van die privaatliggaam aan wie die versoek gerig word, moet, behoudens subartikel (6), so gou as wat redelikerwys moontlik is, maar in elk geval binne 30 dae nadat die versoek ontvang is, aan die persoon toegang tot die rekord verleen.

(5) Indien daar, ooreenkomstig hierdie artikel, toegang verleen word tot 'n rekord wat persoonlike inligting bevat—

(a) moet die hoof van die privaatliggaam die betrokke persoon inlig dat die regstelling van die inligting ingevolge artikel 51 versoek kan word; en

(b) is die vorm van toegang soos deur die hoof van die privaatliggaam bepaal, met dien verstande dat 'n afskrif van die rekord, op versoek van die versoeker, teen redelike gelde verskaf moet word.

(6)*(a)* Behoudens hierdie subartikel is die bepalings wat die weiering of toestaan van 'n versoek om toegang tot 'n rekord, of gedeelte daarvan, van 'n regeringsliggaam vereis of toelaat, soos vervat in artikels 23(1) en (2), 29, 30(1), (2) en (3), 31(1) en (2), 32, 33, 34 (uitgesonderd subartikel (3)*(b)*(iv)), 35, 36 (uitgesonderd subartikel (2)*(b)*(iv)), 37, 38(1), (2) en (3), 39(1) tot (4), 40, 41, 42(1), (2) en (5) en 43, met die veranderings wat deur die konteks verlang word, van toepassing op die versoek.

(b) Enige verwysing in 'n bepaling beoog in paragraaf *(a)* na—

(i) die inligtingsbeampte van 'n regeringsliggaam;

(ii) 'n rekord van 'n regeringsliggaam; en

(iii) 'n kennisgewing ingevolge artikel 19,

moet uitgelê word as 'n verwysing na onderskeidelik die hoof van 'n privaatliggaam, 'n rekord van 'n privaatliggaam en 'n kennisgewing ingevolge paragraaf *(c)* van hierdie subartikel.

(c) Indien die versoek ooreenkomstig paragraaf *(a)* geweier word, moet die hoof van die privaatliggaam die versoeker so gou as wat redelikerwys moontlik is, maar in elk geval binne 30 dae nadat die versoek ontvang is, van die weiering en die redes vir die weiering in kennis stel.

(7) Die hoof van 'n privaatliggaam kan, behoudens die voorwaardes wat die hoof bepaal, 'n bevoegheid of 'n plig wat by hierdie Deel aan die hoof verleen of opgedra is, delegeer aan 'n werknemer van die privaatliggaam.

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Correction of personal information held by private bodies

51. (1) A record may be corrected in terms of this section by amending, supplementing or, subject to subsection (8), deleting the inaccurate information.

(2) If a person is given access to a record of a private body in terms of section 50, that person may request the correction of inaccurate personal information about that person in that record (in this section referred as "the request").

(3) Nothing in this section prevents a private body from correcting personal information in a record of that body in accordance with other law.

(4) If any other law determines any requirement in respect of the correction of personal information in a record of a private body which is additional to, but consistent with, the provisions of this section, a correction requested in terms of this section must be made in accordance with this section and the requirement of that other law.

(5) The request must—

(a) be made orally or in writing to the head of the private body concerned at his or her address, fax number or electronic mail address;

(b) provide sufficient particulars to enable the head of the private body to identify the record which contains the information that the requester regards as inaccurate;

(c) specify the respect in which the requester regards the information as inaccurate and provide any information regarding the inaccuracy that is in the possession or under the control of the requester; and

(d) specify a postal address or fax number for the requester in the Republic.

(6) The head of a private body to whom the request is made, must, as soon as reasonably possible, but in any event, within 30 days, decide on the request.

(7) If the head of a private body decides that the information identified in the request is inaccurate, the head must, free of charge and within the period contemplated in subsection (6)—

(a) correct the information and send a copy of the part of the record containing the correction to the requester; and

(b) determine, as far as reasonably possible, whether the inaccurate information is in any other record of the private body and, if it is, make the same correction on the other record.

(8) If the head of a private body decides upon the request to delete information contained in any record, the head must, before making the deletion—

(a) make a copy of the part of the record to be deleted;

(b) make a note on that copy of the deletion to be made in the original record; and

(c) retain that copy for as long as the record is retained.

(9) If the head of a private body decides that the information referred to in a request for correction is not inaccurate and that the request is not irrelevant, frivolous or vexatious, the head must, free of charge and within the period contemplated in subsection (6)—

(a) make a note in the record as near as reasonably possible to the point where the information appears—

(i) of the decision of the head that the information is not inaccurate;

(ii) that the accuracy of the information is disputed by the requester; and

(iii) that the request is attached to the record,

and attach the request to the record; and

(b) notify the requester—

(i) of the decision that the information is not inaccurate; and

(ii) that a note was made on the record as required by paragraph *(a)*,

and send a copy of the note to the requester.

(10) If a record has been corrected in terms of subsection (7), any disclosure or use of the record after such correction must be in its corrected form.

(11) If a note has been made in a record as contemplated in subsection (9)*(a)*, any disclosure of the information concerned in the record must include—

(a) that note; and

(b) the relevant request attached thereto.

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Regstelling van persoonlike inligting gehou deur privaatliggame

51. (1) 'n Rekord kan ingevolge hierdie artikel reggestel word deur die foutiewe inligting te wysig, aan te vul of, behoudens subartikel (8), te skrap.

(2) Indien 'n persoon ingevolge artikel 50 toegang tot 'n rekord van 'n privaatliggaam verleen is, kan daardie persoon die regstelling van foutiewe inligting oor daardie persoon in daardie rekord versoek (in hierdie artikel "die versoek" genoem).

(3) Niks in hierdie artikel verhoed 'n privaatliggaam om persoonlike inligting in 'n rekord van daardie liggaam ooreenkomstig ander reg reg te stel nie.

(4) Indien enige ander reg enige vereiste ten opsigte van die regstelling van persoonlike inligting in 'n rekord van 'n privaatliggaam neerlê wat bykomend tot, maar bestaanbaar is met die bepalings van hierdie artikel, moet 'n regstelling ingevolge hierdie artikel versoek ooreenkomstig hierdie artikel en die vereiste van daardie ander reg gedoen word.

(5) Die versoek moet—

(a) mondeling of skriftelik gerig word aan die hoof van die betrokke privaatliggaam by sy of haar adres, faksnommer of elektroniese posadres;

(b) voldoende besonderhede verskaf om die hoof van die privaatliggaam in staat te stel om die rekord wat die inligting bevat wat die versoeker as foutief beskou, te identifiseer;

(c) meld in watter opsig die versoeker die inligting as foutief beskou en enige inligting betreffende die onakkuraatheid wat in die besit of onder die beheer van die versoeker is, verskaf; en

(d) 'n posadres of faksnommer vir die versoeker in die Republiek meld.

(6) Die hoof van 'n privaatliggaam aan wie die versoek gerig word, moet, so gou as wat redelikerwys moontlik is, maar in elk geval binne 30 dae, oor die versoek besluit.

(7) Indien die hoof van 'n privaatliggaam besluit dat die inligting geïdentifiseer in die versoek foutief is, moet die hoof, gratis en binne die tydperk beoog in subartikel (6)—

(a) die inligting regstel en 'n afskrif van die gedeelte van die rekord wat die regstelling bevat, aan die versoeker stuur; en

(b) sover dit redelikerwys moontlik is, vasstel of die foutiewe inligting in enige ander rekord van die privaatliggaam is en, indien dit is, dieselfde regstelling in die ander rekord aanbring.

(8) Indien die hoof van 'n privaatliggaam besluit op die versoek om inligting vervat in enige rekord te skrap, moet die hoof, voordat die skrapping gedoen word—

(a) 'n afskrif maak van die gedeelte van die rekord wat geskrap moet word;

(b) op daardie afskrif 'n aantekening maak van die skrapping wat in die oorspronklike rekord gedoen gaan word; en

(c) daardie afskrif behou vir solank as wat die rekord behou word.

(9) Indien die hoof van 'n privaatliggaam besluit dat die inligting bedoel in 'n versoek om regstelling nie foutief is nie en dat die versoek nie irrelevant, beuselagtig of kwelsugtig is nie, moet die hoof, gratis en binne die tydperk beoog in subartikel (6)—

(a) in die rekord 'n aantekening aanbring so na as wat redelikerwys moontlik is aan die plek waar die inligting verskyn—

(i) van die besluit van die hoof dat die inligting nie foutief is nie;

(ii) dat die akkuraatheid van die inligting deur die versoeker betwis word; en

(iii) dat die versoek by die rekord aangeheg word,

en die versoek by die rekord aanheg; en

(b) die versoeker in kennis stel—

(i) van die besluit dat die inligting nie foutief is nie; en

(ii) dat 'n aantekening op die rekord gemaak is soos vereis deur paragraaf *(a)*,

en 'n afskrif van die aantekening aan die versoeker stuur.

(10) Indien 'n rekord reggestel is ingevolge subartikel (7), moet enige openbaarmaking of gebruik van die rekord na sodanige regstelling in sy reggestelde vorm wees.

(11) Indien 'n aantekening in 'n rekord gemaak is soos beoog in subartikel (9)*(a)*, moet enige openbaarmaking van die betrokke inligting in die rekord—

(a) daardie aantekening; en

(b) die betrokke versoek daarby aangeheg,

insluit.

Correction of personal information held by governmental bodies

52. (1) A record may be corrected in terms of this section by amending, supplementing or, subject to subsection (10), deleting the inaccurate information.

(2) If a person is given access to a record of a governmental body in terms of section 9, that person may request the correction of inaccurate personal information about that person in that record.

(3) Nothing in this section prevents a governmental body from correcting personal information in a record of that body in accordance with other law.

(4) If any other law determines any requirement in respect of the correction of personal information in a record of a governmental body which is additional to, but consistent with, the provisions of this section, a correction in terms of this section must be made in accordance with this section and the requirement of that other law.

(5)*(a)* A request for correction must be made in the prescribed form or orally to the information officer of the governmental body concerned at his or her address, fax number or electronic mail address.

(b) The form for a request for correction prescribed for the purposes of paragraph *(a)*, must at least require from the requester—

(i) to provide sufficient particulars to enable an official of the governmental body concerned to identify the record which contains the information that the requester regards as inaccurate;

(ii) to specify the respect in which the requester regards the information as inaccurate and to provide any information regarding the inaccuracy that is in the possession or under the control of the requester; and

(iii) to specify a postal address or fax number for the requester in the Republic.

(6) Sections 13(4), 14, 15, 16, 20 and 21 apply with the changes required by the context to a request for correction.

(7) The information officer to whom a request for correction is made or transferred, must, subject to sections 20 and 21(1), read with subsection (6), as soon as reasonably possible, but in any event within 30 days, after the request is received or transferred, decide on the request.

(8) If the information officer fails to decide on a request for correction within the period contemplated in subsection (7), the information officer is, for the purposes of this Act, regarded to have refused the request.

(9) If the information officer decides that the information identified in a request for correction is inaccurate, the information officer must, free of charge and within the period contemplated in subsection (7)—

(a) correct the information and send a copy of the part of the record containing the correction to the requester;

(b) determine, as far as reasonably possible, whether the inaccurate information is in any other record of that governmental body and, if it is, make the same correction on the other record;

(c) determine, as far as reasonably possible, whether the inaccurate information has been supplied by that governmental body to any other governmental body or person and notify any such other governmental body or person of the correction that was made; and

(d) send to the requester a copy of each notice which the information officer gives in terms of paragraph *(c)*.

(10) If the information officer decides upon a request for correction to delete information contained in any record, he or she must, before making the deletion—

(a) make a copy of the part of the record to be deleted;

(b) make a note on that copy of the fact of the deletion to be made in the original record; and

(c) retain that copy for as long as the record is retained.

(11) A governmental body which has been notified in terms of subsection (9)*(c)* that such governmental body has been supplied with inaccurate information must, as soon as reasonably possible, but in any event within 30 days, after being so notified, if the body—

(a) accepts that the information is inaccurate, correct that information and notify the person to whom or which the information relates that the correction has been made; or

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Regstelling van persoonlike inligting gehou deur regeringsliggame

52. (1) 'n Rekord kan ingevolge hierdie artikel reggestel word deur die foutiewe inligting te wysig, aan te vul of, behoudens subartikel (10), te skrap.

(2) Indien 'n persoon ingevolge artikel 9 toegang tot 'n rekord van 'n regeringsliggaam verleen is, kan daardie persoon die regstelling van foutiewe persoonlike inligting oor daardie persoon in daardie rekord versoek.

(3) Niks in hierdie artikel verhoed 'n regeringsliggaam om persoonlike inligting in 'n rekord van daardie liggaam ooreenkomstig ander reg reg te stel nie.

(4) Indien enige ander reg 'n vereiste ten opsigte van die regstelling van persoonlike inligting in 'n rekord van 'n regeringsliggaam neerlê wat bykomend tot, maar bestaanbaar is met die bepalings van hierdie artikel, moet 'n regstelling ingevolge hierdie artikel versoek ooreenkomstig hierdie artikel en die vereiste van daardie ander reg gedoen word.

(5)*(a)* 'n Versoek om regstelling moet op die voorgeskrewe vorm of mondeling aan die inligtingsbeampte van die betrokke regeringsliggaam by sy of haar adres, faksnommer of elektroniese posadres gerig word.

(b) Die vorm van 'n versoek om regstelling voorgeskryf vir die doeleindes van paragraaf *(a)*, moet van die versoeker minstens vereis—

(i) om voldoende besonderhede te verskaf om 'n amptenaar van die betrokke regeringsliggaam in staat te stel om die rekord wat die inligting bevat wat die versoeker as foutief beskou, te identifiseer;

(ii) om die opsig waarin die versoeker die inligting as foutief beskou, te meld en enige inligting betreffende die onakkuraatheid wat in die besit of onder beheer van die versoeker is, te verskaf; en

(iii) om 'n posadres of faksnommer vir die versoeker in die Republiek te meld.

(6) Artikels 13(4), 14, 15, 16, 20 en 21 is, met die veranderings wat deur die konteks verlang word, van toepassing op 'n versoek om regstelling.

(7) Die inligtingsbeampte aan wie 'n versoek om regstelling gerig of na wie dit oorgeplaas word, moet, behoudens artikels 20 en 21(1), saamgelees met subartikel (6), so gou as wat redelikerwys moontlik is, maar in elk geval binne 30 dae, nadat die versoek ontvang of oorgeplaas is, oor die versoek besluit.

(8) Indien die inligtingsbeampte versuim om te besluit oor 'n versoek om regstelling binne die tydperk beoog in subartikel (7), word die inligtingsbeampte, vir die doeleindes van hierdie Wet, geag die versoek te geweier het.

(9) Indien die inligtingsbeampte besluit dat die inligting geïdentifiseer in 'n versoek om regstelling foutief is, moet die inligtingsbeampte, gratis en binne die tydperk beoog in subartikel (7)—

(a) die inligting regstel en 'n afskrif van die gedeelte van die rekord wat die regstelling bevat, aan die versoeker stuur;

(b) sover as wat redelikerwys moontlik is, vasstel of die foutiewe inligting in enige ander rekord van daardie regeringsliggaam voorkom en, indien wel, dieselfde regstelling in die ander rekord aanbring;

(c) sover as wat redelikerwys moontlik is, vasstel of die foutiewe inligting deur daardie regeringsliggaam aan enige ander regeringsliggaam of persoon verskaf is en enige sodanige ander regeringsliggaam of persoon in kennis stel van die regstelling wat aangebring is; en

(d) aan die versoeker 'n afskrif stuur van elke kennisgewing wat die inligtingsbeampte ingevolge paragraaf *(c)* gee.

(10) Indien die inligtingsbeampte op 'n versoek om regstelling besluit om inligting vervat in enige rekord te skrap, moet hy of sy, voordat die skrapping gedoen word—

(a) 'n afskrif maak van die gedeelte van die rekord wat geskrap gaan word;

(b) op daardie afskrif 'n aantekening maak van die skrapping wat op die oorspronklike rekord gedoen gaan word; en

(c) daardie afskrif behou vir solank as wat die rekord behou word.

(11) 'n Regeringsliggaam wat ingevolge subartikel (9)*(c)* in kennis gestel is dat sodanige regeringsliggaam van foutiewe inligting voorsien is, moet, so gou as wat redelikerwys moontlik is, maar in elk geval binne 30 dae, nadat hy aldus in kennis gestel is, indien die liggaam—

(a) aanvaar dat die inligting foutief is, daardie inligting regstel en die persoon op wie die inligting betrekking het, in kennis stel dat die regstelling aangebring is; of

(b) is of the opinion that the information is not inaccurate, make a note and notify the requester as contemplated in subsection (12)*(a)* and *(b)*.

(12) If the information officer decides that the information identified in a request for correction is not inaccurate and that the request is not irrelevant, frivolous or vexatious, the information officer must, free of charge and within the period contemplated in subsection (7)—

(a) make a note in the relevant record as near as reasonably possible to the point where the information appears—

(i) of the decision of the information officer that the information is not inaccurate;

(ii) that the accuracy of the information is disputed by the requester concerned; and

(iii) that the request is attached to the record,

and attach the request to the record;

(b) notify the requester—

(i) of the decision that the information is not inaccurate;

(ii) that a note was made on the record as required by paragraph *(a)*;

(iii) that he or she may lodge an internal appeal with the head of the governmental body against the decision that the information is not inaccurate, and of the procedure (including the period) for lodging the internal appeal,

and send a copy of the note to the requester;

(c) take reasonable steps to enable the requester to provide a statement of any further reasons why the requester considers the information to be inaccurate; and

(d) unless there are reasonable grounds for considering the statement irrelevant, defamatory or unnecessarily voluminous, attach the statement so provided to the record.

(13) If a record containing personal information has been corrected in terms of subsection (9) or (11), any disclosure or use of the record after such correction must be in its corrected form.

(14) If a note has been made in a record as contemplated in subsection (11)*(b)* or (12)*(a)*, any disclosure of the information concerned in the record must include—

(a) that note;

(b) the request for correction concerned, if applicable; and

(c) any statement attached as contemplated in subsection (12)*(d)*, if applicable.

Use of personal information by private bodies

53. Subject to section 59, a private body may not use a record of the private body containing personal information, except—

(a) if the person to whom or which the information relates has consented to its use in accordance with section 58;

(b) for the purpose for which the information was obtained or compiled or for a purpose consistent with that purpose; or

(c) for a purpose for which the information may be disclosed to the private body in terms of section 55 or 56.

Use of personal information by governmental bodies

54. Subject to section 59, a governmental body may not use a record of the governmental body containing personal information, except—

(a) if the person to whom or which the information relates has consented to its use in accordance with section 58;

(b) for the purpose for which the information was obtained or compiled or for a purpose consistent with that purpose; or

(c) for a purpose for which the information may be disclosed to the governmental body in terms of section 55 or 56.

Disclosure of personal information by private bodies

55. Subject to section 59, a private body may not disclose a record of the private body containing personal information, except—

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(b) van mening is dat die inligting nie foutief is nie, 'n aantekening maak en die versoeker in kennis stel soos beoog in subartikel (12)*(a)* en *(b)*.

(12) Indien die inligtingsbeampte besluit dat die inligting geïdentifiseer in 'n versoek om regstelling nie foutief is nie, moet die inligtingsbeampte, gratis en binne die tydperk beoog in subartikel (7)—

(a) in die betrokke rekord 'n aantekening aanbring so na as redelikerwys moontlik aan die plek waar die inligting verskyn—

(i) van die besluit van die inligtingsbeampte dat die inligting nie foutief is nie;

(ii) dat die akkuraatheid van die inligting deur die betrokke versoeker betwis word; en

(iii) dat die versoek by die rekord aangeheg word,

en die versoek by die rekord aanheg;

(b) die versoeker in kennis stel—

(i) van die besluit dat die inligting nie foutief is nie;

(ii) dat 'n aantekening op die rekord gemaak is soos vereis deur paragraaf *(a)*;

(iii) dat hy of sy by die hoof van die regeringsliggaam 'n interne appèl kan aanteken teen die besluit dat die inligting nie foutief is nie, en van die prosedure (insluitende die tydperk) vir die aanteken van die interne appèl,

en 'n afskrif van die aantekening aan die versoeker stuur;

(c) redelike stappe doen om die versoeker in staat te stel om 'n verklaring te verskaf van enige verdere redes waarom die versoeker die inligting as foutief beskou; en

(d) tensy daar redelike gronde is om die verklaring as irrelevant, lasterlik of onnodig omvangryk te beskou, die verklaring aldus verskaf, by die rekord aanheg.

(13) Indien 'n rekord wat persoonlike inligting bevat, ingevolge subartikel (9) of (11) reggestel is, moet enige openbaarmaking of gebruik van die rekord na sodanige regstelling in sy reggestelde vorm wees.

(14) Indien 'n aantekening in 'n rekord gemaak is soos beoog in subartikel (11)*(b)* of (12)*(a)*, moet enige openbaarmaking van die betrokke inligting in die rekord—

(a) daardie aantekening;

(b) die betrokke versoek om regstelling, indien toepaslik; en

(c) enige verklaring aangeheg soos beoog in subartikel (12)*(d)*, indien toepaslik, insluit.

Gebruik van persoonlike inligting deur privaatliggame

53. Behoudens artikel 59 mag geen privaatliggaam 'n rekord van die privaatliggaam wat persoonlike inligting bevat, gebruik, behalwe—

(a) indien die persoon op wie die inligting betrekking het tot die gebruik daarvan ooreenkomstig artikel 58 toegestem het;

(b) vir die doel waarvoor die inligting verkry of saamgestel is of vir 'n doel bestaanbaar met daardie doel; of

(c) vir die doel waarvoor die inligting aan die privaatliggaam ingevolge artikel 55 of 56 openbaar gemaak mag word.

Gebruik van persoonlike inligting deur regeringsliggame

54. Behoudens artikel 59 mag geen regeringsliggaam 'n rekord van die regeringsliggaam wat persoonlike inligting bevat, gebruik, behalwe—

(a) indien die persoon op wie die inligting betrekking het tot die gebruik daarvan ooreenkomstig artikel 58 toegestem het;

(b) vir die doel waarvoor die inligting verkry of saamgestel is of vir 'n doel bestaanbaar met daardie doel; of

(c) vir die doel waarvoor die inligting aan die regeringsliggaam ingevolge artikel 55 of 56 openbaar gemaak mag word.

Openbaarmaking van persoonlike inligting deur privaatliggame

55. Behoudens artikel 59 mag geen privaatliggaam 'n rekord van die privaatliggaam wat persoonlike inligting bevat, openbaar maak, behalwe—

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(a) in accordance with section 50 of this Act or any other law that authorises its disclosure;

(b) if the person to whom or which the information relates has consented to its disclosure in accordance with section 58;

(c) for the purpose for which the information was obtained or compiled or for a purpose consistent with that purpose;

(d) for the purpose of complying with—

(i) a subpoena, warrant issued or order made by a court or person authorised to compel the production of information; or

(ii) rules of court relating to the production of information;

(e) for the purpose of avoiding prejudice to the maintenance of the law, including the prevention, detection, investigation, prosecution and punishment of an offence;

(f) for the purpose of averting or lessening an imminent and serious threat to the health or safety of an individual or the public;

(g) for the purpose of the performance of a contract to which the person to whom or which the information relates is a party; or

(h) for any prescribed purpose which would not pose a threat to the privacy of the person to whom or which the information relates and—

(i) to which the person on invitation of the private body did not object; or

(ii) which is necessary for pursuing the legitimate interests of the private body.

Disclosure of personal information by governmental bodies

56. Subject to section 59, a governmental body may not disclose a record of the governmental body containing personal information, except—

(a) in accordance with Part 3 of this Act or any other law that authorises its disclosure;

(b) if the person to whom or which the information relates has consented to its disclosure in accordance with section 58;

(c) for the purpose for which the information was obtained or compiled or for a consistent purpose;

(d) for the purpose of complying with—

(i) a subpoena, warrant issued or order made by a court or person authorised to compel the production of information; or

(ii) the rules of court relating to the production of information;

(e) for the purpose of avoiding prejudice to the maintenance of the law, including the prevention, detection, investigation, prosecution and punishment of an offence;

(f) for the purpose of averting or lessening an imminent and serious threat to the health or safety of an individual or the public;

(g) to a prosecuting authority for the purposes of criminal proceedings or to a legal practitioner representing the state, the Government of the Republic, any functionary thereof or a governmental body in civil proceedings for the purposes of those civil proceedings;

(h) to a governmental body, on the written request of that body, for the purposes of enforcing the law or carrying out an investigation in terms of the law, if the request specifies the purpose and describes the information to be disclosed;

(i) in terms of an agreement between the Government of the Republic or an organ thereof and the government of a foreign state, an international organisation or an organ of that government or organisation, for the purposes of administering or enforcing the law or carrying out an investigation in terms of the law;

(j) to an official of a governmental body for the purpose of an internal audit or to the Auditor-General or an official from his or her office for the purpose of audit or to a person appointed to carry out an audit in respect of a governmental body;

(k) to an archives repository in accordance with—

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(a) ooreenkomstig artikel 50 van hierdie Wet of enige ander reg wat die openbaarmaking daarvan magtig;

(b) indien die persoon op wie die inligting betrekking het tot die openbaarmaking daarvan ooreenkomstig artikel 58 toegestem het;

(c) vir die doel waarvoor die inligting verkry of saamgestel is of vir 'n doel bestaanbaar met daardie doel;

(d) met die doel om—

(i) 'n dagvaarding, lasbrief uitgereik of bevel gegee deur 'n hof of persoon wat gemagtig is om die voorlegging van inligting af te dwing, na te kom; of

(ii) die hofreëls in verband met die voorlegging van inligting na te kom;

(e) met die doel om die benadeling van die handhawing van die reg, insluitende die voorkoming, opsporing, ondersoek, vervolging en straf van 'n misdryf, te verhoed;

(f) met die doel om 'n dreigende en ernstige gevaar vir die gesondheid of veiligheid van 'n individu of die publiek af te weer of te verminder;

(g) met die doel om 'n kontrak waartoe die persoon op wie die inligting betrekking het 'n party is, uit te voer; of

(h) vir enige voorgeskrewe doel wat nie 'n gevaar vir die privaatheid van die persoon op wie die inligting betrekking het, inhou nie en—

(i) waaroor die persoon op uitnodiging van die privaatliggaam nie beswaar gemaak het nie; of

(ii) wat nodig is om die regmatige belange van die privaatliggaam na te volg:

Openbaarmaking van persoonlike inligting deur regeringsliggame

56. Behoudens artikel 59 mag geen regeringsliggaam 'n rekord van die regeringsliggaam wat persoonlike inligting bevat, openbaar maak, behalwe—

(a) ooreenkomstig Deel 3 van hierdie Wet of enige ander reg wat die openbaarmaking daarvan magtig;

(b) indien die persoon op wie die inligting betrekking het tot die openbaarmaking daarvan ooreenkomstig artikel 58 toegestem het;

(c) vir die doel waarvoor die inligting verkry of saamgestel is of vir 'n doel bestaanbaar met daardie doel;

(d) met die doel om—

(i) 'n dagvaarding, lasbrief uitgereik of bevel gegee deur 'n hof of persoon wat gemagtig is om die voorlegging van inligting af te dwing, na te kom; of

(ii) die hofreëls in verband met die voorlegging van inligting na te kom;

(e) met die doel om die benadeling van die handhawing van die reg, insluitende die voorkoming, opsporing, ondersoek, vervolging en straf van 'n misdryf, te verhoed;

(f) met die doel om 'n dreigende en ernstige gevaar vir die gesondheid of veiligheid van 'n individu of die publiek af te weer of te verminder;

(g) aan 'n vervolgingsowerheid vir die doeleindes van strafregtelike verrigtinge of aan 'n regspraktisyn wat die staat, die Regering van die Republiek, enige funksionaris daarvan of 'n regeringsligaam in sivielregtelike verrigtinge verteenwoordig, vir die doeleindes van daardie sivielregtelike verrigtinge;

(h) aan 'n regeringsliggaam, op skriftelike versoek van daardie liggaam, vir die doeleindes van die toepassing van die reg of die doen van 'n ondersoek ingevolge die reg, indien die versoek die doel vermeld en die inligting wat openbaar gemaak gaan word, beskryf;

(i) ingevolge 'n ooreenkoms tussen die Regering van die Republiek of 'n orgaan daarvan en die Regering van 'n buitelandse staat, 'n internasionale organisasie of 'n orgaan van daardie regering of organisasie, vir die doeleindes van administrasie of toepassing van die reg of die doen van 'n ondersoek ingevolge die reg;

(j) aan 'n amptenaar van 'n regeringsliggaam vir die doel van 'n interne oudit of aan die Ouditeur-generaal of 'n amptenaar van sy of haar kantoor vir die doel van ouditering of aan 'n persoon aangestel om 'n oudit met betrekking tot 'n regeringsliggaam uit te voer;

(k) aan 'n argiefbewaarplek ooreenkomstig—

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(i) section 11 of the National Archives of South Africa Act, 1996 (Act No. 43 of 1996); or

(ii) an equivalent provision of a provincial law regarding the custody of records of governmental bodies in the relevant provincial sphere of government;

(l) to any person for research or statistical purposes if—

(i) there are reasonable grounds for believing that the purpose for which the information is disclosed cannot reasonably be accomplished unless the information is provided in a form that would identify the person to whom or which it relates; and

(ii) the information officer of the governmental body obtains from the person a written undertaking that no subsequent disclosure of the information will be made in a form that could reasonably be expected to identify the person to whom or which it relates;

(m) to a governmental body for the purposes of locating a person—

(i) to collect a debt owing to the state or a governmental body by that person; or

(ii) to make a payment owing to that person by the state or a governmental body;

(n) to a person other than a governmental body for the purpose of locating another person in order to make a payment owing to that other person;

(o) for the purpose of the performance of a contract to which the person to whom or which the information relates, is a party; or

(p) for any prescribed purpose which would not pose a threat to the privacy of the person to whom or which the information relates and—

(i) to which the person on invitation of the governmental body did not object; or

(ii) which is necessary for pursuing the legitimate interests of the private body.

Consistent purpose

57. If personal information has been collected directly from the person to whom or which the information relates, the purpose of a use or disclosure of that information is a consistent purpose in terms of sections 53*(b)*, 54*(b)*, 55*(c)* and 56*(c)* only if the person might reasonably have expected such a use or disclosure.

Consent to use or disclose personal information

58. (1) The consent of a person for the use or disclosure of personal information in a record of a private or governmental body contemplated in section 53*(a)*, 54*(a)*, 55*(b)* or 56*(b)*—

(a) must be obtained by the prescribed person in the prescribed form and manner; and

(b) may be withdrawn by the person giving that consent as prescribed.

(2) Regulations made for the purposes of subsection (1) may—

(a) differentiate between different—

(i) categories of private bodies; and

(ii) categories of governmental bodies; and

(b) provide for the consent for a specific purpose or a category of purposes.

Use and disclosure of personal information held before commencement

59. (1) If a record containing personal information is in the possession or under the control of—

(a) a private body from a date before the commencement of sections 53 and 55, those sections do not apply to that record of the private body for a prescribed period from that commencement;

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(i) artikel 11 van die Wet op die Nasionale Argief van Suid-Afrika, 1996 (Wet No. 43 van 1996); of

(ii) 'n ekwivalente bepaling van 'n provinsiale wet betreffende die bewaring van rekords van regeringsliggame in die tersaaklike provinsiale regeringsfeer;

(l) aan enige persoon vir navorsing of statistiese doeleindes indien—

(i) daar redelike gronde is om van mening te wees dat die doel waarvoor die inligting openbaar gemaak word, nie redelikerwys bereik kan word nie tensy die inligting verskaf word in 'n vorm wat die persoon op wie dit betrekking het, sal identifiseer; en

(ii) die inligtingsbeampte van die regeringsliggaam 'n skriftelike onderneming van die persoon kry dat geen daaropvolgende openbaarmaking van die inligting gedoen sal word in 'n vorm waarvan daar redelikerwys verwag kan word dat dit die persoon op wie dit betrekking het, sal identifiseer nie;

(m) aan 'n regeringsliggaam vir die doeleindes van opsporing van 'n persoon—

(i) om 'n skuld te vorder wat aan die staat of 'n regeringsliggaam verskuldig is deur daardie persoon; of

(ii) om 'n betaling te maak wat deur die staat of 'n regeringsliggaam aan daardie persoon geskuld word;

(n) aan 'n persoon uitgesonderd 'n regeringsliggaam vir die doeleindes van opsporing van 'n ander persoon om 'n betaling te maak wat aan daardie ander persoon geskuld word;

(o) met die doel om 'n kontrak waartoe 'n persoon op wie die inligting betrekking het 'n party is, na te kom; of

(p) vir enige voorgeskrewe doel wat nie 'n gevaar vir die privaatheid van die persoon op wie die inligting betrekking het, inhou nie en—

(i) waaroor die persoon op uitnodiging van die regeringsliggaam nie beswaar gemaak het nie; of

(ii) wat nodig is om die regmatige belange van die regeringsliggaam na te streef.

Bestaanbare doel

57. Indien persoonlike inligting regstreeks van die persoon op wie die inligting betrekking het, ingesamel word, is die doel van 'n gebruik of openbaarmaking van daardie inligting slegs 'n bestaanbare doel ingevolge artikels 53*(b)*, 54*(b)*, 55*(c)* en 56*(c)* indien die persoon redelikerwys so 'n gebruik of openbaarmaking kon verwag het.

Toestemming tot gebruik of openbaarmaking van persoonlike inligting

58. (1) Die toestemming van 'n persoon vir die gebruik of openbaarmaking van persoonlike inligting in 'n rekord van 'n privaat- of regeringsliggaam beoog in artikel 53*(a)*, 54*(a)*, 55*(b)* of 56*(b)*—

(a) moet deur die voorgeskrewe persoon op die voorgeskrewe vorm en wyse verkry word; en

(b) kan soos voorgeskryf deur die persoon wat die toestemming verleen, ingetrek word.

(2) Regulasies uitgevaardig vir die doeleindes van subartikel (1) kan—

(a) onderskei tussen verskillende—

(i) kategorieë privaatliggame; en

(ii) kategorieë regeringsliggame; en

(b) voorsiening maak vir die toestemming vir 'n spesifieke doel of 'n kategorie doeleindes.

Gebruik en openbaarmaking van persoonlike inligting gehou voor inwerkingtreding

59. (1) Indien 'n rekord wat persoonlike inligting bevat in die besit of onder beheer van—

(a) 'n privaatliggaam is vanaf 'n datum voor die inwerkingtreding van artikels 53 en 55, is daardie artikels nie van toepassing nie op daardie rekord van die privaatliggaam vir 'n voorgeskrewe tydperk vanaf daardie inwerkingtreding;

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(b) a governmental body before the commencement of sections 54 and 56, those sections do not apply to that record of the governmental body for a prescribed period from that commencement.

(2) If, at the end of the prescribed period referred to in subsection (1)*(a)* or *(b)*, as the case may be, the prescribed steps have been taken to obtain the consent contemplated in section 53*(a)*, 54*(a)*, 55*(b)* or 56*(b)*, as the case may be, of the person to whom or which the personal information in the record contemplated in subsection (1)*(a)* or *(b)*, as the case may be, relates, that person is regarded to have given that consent whether or not the person in fact gave consent.

(3) Any consent regarded to have been given in terms of subsection (2) may be withdrawn as prescribed.

(4) Regulations made for the purposes of subsection (1) or (3) may—

(a) differentiate between different—

(i) categories of private bodies; and

(ii) categories of governmental bodies; and

(b) provide for the consent for a specific purpose or a category of purposes.

Register of uses and disclosures not in governmental body's manual

60. (1) If the use or purpose of personal information in a personal information bank of a governmental body is not included in the statements of uses and purposes set out in accordance with section 6(2)*(d)*(ii)*(bb)* in the manual of the body published in terms of section 6, the head of that body must—

(a) keep a register of—

(i) any use by the body of that personal information; and

(ii) any use or purpose for which that personal information is disclosed by the body; and

(b) attach that register to that personal information.

(2) For the purposes of this Act, a register attached in terms of subsection (1)*(b)* is regarded to form part of the personal information to which it is attached.

(3) If the personal information in a personal information bank of a governmental body is used or disclosed for a use consistent with the purpose for which the information was obtained or compiled by the body but the use is not included in the statement of compatible uses set out in accordance with section 6(2)*(d)*(ii)*(bb)* in the manual of the body, the head of the body must ensure that the use is included in the next manual to be published.

Collection of personal information by governmental bodies

61. (1) No personal information may be collected by a governmental body unless such collection is—

(a) required or permitted in terms of legislation; or

(b) required for carrying out the functions of that body.

(2) A governmental body must, if reasonably possible, collect personal information which is intended to be or may be used in taking any decision which affects a person's right or determines its content, directly from that person unless—

(a) the person authorises otherwise; or

(b) personal information contained in a record may be disclosed to the body in terms of section 56.

(3) If a governmental body collects personal information directly from a person, the body must inform the person of—

(a) the fact that, and the purpose for which, the information is being collected;

(b) the name and address of the body that—

(i) is collecting the information; and

(ii) will hold the information;

(c) if the collection of the information is required or permitted in terms of legislation—

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(b) 'n regeringsliggaam voor die inwerkingtreding van artikels 54 en 56 was, is daardie artikels nie van toepassing nie op daardie rekord van die regeringsliggaam vir 'n voorgeskrewe tydperk vanaf daardie inwerkingtreding.

(2) Indien, voor die einde van die voorgeskrewe tydperk bedoel in subartikel (1)*(a)* of *(b)*, na gelang van die geval, die voorgeskrewe stappe gedoen is om die toestemming beoog in artikel 53*(a)*, 54*(a)*, 55*(b)* of 56*(b)*, na gelang van die geval, van die persoon op wie die persoonlike inligting in daardie rekord, beoog in subartikel (1)*(a)* of *(b)*, na gelang van die geval, betrekking het, word daardie persoon geag daardie toestemming te verleen het, ongeag of die persoon werklik toestemming verleen het al dan nie.

(3) Enige toestemming wat ingevolge subartikel (2) geag te verleen gewees het, kan soos voorgeskryf ingetrek word.

(4) Regulasies uitgevaardig vir die doel van subartikel (1) of (3) kan—

(a) onderskei tussen verskillende—

(i) kategorieë privaatliggame en;

(ii) kategorieë regeringsliggame; en

(b) voorsiening maak vir die toestemming vir 'n spesifieke doel of 'n kategorie doeleindes.

Register van gebruike en openbaarmakings nie in regeringsliggaam se handleiding nie

60. (1) Indien die gebruik of doel van persoonlike inligting in 'n persoonlike inligtingsbank van 'n regeringsliggaam nie ingesluit is nie by die verklarings van gebruike en doeleindes uiteengesit ooreenkomstig artikel 6(2)*(d)*(ii)*(bb)* in die handleiding van die liggaam gepubliseer ingevolge artikel 6, moet die hoof van 'n regeringsliggaam—

(a) 'n register hou van—

(i) enige gebruik deur die liggaam van daardie persoonlike inligting; en

(ii) enige gebruik of doel waarvoor daardie persoonlike inligting deur die liggaam openbaar gemaak word; en

(b) daardie register by daardie persoonlike inligting aanheg.

(2) By die toepassing van hierdie Wet word 'n register wat ingevolge subartikel (1)*(b)* aangeheg is, geag deel uit te maak van die persoonlike inligting waarby dit aangeheg is.

(3) Indien die persoonlike inligting in 'n persoonlike inligtingsbank van 'n regeringsliggaam gebruik of openbaar gemaak word vir 'n gebruik wat bestaanbaar is met die doel waarvoor die inligting deur die liggaam verkry of saamgestel is, maar die gebruik nie ingesluit is by die verklaring van bestaanbare gebruike ooreenkomstig artikel 6(2)*(d)*(ii)*(bb)* in die handleiding van die liggaam uiteengesit nie, moet die hoof van die liggaam verseker dat die gebruik ingesluit word in die volgende handleiding wat gepubliseer gaan word.

Insameling van persoonlike inligting deur regeringsliggame

61. (1) Geen persoonlike inligting mag deur 'n regeringsliggaam ingesamel word nie, tensy sodanige insameling—

(a) ingevolge wetgewing vereis of toegelaat word; of

(b) benodig word vir die verrigting van die funksies van daardie liggaam.

(2) 'n Regeringsliggaam moet, indien dit redelikerwys moontlik is, persoonlike inligting wat bedoel is om gebruik te word of gebruik kan word by die neem van 'n besluit wat 'n persoon se reg raak of die inhoud daarvan bepaal, regstreeks van daardie persoon insamel, behalwe indien—

(a) die persoon anders magtig; of

(b) persoonlike inligting wat in 'n rekord vervat is ingevolge artikel 56 aan die liggaam openbaar gemaak kan word.

(3) Indien 'n regeringsliggaam persoonlike inligting regstreeks van 'n persoon insamel, moet die liggaam die persoon inlig oor—

(a) die feit dat, en die doel waarvoor, die inligting ingesamel word;

(b) die naam en adres van die liggaam wat—

(i) die inligting insamel; en

(ii) die inligting sal hou;

(c) indien die insamel van die inligting ingevolge wetgewing vereis of toegelaat word—

(i) the relevant provisions of that legislation; and
(ii) whether the supply of the information by the person voluntary or compulsory;

(d) the rights of access to, and correction of, personal information referred to in sections 9 and 52, respectively.

(4) Subsections (2) and (3) do not apply if compliance therewith could reasonably be expected to defeat the purpose, or prejudice the use, for which the information is being collected.

Retention, accuracy and disposal of personal information by governmental bodies

62. (1) Personal information which has been used by a governmental body to make a decision which affects a person's right, or determines its content, must be retained by the head of that body for such prescribed period after it was so used as is necessary to ensure that the person to whom or which it relates has a reasonable opportunity to obtain access to that information.

(2) The head of a governmental body must take all reasonable steps to ensure that personal information which is used by the body to make a decision which affects a person's right, or determines its content, is as accurate, up-to-date and complete as possible and that—

(a) the confidentiality of that information is protected; and

(b) that information is secured against unauthorised access.

(3) The head of a governmental body must dispose of personal information in a record of the body as prescribed.

PART 5

PROTECTION OF WHISTLE-BLOWERS

Exclusion of liability if disclosing contravention of law, corruption or maladministration

63. (1) No person is civilly or criminally liable or may be subjected to disciplinary action in any court or administrative or other tribunal on account of having disclosed any information, if—

(a) the person in good faith and reasonably believed at the time of the disclosure that he or she was disclosing evidence of a contravention of the law, corruption, dishonesty or serious maladministration in a governmental body or on the part of an official of the body (in this Part referred to as an "impropriety"); and

(b) the disclosure was made in accordance with subsection (3).

(2) Without limiting the generality of subsection (1)*(a)* "impropriety" includes—

(a) an abuse of power by a governmental body or an official thereof;

(b) an improper or unauthorised use of the funds or other assets of the state or a governmental body;

(c) negligent administration resulting or likely to result in a substantial—
(i) waste of public resources; or
(ii) danger to the health or safety of an individual or the public; or

(d) an offence referred to in section 1 of the Corruption Act, 1992 (Act No. 94 of 1992).

(3) Subsection (1) applies only if the person concerned—

(a) disclosed the information concerned to—
(i) a committee of Parliament or of a provincial legislature;
(ii) the Public Protector;
(iii) the Human Rights Commission;
(iv) the Auditor-General;
(v) any Attorney-General or his or her successor; or

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(i) die tersaaklike bepalings van daardie wetgewing; en
(ii) die vraag of die verskaffing van die inligting deur die persoon vrywillig of verpligtend is al dan nie;

(d) die regte op toegang tot, en regstelling van, persoonlike inligting bedoel in onderskeidelik artikels 9 en 52.

(4) Subartikels (2) en (3) is nie van toepassing nie indien daar redelikerwys verwag kan word dat die nakoming daarvan die doel waarvoor die inligting ingesamel word, sal verydel of die gebruik daarvan sal benadeel.

Behoud en korrektheid van en beskikking oor persoonlike inligting deur regeringsliggame

62. (1) Persoonlike inligting wat deur 'n regeringsliggaam gebruik is om 'n besluit te neem wat die reg van 'n persoon raak of die inhoud daarvan bepaal, moet deur die hoof van daardie liggaam behou word vir die voorgeskrewe tydperk nadat dit aldus gebruik is wat nodig is om te verseker dat die persoon op wie dit betrekking het, 'n redelike geleentheid het om toegang tot daardie inligting te verkry.

(2) Die hoof van 'n regeringsliggaam moet alle redelike stappe doen om te verseker dat persoonlike inligting wat deur die liggaam gebruik word om 'n besluit te neem wat die reg van 'n persoon raak of die inhoud daarvan bepaal, so akkuraat, bygewerk en volledig moontlik is en dat—

(a) die vertroulikheid van daardie inligting beskerm word; en
(b) daardie inligting teen ongemagtigde toegang beveilig is.

(3) Die hoof van 'n regeringsliggaam moet, soos voorgeskryf, met persoonlike inligting in 'n rekord van die liggaam wegdoen.

DEEL 5

BESKERMING VAN ALARMMAKERS

Uitsluiting van aanspreeklikheid wanneer oortreding van reg, korrupsie of wanadministrasie openbaar gemaak word

63. (1) Geen persoon is sivielregtelik of strafregtelik aanspreeklik of mag aan dissiplinêre optrede in enige hof of administratiewe of ander tribunaal onderwerp word vanweë die openbaarmaking van enige inligting nie, indien—

(a) die persoon ten tyde van die openbaarmaking te goeder trou en redelikerwys van mening was dat hy of sy getuienis openbaar maak van 'n oortreding van die reg, korrupsie, oneerlikheid of ernstige wanadministrasie in 'n regeringsliggaam of van die kant van 'n amptenaar van die liggaam (in hierdie Deel 'n "onbehoorlikheid" genoem); en
(b) die openbaarmaking ooreenkomstig subartikel (3) gedoen is.

(2) Sonder om die algemeenheid van subartikel (1)*(a)* in te kort, sluit "onbehoorlikheid"—

(a) 'n misbruik van mag deur 'n regeringsliggaam of 'n amptenaar daarvan;
(b) 'n onbehoorlike of ongemagtigde gebruik van die fondse of ander bates van die staat of 'n regeringsliggaam;
(c) nalatige administrasie wat lei tot of waarskynlik sal lei tot 'n wesenlike—
(i) verkwisting van openbare hulpbronne; of
(ii) gevaar vir die gesondheid of veiligheid van 'n individu of die publiek; of
(d) 'n misdryf bedoel in artikel 1 van die Wet op Korrupsie, 1992 (Wet No. 94 van 1992),

in.

(3) Subartikel (1) is van toepassing slegs indien die betrokke persoon—

(a) die betrokke inligting openbaar gemaak het aan—
(i) 'n komitee van die Parlement of van 'n provinsiale wetgewer;
(ii) die Openbare Beskermer;
(iii) die Menseregtekommissie;
(iv) die Ouditeur-generaal;
(v) enige Prokureur-generaal of sy of haar opvolger; of

(vi) more than one of the bodies or persons referred to in subparagraph (i) to (v); or

(b) disclosed the information concerned to one or more news media and on clear and convincing grounds (of which he or she bears the burden of proof) believed at the time of the disclosure—

(i) that disclosure was necessary to avert an imminent and serious threat to the safety or health of an individual or the public, to ensure that the impropriety concerned was properly and timeously investigated or to protect himself or herself against serious or irreparable harm from reprisals; or

(ii) giving due weight to the importance of open, accountable and participatory administration, that the public interest in disclosure of the information clearly outweighed any need for non-disclosure; or

(c) disclosed the information concerned substantially in accordance with any applicable external or internal procedure (other than the procedures contemplated in paragraph *(a)* or *(b)*) for reporting or otherwise remedying the impropriety concerned.

(4) Subsection (1) applies whether or not the person disclosing the information concerned has used or exhausted any other applicable external or internal procedure to report or otherwise remedy the impropriety concerned.

Exclusion of liability if disclosing information after publication

64. No person is civilly or criminally liable or may be subjected to disciplinary action in any court or administrative or other tribunal on account of having disclosed any information if, before the time of the disclosure of the information, it had become available to the public, whether in the Republic or elsewhere.

Protection against reprisals

65. (1) Any person who made, or indicated that he or she intends making, a disclosure contemplated in section 63 or who refused to participate in an impropriety, may not as a result thereof or partly as a result thereof—

(a) in respect of his or her employment, profession or office—

(i) be dismissed, suspended, demoted, harassed or intimidated;

(ii) be transferred against his or her will;

(iii) be refused transfer or promotion;

(iv) be subjected to a term or condition of employment or retirement which is altered or kept unaltered to his or her disadvantage;

(v) be otherwise detrimentally affected in respect of that employment, profession or office, including, but not limited to, employment opportunities and work security;

(b) be denied appointment or election to any employment, profession or office; or

(c) be threatened with an action referred to in paragraph *(a)* or *(b)*.

(2) If it is proved, in any criminal or civil proceedings or disciplinary action before a court or administrative or other tribunal with respect to an alleged contravention or threatened contravention of subsection (1), that an action contemplated in subsection (1)*(a)*, *(b)* or *(c)* took place within two years after a disclosure, indication of an intention to disclose or refusal contemplated in subsection (1), it must be presumed, unless the contrary is proved, that such action took place as a result, or partly as a result, of that disclosure, indication of an intention to disclose or refusal.

(3) Subsection (1) applies whether or not the person who disclosed the information concerned has used or exhausted any other applicable external or internal procedure to report or otherwise remedy the impropriety concerned.

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(vi) meer as een van die liggame of persone bedoel in subparagrawe (i) to (v); of

(b) die betrokke inligting openbaar gemaak het aan een of meer nuusmedia en op duidelike en oortuigende gronde (waarvan hy of sy die bewyslas dra) ten tyde van die openbaarmaking oortuig was—

(i) dat openbaarmaking nodig is om 'n dreigende en ernstige gevaar vir die veiligheid of gesondheid van 'n individu of die publiek af te weer, om te verseker dat die betrokke onbehoorlikheid behoorlik en betyds ondersoek word, of om homself of haarself teen ernstige of onherstelbare skade vanweë vergelding te beskerm; of

(ii) dat, met behoorlike inagneming van die belangrikheid van oop, verantwoordingspligtige en deelnemende administrasie, die openbare belang by die openbaarmaking van die inligting duidelik swaarder geweeg het as die behoefte aan nie-openbaarmaking; of

(c) die betrokke inligting openbaar gemaak het wesenlik ooreenkomstig enige toepaslike eksterne of interne prosedure (uitgesonderd die prosedures beoog in paragraaf *(a)* of *(b)*) om die betrokke onbehoorlikheid aan te meld of andersins goed te maak.

(4) Subartikel (1) is van toepassing ongeag of die persoon wat die betrokke inligting openbaar maak, enige ander toepaslike eksterne of interne prosedure om die betrokke onbehoorlikheid aan te meld of andersins goed te maak, gebruik of uitgeput het, al dan nie.

Uitsluiting van aanspreeklikheid indien inligting na publikasie openbaar gemaak word

64. Geen persoon is sivielregtelik of strafregtelik aanspreeklik of mag aan dissiplinêre optrede in enige hof of administratiewe of ander tribunaal onderwerp word vanweë die openbaarmaking van enige inligting nie, indien dit voor die openbaarmaking van die inligting vir die publiek beskikbaar geword het, hetsy in die Republiek of elders.

Beskerming teen vergelding

65. (1) 'n Persoon wat 'n openbaarmaking beoog in artikel 63 gedoen het, of wat aangedui het dat hy of sy van voorneme is om sodanige openbaarmaking te doen, of wat geweier het om aan 'n onbehoorlikheid deel te neem, mag nie as gevolg daarvan of gedeeltelik as gevolg daarvan—

(a) ten opsigte van sy of haar diens, professie of amp—

(i) ontslaan, geskors, gedemoveer, geteister of geïntimideer word nie;

(ii) teen sy of haar wil verplaas word nie;

(iii) verplasing of bevordering geweier word nie;

(iv) aan bedinge of voorwaardes van diens of aftrede onderwerp word nie wat tot sy of haar nadeel verander of onveranderd gehou word;

(v) andersins nadelig geraak word nie met betrekking tot daardie diens, professie of amp, insluitende, maar nie beperk nie tot, werkgeleenthede en werksekerheid;

(b) aanstelling in of verkiesing tot enige diens, professie of amp ontsê word nie; of

(c) gedreig word met optrede bedoel in paragraaf *(a)* of *(b)* nie.

(2) Indien daar bewys word, in enige strafregtelike of sivielregtelike verrigtinge of dissiplinêre optrede voor 'n hof of administratiewe of ander tribunaal ten opsigte van 'n beweerde oortreding of dreigende oortreding van subartikel (1), dat 'n optrede beoog in subartikel (1)*(a)*, *(b)* of *(c)* binne twee jaar na 'n openbaarmaking, aanduiding van 'n voorneme om openbaar te maak of weiering beoog in subartikel (1) plaasgevind het, moet daar, tensy die teendeel bewys word, vermoed word dat sodanige optrede plaasgevind het as gevolg van, of gedeeltelik as gevolg van, daardie openbaarmaking, aanduiding van 'n voorneme om openbaar te maak of weiering.

(3) Subartikel (1) is van toepassing ongeag of die persoon wat die betrokke inligting openbaar gemaak het, enige ander toepaslike eksterne of interne prosedure om die betrokke onbehoorlikheid aan te meld of andersins goed te maak, gebruik of uitgeput het al dan nie.

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(4) A provision in a contract of employment or other agreement whereby any provision of this section is excluded, is void.

(5) An official of a governmental body who has made a disclosure contemplated in section 63 must, on his or her request and if reasonably possible, be transferred from the post or position occupied by him or her at the time of the disclosure to—

(a) another post or position in the same division or another division of that governmental body; or

(b) another governmental body.

(6) The terms and conditions of employment of a person transferred in terms of subsection (5) may not, without his or her written consent, be less favourable than the terms and conditions applicable to him or her immediately before his or her transfer.

Notice to officials of provisions of Part and other complaint procedure

66. The head of a governmental body must give to every official of the body a copy of a notice prepared by the Human Rights Commission, which explains—

(a) the provisions of this Part and section 85*(b)* and all external and internal procedures (other than the procedure contemplated in section 63) available to an official of the body who wishes to report or otherwise remedy an impropriety or, when those provisions or procedures are amended, that amendment;

(b) that, if a contravention or threatened contravention of a provision of this Part in relation to a person is alleged, that the person may lodge an application with a High Court for appropriate relief, and the procedure (including the period) for lodging that application.

PART 6

APPEALS AGAINST DECISIONS

CHAPTER 1

INTERNAL APPEALS

Right of internal appeal to head of governmental body

67. (1) A person may lodge an internal appeal against any decision of the information officer of a governmental body in relation to that person with the head of the body.

(2) Subsection (1) may not be construed to limit any other right a person has in terms of the law to remedy a matter in respect of which an internal appeal may be lodged.

Manner of internal appeal, and appeal fees

68. (1) An internal appeal—

(a) must be lodged in the prescribed form—

(i) within 60 days;

(ii) if notice to a third party is required by section 47(1)*(b)*, within 30 days; or

(iii) if the internal appeal is against the granting of a request for access and an urgent request application has been granted in respect of the request, within 10 working days,

after notice is given to the appellant of the decision appealed against or, if notice to the appellant is not required, after the decision was taken;

(b) must be delivered or sent to the information officer of the governmental body concerned at his or her address, fax number or electronic mail address;

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(4) 'n Bepaling van 'n dienskontrak of ander ooreenkoms waarby enige bepaling van hierdie artikel uitgesluit word, is nietig.

(5) 'n Amptenaar van 'n regeringsliggaam wat 'n openbaarmaking beoog in artikel 63 gedoen het, moet, op sy of haar versoek en indien dit redelikerwys moontlik is, verplaas word vanaf die pos of posisie wat hy of sy ten tyde van die openbaarmaking beklee het, na—

(a) 'n ander pos of posisie in dieselfde afdeling of 'n ander afdeling van daardie regeringsliggaam; of

(b) 'n ander regeringsliggaam.

(6) Die bedinge en voorwaardes van diens van 'n persoon wat ingevolge subartikel (5) verplaas word, mag nie sonder sy of haar skriftelike toestemming minder gunstig wees as die bedinge en voorwaardes wat onmiddellik voor sy of haar verplasing op hom of haar van toepassing was nie.

Kennisgewing aan amptenare van bepalings van Deel en ander klagteprosedure

66. Die hoof van 'n regeringsliggaam moet aan elke amptenaar van die liggaam 'n afskrif gee van 'n kennisgewing opgestel deur die Menseregtekommissie, wat—

(a) die bepalings van hierdie Deel en artikel 85*(b)* en alle eksterne en interne prosedures (uitgesonderd die prosedure bedoel in artikel 63) beskikbaar vir 'n amptenaar van die liggaam wat 'n onbehoorlikheid wil aanmeld of andersins wil goedmaak of, wanneer daardie bepalings of prosedures gewysig word, daardie wysiging, verduidelik;

(b) verduidelik dat, indien 'n oortreding of dreigende oortreding van 'n bepaling van hierdie Deel met betrekking tot 'n persoon beweer word, daardie persoon 'n aansoek om toepaslike regshulp by 'n Hoë Hof kan indien, en die prosedure (insluitende die tydperk) vir die indien van daardie aansoek verduidelik.

DEEL 6

APPÈLLE TEEN BESLUITE

HOOFSTUK 1

INTERNE APPÈLLE

Reg op interne appèl na hoof van regeringsliggaam

67. (1) 'n Persoon kan 'n interne appèl teen enige besluit van die inligtingsbeampte van 'n regeringsliggaam in verband met daardie persoon by die hoof van die liggaam aanteken.

(2) Subartikel (1) mag nie uitgelê word nie as sou dit enige ander reg beperk wat 'n persoon regtens het om 'n aangeleentheid ten opsigte waarvan 'n interne appèl aangeteken kan word, goed te maak.

Wyse van interne appèl, en appèlgelde

68. (1) 'n Interne appèl—

(a) moet in die voorgeskrewe vorm aangeteken word—

(i) binne 60 dae;

(ii) indien kennisgewing aan 'n derde party vereis word deur artikel 47(1)*(b)*, binne 30 dae; of

(iii) indien die interne appèl teen die toestaan van 'n versoek om toegang is en 'n aansoek om dringende versoek ten opsigte van die versoek toegestaan is, binne 10 werkdae;

nadat daar aan die appellant kennis gegee is van die besluit waarteen geappelleer word of, indien kennisgewing aan die appellant nie vereis word nie, nadat die besluit geneem is;

(b) moet afgelewer word of gestuur word aan die inligtingsbeampte van die betrokke regeringsliggaam by sy of haar adres, faksnommer of elektroniese posadres;

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(c) must identify the subject of the internal appeal and state the reasons for the internal appeal and may include any other relevant information known to the appellant;

(d) if, in addition to a written reply, the appellant wishes to be informed of the decision on the internal appeal in any other manner, must state that manner and provide the necessary particulars to be so informed;

(e) if applicable, must be accompanied by the prescribed appeal fee referred to in subsection (4); and

(f) must specify a postal address or fax number and, if the internal appeal includes an urgent appeal application, a phone number for the appellant in the Republic.

(2) A person who wishes to lodge an internal appeal, but, because of illiteracy, poor literacy or physical disability, is unable to comply with subsection (1), may request the Human Rights Commission to assist him or her to so comply.

(3)*(a)* If an internal appeal is lodged after the expiry of the period referred to in subsection (1), the head of the governmental body concerned must, upon good cause being shown, allow the late lodging of the internal appeal.

(b) If that head disallows the late lodging of the internal appeal, he or she must give notice of that decision to the person that lodged the internal appeal.

(4)*(a)* A commercial requester lodging an internal appeal against the refusal of his or her request for access must pay the prescribed appeal fee.

(b) If the prescribed appeal fee is payable in respect of an internal appeal, the decision on the internal appeal may be deferred until the fee is paid.

(5) As soon as reasonably possible, but in any event, within 10 working days, or, if an urgent appeal application has been granted, immediately, after receipt of an internal appeal in accordance with subsection (1), the information officer of the governmental body concerned must submit to the head of that body—

(a) the internal appeal together with his or her reasons for the decision concerned; and

(b) if the internal appeal is against the refusal or granting of a request for access, the name, postal address, phone and fax number and electronic mail address, whichever is available, of any third party that must be notified in terms of section 45(1) of the request.

Notice to and representations by other interested persons

69. (1) If the head of a governmental body is considering an internal appeal against the refusal of a request for access to a record contemplated in section 29(1) or 31(1), the head must inform the third party to whom or which the record relates of the internal appeal, unless all necessary steps to locate the third party have been unsuccessful.

(2) The head must inform a third party in terms of subsection (1)—

(a) as soon as reasonably possible, but in any event, within 30 days or, if an urgent appeal application has been granted, within five working days, after the receipt of the internal appeal; and

(b) by the fastest means reasonably possible.

(3) When informing a third party in terms of subsection (1), the head concerned must—

(a) state that he or she is considering an internal appeal against the refusal of a request for access to a record contemplated in section 29(1) or 31(1), as the case may be, and describe the content of the record;

(b) furnish the name of the appellant;

(c) in the case of a record contemplated in—

(i) section 29(1), describe the provisions of section 29; or

(ii) section 31(1), describe the provisions of section 31;

(d) in any case where that head believes that the provisions of section 44(1) might apply, describe those provisions, specify which of the circumstances referred to in section 44(1)*(a)*(i) to (iv) in the opinion of the head might apply and state the reasons why he or she is of the opinion that section 44(1) might apply; and

(e) state that the third party may, within 21 days or, if an urgent appeal application

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(c) moet die onderwerp van die interne appèl identifiseer en die redes vir die interne appèl meld en kan enige ander tersaaklike inligting wat aan die appellant bekend is, insluit;

(d) moet, indien die aansoeker, benewens 'n skriftelike antwoord, op enige ander wyse oor die besluit oor die interne appèl ingelig wil word, daardie wyse meld en die nodige besonderhede verskaf om aldus ingelig te word;

(e) moet, indien van toepassing, vergesel gaan van die voorgeskrewe appèlgelde bedoel in subartikel (4); en

(f) moet 'n posadres of faksnommer en, indien die interne appèl 'n versoek om dringende appèl insluit, 'n telefoonnommer vir die appellant in die Republiek meld.

(2) 'n Persoon wat 'n interne appèl wil aanteken, maar wat vanweë ongeletterdheid, swak geletterdheid of fisiese gestremdheid nie in staat is om subartikel (1) na te kom nie, kan die Menseregtekommissie versoek om hom of haar by te staan om dit aldus na te kom.

(3)*(a)* Indien 'n interne appèl na die verstryking van die tydperk bedoel in subartikel (1) aangeteken word, moet die hoof van die betrokke regeringsliggaam, by aanvoering van goeie gronde, die laat aanteken van die interne appèl toelaat.

(b) Indien daardie hoof besluit om nie die laat aanteken van die interne appèl toe te laat nie, moet hy of sy die persoon wat die interne appèl aangeteken het, van daardie besluit in kennis stel.

(4)*(a)* 'n Kommersiële versoeker wat 'n interne appèl teen die weiering van sy of haar versoek om toegang aanteken, moet die voorgeskrewe appèlgelde betaal.

(b) Indien die voorgeskrewe appèlgelde betaalbaar is ten opsigte van 'n interne appèl, kan die besluit oor die interne appèl uitgestel word totdat die gelde betaal is.

(5) So gou as wat redelikerwys moontlik is, maar in elk geval binne 10 werkdae, of, indien 'n aansoek om dringende appèl toegestaan is, onmiddellik, na ontvangs van 'n interne appèl ooreenkomstig subartikel (1), moet die inligtingsbeampte van die betrokke regeringsliggaam aan die hoof van daardie liggaam—

(a) die interne appèl tesame met sy of haar redes vir die betrokke besluit; en

(b) indien die interne appèl teen die weiering of toestaan van 'n versoek om toegang is, die naam, posadres, telefoon- en faksnommer en elektroniese posadres, wat ook al beskikbaar is, van enige derde party, uitgesonderd die appellant, wat ingevolge artikel 45 van die versoek in kennis gestel moet word,

voorlê.

Kennisgewing aan en vertoë deur ander belanghebbende persone

69. (1) Indien die hoof van 'n regeringsliggaam 'n interne appèl teen die weiering van 'n versoek om toegang tot 'n rekord beoog in artikel 29(1) of 31(1) oorweeg, moet die hoof die derde party met wie of waarmee die rekord in verband staan oor die interne appèl inlig, tensy alle nodige stappe om die derde party op te spoor, onsuksesvol was.

(2) Die hoof moet 'n derde party ingevolge subartikel (1) inlig—

(a) so gou as wat redelikerwys moontlik is, maar in elk geval, binne 30 dae of, in die geval waar 'n aansoek om dringende appèl toegestaan is, binne vyf werkdae, na ontvangs van die interne appèl; en

(b) op die vinnigste wyse wat redelikerwys moontlik is.

(3) Wanneer 'n derde party ingevolge subartikel (1) ingelig word, moet die betrokke hoof—

(a) meld dat hy of sy 'n interne appèl teen die weiering van 'n versoek om toegang tot 'n rekord beoog in artikel 29(1) of 31(1), na gelang van die geval, oorweeg en die inhoud van die rekord beskryf;

(b) die naam van die appellant verskaf;

(c) in die geval van 'n rekord beoog in—

(i) artikel 29(1), die bepalings van artikel 29 beskryf; of

(ii) artikel 31(1), die bepalings van artikel 31 beskryf;

(d) in enige geval waar daardie hoof meen dat die bepalings van artikel 44(1) van toepassing kan wees, daardie bepalings beskryf, meld watter van die omstandighede beoog in artikel 44(1)*(a)*(i) tot (iv) na die mening van die hoof van toepassing kan wees en die redes meld waarom hy of sy van mening is dat artikel 44(1) van toepassing kan wees; en

(e) meld dat die derde party binne 21 dae of, indien 'n aansoek om dringende

has been granted, within 10 working days, after the third party is informed, make written representations to that head why the request for access should not be granted.

(4) If a third party is not informed in writing of an internal appeal in terms of subsection (1), the head of the governmental body concerned must, on request, give a written notice stating the matters referred to in subsection (3) to the third party.

(5) A third party that is informed of an internal appeal in terms of subsection (1), may—

(a) within 21 days; or

(b) if an urgent appeal application has been granted, within 10 working days, after the third party has been informed, make written representations to the head of the governmental body concerned why the request for access should not be granted.

(6) If the head of a governmental body is considering an internal appeal against the granting of a request for access, the head must give notice of the internal appeal to the requester.

(7) The head must—

(a) notify a third party in terms of subsection (6) as soon as reasonably possible, but in any event, within 30 days or, if an urgent appeal application has been granted, within five working days, after the receipt of the internal appeal; and

(b) state in that notice that the third party may within 21 days after notice is given, make written representations to that head why that request should be granted.

(8) A requester to whom or which notice is given in terms of subsection (6) may within 21 days after that notice is given, make written representations to the head of the governmental body why the request for access should be granted.

Decision on internal appeal and notice thereof

70. (1) The decision on an internal appeal must be made with due regard to—

(a) the particulars stated in the internal appeal in terms of section 68(1)*(c)*;

(b) any reasons submitted by the information officer in terms of 68(5)*(a)*;

(c) any representations made in terms of section 69(5) or (8); and

(d) if a third party cannot be located as contemplated in section 69(1), the fact that the third party did not have the opportunity to make representations in terms of section 69(5) why the internal appeal should be dismissed.

(2) When deciding on the internal appeal the head of the governmental body concerned may confirm the decision appealed against or substitute a new decision for it.

(3) The head of the governmental body concerned must, subject to section 71, decide on the internal appeal—

(a) as soon as reasonably possible, but in any event, within 30 days after the internal appeal is received by the information officer of the body;

(b) if a third party is informed in terms of section 69(1), as soon as reasonably possible, but in any event—

(i) within 30 days; or

(ii) if an urgent appeal application has been granted, within 15 working days after the third party has been informed;

(c) if notice is given in terms of section 69(6)—

(i) within five working days after the requester concerned has made written representations in terms of section 69(8); or

(ii) in any other case within 30 days after notice is so given.

(4) The head of the governmental body must, immediately after the decision on an internal appeal—

(a) give notice of the decision to—

(i) the appellant;

(ii) every third party informed as required by section 69(1); and

(iii) the requester notified as required by section 69(6); and

(b) if reasonably possible, inform the appellant about the decision in any other manner stated in terms of section 68(1)*(d)*.

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appèl toegestaan is, binne 10 werkdae, nadat die derde party ingelig is, skriftelike vertoë aan daardie hoof kan rig waarom die versoek om toegang nie toegestaan moet word nie.

(4) Indien 'n derde party nie skriftelik oor 'n interne appèl ingevolge subartikel (1) ingelig word nie, moet die hoof van die betrokke regeringsliggaam, op versoek, 'n skriftelike kennisgewing wat die aangeleenthede bedoel in subartikel (3) meld, aan die derde party gee.

(5) 'n Derde party wat ingevolge subartikel (1) oor 'n interne appèl ingelig word, kan—

(a) binne 21 dae; of

(b) indien 'n aansoek om dringende appèl toegestaan is, binne 10 werkdae,

nadat die derde party ingelig is, skriftelike vertoë aan die hoof van die betrokke regeringsliggaam rig waarom die versoek om toegang nie toegestaan moet word nie.

(6) Indien die hoof van 'n regeringsliggaam 'n interne appèl teen die toestaan van 'n versoek om toegang oorweeg, moet die hoof die versoeker kennis gee van die interne appèl.

(7) Die hoof moet—

(a) 'n derde party ingevolge subartikel (7) kennis gee so gou as wat redelikerwys moontlik is, maar in elk geval, binne 30 dae of, indien 'n aansoek om dringende appèl toegestaan is, binne vyf werkdae, na ontvangs van die interne appèl; en

(b) in daardie kennisgewing meld dat die derde party binne 21 dae nadat daardie kennisgewing gegee is, skriftelike vertoë waarom daardie versoek toegestaan moet word, tot daardie hoof kan rig.

(8) 'n Versoeker aan wie ingevolge subartikel (6) kennis gegee word, kan binne 21 dae nadat daardie kennis gegee is, skriftelike vertoë waarom die versoek om toegang toegestaan moet word, tot die hoof van die regeringsliggaam rig.

Besluit oor interne appèl en kennisgewing daarvan

70. (1) Die besluit oor 'n interne appèl moet geneem word met behoorlike inagneming van—

(a) die besonderhede in die interne appèl ingevolge artikel 68(1)*(c)* gemeld;

(b) enige redes voorgelê deur die inligtingsbeampte ingevolge artikel 68(5)*(a)*;

(c) enige vertoë gerig ingevolge artikel 69(5) of (8); en

(d) indien 'n derde party nie opgespoor kan word nie soos beoog in artikel 69(1), die feit dat die derde party nie die geleentheid gehad het om ingevolge artikel 69(5) vertoë te rig waarom die interne appèl van die hand gewys moet word nie.

(2) Wanneer oor die interne appèl besluit word, kan die hoof van die betrokke regeringsliggaam die besluit waarteen geappelleer word, bevestig of dit deur 'n nuwe besluit vervang.

(3) Die hoof van die betrokke regeringsliggaam moet, behoudens artikel 71—

(a) so gou as wat redelikerwys moontlik is, maar in elk geval binne 30 dae nadat die interne appèl deur die inligtingsbeampte van die liggaam ontvang is;

(b) indien 'n derde party ingelig is ingevolge artikel 69(1), so gou as wat redelikerwys moontlik is, maar in elk geval—

(i) binne 30 dae; of

(ii) indien 'n aansoek om dringende appèl toegestaan is, binne 15 werkdae, nadat die derde party ingelig is;

(c) indien kennis gegee is ingevolge artikel 69(6)—

(i) binne vyf werkdae nadat die betrokke versoeker skriftelike vertoë ingevolge artikel 69(8) gerig het; of

(ii) in enige ander geval, binne 30 dae nadat kennis aldus gegee is,

oor die interne appèl besluit.

(4) Die hoof van die regeringsliggaam moet, onmiddelik na die besluit oor 'n interne appèl—

(a) kennis gee van die besluit aan—

(i) die appellant;

(ii) elke derde party wat ingelig is soos vereis deur artikel 69(1); en

(iii) 'n versoeker wat in kennis gestel is soos vereis deur artikel 69(6); en

(b) indien redelikerwys moontlik, die appellant oor die besluit inlig op enige ander wyse gemeld ingevolge artikel 68(1)*(d)*.

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(5) The notice in terms of subsection (4)*(a)* must state—

(a) the findings on all material questions of fact, referring to the material on which those findings were based;

(b) the reasons for the decision (including the provision of the Act relied upon to justify the decision) in such manner as to enable the appellant, third party or requester, as the case may be—

(i) to understand the justification for the decision; and

(ii) to make an informed decision about whether to lodge an application with a High Court or to utilise any other remedy in law available to him or her, with respect to the decision on internal appeal; and

(c) that the appellant, third party or requester, as the case may be, may lodge an application with a High Court against the decision on internal appeal—

(i) within 60 days;

(ii) if notice to a third party is required by subsection (4)*(a)*(ii), within 30 days; or

(iii) if that application is against the granting of a request for access on internal appeal and an urgent appeal application has been granted in respect of the internal appeal, within 10 working days,

after notice is given, and the procedure for lodging the application; and

(d) if the head of the governmental body concerned decides on internal appeal to grant a request for access and notice to a third party—

(i) is not required by subsection (4)*(a)*(ii), that access to the record will forthwith be given; or

(ii) is so required, that access to the record will be given after the expiry of the applicable period for lodging an application with a High Court against the decision on internal appeal referred to in paragraph *(c)*, unless that application is lodged before the end of that applicable period.

(6) If the head of the governmental body decides on internal appeal to grant a request for access and notice to a third party—

(a) is not required by subsection (4)*(a)*(ii), the information officer of the body must forthwith give the requester concerned access to the record concerned; or

(b) is so required, the information officer must, after the expiry of—

(i) 30 days; or

(ii) if an urgent appeal application has been granted in respect of the internal appeal, 10 working days,

after the notice is given to every third party concerned, give the requester access to the record concerned, unless an application with a High Court is lodged against the decision on internal appeal before the end of the applicable period referred to in subsection (5)*(c)* for lodging that application.

(7) If the head of a governmental body fails to decide on an internal appeal within the period contemplated in subsection (3), that head is, for the purposes of this Act, regarded to have dismissed the internal appeal.

Urgent internal appeals

71. (1) A requester who wishes—

(a) his or her internal appeal against the refusal of a request for access to be decided urgently must include an application to that effect in the internal appeal; or

(b) an internal appeal against the granting of his or her request for access to be decided urgently must lodge an application to that effect with the information officer concerned,

and in that application give reasons for the urgency.

(2) If an urgent appeal application is included in an internal appeal or is lodged with an information officer of a governmental body, the head of that body must, subject to section 69, immediately or, if that is not reasonably possible, as soon as reasonably possible, but in any event, within five working days, after the receipt of that urgent appeal application, decide on the internal appeal and give notice of the decision as required by section 70(4), unless there are reasonable grounds for believing that—

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(5) Die kennisgewing ingevolge subartikel (4)*(a)* moet—

(a) die bevindings oor alle wesenlike feitevrae, met verwysing na die gegewens waarop daardie bevindings gebaseer is, meld;

(b) die redes vir die besluit (insluitende die bepalings van hierdie Wet waarop gesteun is om die besluit te regverdig) op die wyse wat die appellant, derde party of versoeker, na gelang van die geval, in staat stel—

(i) om die regverdiging vir die besluit te begryp; en

(ii) om 'n ingeligte besluit te neem oor of 'n aansoek by 'n Hoë Hof ingedien moet word, en of enige ander regsmiddel wat vir hom of haar beskikbaar is, benut moet word, met betrekking tot die besluit op interne appèl,

meld, en

(c) meld dat die appellant, derde party of versoeker, na gelang van die geval, 'n aansoek teen die besluit op interne appèl by 'n Hoë Hof kan indien—

(i) binne 60 dae;

(ii) indien kennisgewing aan 'n derde party deur subartikel (4)*(a)*(ii) vereis word, binne 30 dae; of

(iii) indien daardie aansoek teen die toestaan van 'n versoek om toegang op interne appèl is en 'n aansoek om dringende appèl ten opsigte van die interne appèl toegestaan is, binne 10 werkdae,

nadat kennis gegee is, en moet die prosedure vir die indien van die aansoek meld; en

(d) indien die hoof van die betrokke regeringsliggaam op interne appèl besluit om 'n versoek om toegang toe te staan en kennisgewing aan 'n derde party—

(i) nie deur subartikel (4)*(a)*(ii) vereis word nie, meld dat daardie toegang tot die rekord onverwyld verleen sal word; of

(ii) aldus vereis word, meld dat daardie toegang tot die rekord verleen sal word na verstryking van die toepaslike tydperk vir die indien van 'n aansoek by 'n Hoë Hof teen die besluit op interne appèl bedoel in paragraaf *(c)*, tensy daardie aansoek voor die einde van daardie toepaslike tydperk ingedien word.

(6) Indien die hoof van die regeringsliggaam op interne appèl besluit om 'n versoek om toegang toe te staan en kennisgewing aan 'n derde party—

(a) nie deur subartikel (4)*(a)*(ii) vereis word nie, moet die inligtingsbeampte van die liggaam onverwyld aan die betrokke versoeker toegang tot die betrokke rekord verleen; of

(b) aldus vereis word, moet die inligtingsbeampte, na verstryking van—

(i) 30 dae; of

(ii) indien 'n aansoek om dringende appèl ten opsigte van die interne appèl toegestaan is, 10 werkdae,

nadat aan elke betrokke derde party kennis gegee is, aan die versoeker toegang tot die betrokke rekord verleen, tensy 'n aansoek teen die besluit op interne appèl by 'n Hoë Hof ingedien word voor die einde van die toepaslike tydperk bedoel in subartikel (5)*(c)* vir die indien van daardie aansoek.

(7) Indien die hoof van 'n regeringsliggaam versuim om binne die tydperk beoog in subartikel (3) oor 'n interne appèl te besluit, word daardie hoof vir die doeleindes van hierdie Wet, geag die interne appèl van die hand te gewys het.

Dringende interne appèlle

71. (1) 'n Versoeker wat dringend 'n besluit oor—

(a) sy of haar interne appèl teen die weiering van 'n versoek om toegang wil hê, moet 'n aansoek te dien effekte by die interne appèl insluit; of

(b) 'n interne appèl teen die toestaan van sy of haar versoek om toegang wil hê, moet 'n aansoek te dien effekte by die betrokke inligtingsbeampte indien,

en in daardie aansoek redes vir die dringendheid verstrek.

(2) Indien 'n aansoek om dringende appèl by 'n interne appèl ingesluit is, of by 'n inligtingsbeampte van 'n regeringsligaam ingedien is, moet die hoof van daardie liggaam, behoudens artikel 69, onmiddellik, of, indien dit nie redelikerwys moontlik is nie, so gou as wat redelikerwys moontlik is, maar in elk geval binne vyf werkdae, na ontvangs van daardie aansoek om dringende appèl oor die interne appèl besluit en vir die besluit kennis gee soos vereis deur artikel 70(4), tensy daar redelike gronde is om te glo dat—

(a) the nature of the reasons for the urgency furnished by the applicant is such that the applicant will suffer no prejudice if the internal appeal is decided upon within the period contemplated in section 70(3); or

(b) it is impractical to decide on the internal appeal within five working days after that urgent appeal application has been received.

(3) If the head of a governmental body refuses an urgent appeal application on the grounds referred to in subsection (2)*(a)* or *(b)*, the head must immediately or, if that is not reasonably possible, as soon as reasonably possible, but in any event, within five working days, after that urgent appeal application has been received, notify the applicant of the refusal.

(4) The notice in terms of subsection (3) must state—

(a) the findings on all material questions of fact, referring to the material on which those findings were based;

(b) the reasons for the refusal (including the provision of this Act relied upon to justify the refusal) in such manner as to enable the applicant—

(i) to understand the justification for the refusal; and

(ii) to make an informed decision about whether to lodge an application with a High Court or to utilise any other remedy in law available to the applicant, with respect to the refusal; and

(c) that the applicant may lodge an application with a High Court against the refusal of the urgent appeal application, and the procedure (including the period) for lodging that application with a High Court.

(5) If the notice in terms of subsection (2) or (3) of a decision is not given by fax, the applicant concerned must be informed by phone of the decision.

CHAPTER 2

APPLICATIONS TO HIGH COURT

Non-exclusion of other remedies

72. This Chapter may not be construed to exclude or limit any other right a person has in terms of the law to remedy a matter in respect of which an application may be lodged with a High Court in terms of this Chapter.

Manner of applications to High Court

73. (1) An application in terms of this Chapter must be lodged—

(a) with a High Court having jurisdiction in terms of section 76; and

(b) subject to this Chapter, in accordance with the rules regarding an urgent application by way of notice on motion applicable to that High Court.

(2) For the purposes of those rules of the High Court concerned, all applications are regarded to be urgent without any supporting documents required to set out the reasons for the urgency and why the applicant could not be afforded substantial redress at a hearing in due course.

(3) If the interests of justice so require, a High Court having jurisdiction may extend the period within which an application may be lodged.

Applications regarding decisions of information officers or heads of governmental bodies

74. (1) A person—

(a) that has been unsuccessful in an urgent request application, an internal appeal to the head of a governmental body or an urgent appeal application; or

(b) aggrieved by a decision of the head of a governmental body to disallow the late lodging of an internal appeal in terms of section 68(3),

may appeal against the decision by way of an application.

(2) If an application referred to in subsection (1) is against the granting of a request for access on internal appeal that application must be lodged—

(a) within 30 days; or

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(a) die aard van die redes vir die dringendheid wat deur die aansoeker verstrek is, sodanig is dat die aansoeker nie benadeel sal word nie indien daar binne die tydperk beoog in artikel 70(3) oor die interne appèl besluit word; of

(b) dit onprakties is om binne vyf werkdae nadat daardie aansoek om dringende appèl ontvang is, oor die interne appèl te besluit.

(3) Indien die hoof van 'n regeringsliggaam 'n aansoek om dringende appèl weier op die gronde bedoel in subartikel (2)*(a)* of *(b)*, moet die hoof onmiddellik of, indien dit nie redelikerwys moontlik is nie, so gou as wat redelikerwys moontlik is, maar in elk geval binne vyf werkdae, nadat daardie aansoek om dringende appèl ontvang is, die aansoeker in kennis stel van die weiering.

(4) Die kennisgewing ingevolge subartikel (3) moet—

(a) die bevindings oor alle wesenlike feitevrae, met verwysing na die gegewens waarop daardie bevindings gebaseer is;

(b) die redes vir die weiering (insluitende die bepaling van hierdie Wet waarop gesteun is om die weiering te regverdig) op die wyse wat die aansoeker in staat stel—

(i) om die regverdiging vir die weiering te begryp; en

(ii) om 'n ingeligte besluit te neem of 'n aansoek by 'n Hoë Hof ingedien moet word, en of enige ander regsmiddel wat vir die aansoeker beskikbaar is, benut moet word, met betrekking tot die weiering; en

(c) dat die aansoeker by 'n Hoë Hof 'n aansoek teen die weiering van die aansoek om dringende appèl kan indien, en die prosedure (insluitende die tydperk) vir die indien van daardie aansoek by 'n Hoë Hof.

(5) Indien die kennisgewing ingevolge subartikel (2) of (3) van 'n besluit nie per faks gestuur word nie, moet die betrokke versoeker telefonies oor die besluit ingelig word.

HOOFSTUK 2

AANSOEKE BY HOË HOF

Nie-uitsluiting van ander regsmiddele

72. Hierdie Hoofstuk mag nie uitgelê word as sou dit enige ander reg wat 'n persoon regtens het om 'n aangeleentheid goed te maak ten opsigte waarvan 'n aansoek ingevolge hierdie Hoofstuk by 'n Hoë Hof ingedien kan word, uitsluit of beperk nie.

Wyse van aansoeke by Hoë Hof

73. (1) 'n Aansoek ingevolge hierdie Hoofstuk moet—

(a) by 'n Hoë Hof wat ingevolge artikel 76 jurisdiksie het, ingedien word; en

(b) behoudens hierdie Hoofstuk, ingedien word ooreenkomstig die reëls betreffende 'n dringende aansoek by wyse van mosie met kennisgewing wat op daardie Hoë Hof van toepassing is.

(2) Vir die doeleindes van daardie reëls van die betrokke Hoë Hof word alle aansoeke geag dringend te wees sonder dat enige stawende dokumente vereis word ter uiteensetting van die redes vir die dringendheid en waarom daar nie by 'n verhoor te gelegener tyd wesenlike herstel aan die aansoeker verskaf sal kan word nie.

(3) Indien geregtigheid dit vereis, kan 'n Hoë Hof wat jurisdiksie het, die tydperk waarbinne 'n aansoek ingedien kan word, verleng.

Aansoeke betreffende besluite van inligtingsbeamptes of hoofde van regeringsliggame

74. (1) 'n Persoon wat—

(a) onsuksesvol was met 'n aansoek om dringende versoek, 'n interne appèl na die hoof van 'n regeringsliggaam of 'n aansoek om dringende appèl; of

(b) veronreg voel deur 'n besluit van die hoof van 'n regeringsliggaam om nie die laat aanteken van 'n interne appèl ingevolge artikel 68(3) toe te laat nie,

kan by wyse van 'n aansoek teen die besluit appelleer.

(2) Indien 'n aansoek bedoel in subartikel (1) teen die toestaan van 'n versoek om toegang op interne appèl is, moet daardie aansoek—

(a) binne 30 dae ingedien word; of

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(b) if an urgent appeal application has been granted in respect of the internal appeal, within 10 working days,

after the third party concerned has been notified of the decision to grant the request on internal appeal.

(3) The Human Rights Commission may appeal by way of an application against a decision of—

(a) the information officer of a governmental body; or

(b) the head of a governmental body on internal appeal.

(4) A third party notified of a decision of the head of a governmental body to disclose information regarding a serious public safety or environmental risk in terms of section 8(5)*(a)*, may appeal by way of an application against the decision within 10 working days after the third party concerned has been notified of the decision.

Applications regarding contraventions of Part 5

75. If a contravention or threatened contravention of a provision of Part 5 is alleged in relation to a person, that person may lodge an application for appropriate relief.

Jurisdiction of High Court

76. A High Court has jurisdiction in respect of—

(a) a decision of the information officer or head of a governmental body contemplated in section 74 which has its office or, if the body has more than one office, its main office;

(b) a person that lodges an application in terms of section 74(1) or (4) or 75 and resides, carries on a business or is employed;

(c) an alleged contravention referred to in section 75 which has occurred or is about to occur,

in the area of jurisdiction of the High Court.

Assistance of Human Rights Commission

77. (1) An individual who wishes to lodge an application, but, because of illiteracy, poor literacy or a physical disability, is unable to comply with this Chapter, may request the Human Rights Commission to assist him or her to so comply.

(2) If the Human Rights Commission is of the opinion that an important matter of principle is involved, the Commission may appear before a High Court as a party to an application.

(3) The Human Rights Commission may, on request, appoint a person to represent an individual who has lodged an application in terms of section 74(1) or 75.

Production of records of governmental bodies to High Court

78. (1) Despite any other provisions of this Act, any court hearing an application or an appeal against a decision on an application may examine any record of a governmental body to which this Act applies, and no such record may be withheld from that court on any grounds.

(2) Such court may, subject to subsection (3), not disclose to any person, including the parties to the proceedings concerned—

(a) any record of a governmental body which is required or permitted in terms of this Act to be withheld from disclosure; or

(b) if the information officer of a governmental body, or the head of that body on internal appeal, in refusing to grant access to a record in terms of section 34(2) or 36(2), refuses to confirm or deny the existence or non-existence of the record, any information as to whether the record exists.

(3) If such court considers it in the interest of justice, it may order the disclosure of such record or such information to any party to the proceedings concerned, and may, if it considers it necessary, order such party not to disclose such record or such information to another person.

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(b) indien 'n aansoek om dringende appèl ten opsigte van daardie interne appèl toegestaan is, binne 10 werkdae,

nadat die betrokke derde party in kennis gestel is van die besluit om die versoek op interne appèl toe te laat.

(3) Die Menseregtekommissie kan deur middel van 'n aansoek appelleer teen 'n besluit van—

(a) die inligtingsbeampte van 'n regeringsliggaam; of

(b) die hoof van 'n regeringsliggaam op interne appèl.

(4) 'n Derde party wat in kennis gestel is van 'n besluit van die hoof van 'n regeringsliggaam om ingevolge artikel 8(5)*(a)* inligting betreffende 'n ernstige risiko vir openbare veiligheid of die omgewing openbaar te maak, kan, binne 10 werkdae nadat die betrokke derde party van die besluit in kennis gestel is, deur middel van 'n aansoek teen die besluit appelleer.

Aansoeke betreffende oortredings van Deel 5

75. Indien 'n oortreding of dreigende oortreding van 'n bepaling van Deel 5 beweer word met betrekking tot 'n persoon, kan daardie persoon 'n aansoek om toepaslike regshulp indien.

Jurisdiksie van Hoë Hof

76. 'n Hoë Hof het jurisdiksie ten opsigte van—

(a) 'n besluit van die inligtingsbeampte of hoof van 'n regeringsliggaam beoog in artikel 74 wat sy kantoor of, indien die liggaam meer as een kantoor het, sy hoofkantoor, het;

(b) 'n persoon wat 'n aansoek indien ingevolge artikel 74(1) of (4) of 75 en wat woon, 'n besigheid bedryf of in diens is;

(c) 'n beweerde oortreding bedoel in artikel 75 wat plaasgevind het of gaan plaasvind,

in die regsgebied van die Hoë Hof.

Bystand van Menseregtekommissie

77. (1) 'n Individu wat 'n aansoek wil indien maar vanweë ongeletterdheid, swak geletterdheid of fisiese gestremdheid nie in staat is om aan hierdie Hoofstuk te voldoen nie, kan die Menseregtekommissie versoek om hom of haar by te staan om aldus te voldoen.

(2) Indien die Menseregtekommissie van mening is dat 'n belangrike beginselsaak betrokke is, kan die Kommissie as 'n party by 'n aansoek voor 'n Hoë Hof verskyn.

(3) Die Menseregtekommissie kan, op versoek, 'n persoon aanstel om 'n persoon te verteenwoordig wat ingevolge artikel 74(1) of 75 'n aansoek ingedien het.

Voorlê van rekords van regeringsliggame aan Hoë Hof

78. (1) Ondanks enige ander bepalings van hierdie Wet kan enige hof wat 'n aansoek of 'n appèl teen 'n beslissing oor 'n aansoek aanhoor, enige rekord van 'n regeringsliggaam waarop hierdie Wet van toepassing is, ondersoek, en geen sodanige rekord mag op enige gronde van daardie hof weerhou word nie.

(2) Sodanige hof mag, behoudens subartikel (3), aan geen persoon, insluitende die partye by die betrokke verrigtinge—

(a) enige rekord van 'n regeringsliggaam wat ingevolge hierdie Wet van openbaarmaking weerhou kan of moet word; of

(b) indien die inligtingsbeampte van 'n regeringsliggaam of die hoof van daardie liggaam op interne appèl, by weiering om toegang tot 'n rekord te verleen ingevolge artikel 34(2) of 36(2), weier om die bestaan of nie-bestaan van die rekord te bevestig of te ontken, enige inligting oor die bestaan al dan nie van die rekord,

openbaar maak nie.

(3) Indien sodanige hof dit in belang van geregtigheid ag, kan hy die openbaarmaking van sodanige rekord of sodanige inligting aan enige party by die betrokke verrigtinge gelas, en kan hy, indien hy dit nodig ag, sodanige party gelas om nie sodanige rekord of sodanige inligting aan 'n ander persoon openbaar te maak nie.

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Burden of proof

79. In any legal proceedings the burden of establishing that—

(a) the refusal of a request for access; or

(b) any decision taken in terms of section 17(2), 18(1), 20, 21(1), 25(3), 52(12)*(d)*, 65(5) or 71,

is justified in terms of this Act is on the party claiming that it is so justified.

Decision on application

80. (1) After due consideration of all written and oral evidence before a High Court in respect of an application, the Court may make any order or other decision which it considers just.

(2) An order or other decision in terms of subsection (1) includes, but is not limited to, an order or other decision—

(a) which confirms, amends or sets aside the decision which is the subject of the application concerned;

(b) which requires from the information officer or head of a governmental body to take such action as the High Court considers necessary within a period mentioned in the order;

(c) if the application is against the refusal of an urgent request application or urgent appeal application, on the request for access to a record in respect of which that application was made;

(d) which grants an interdict, interim or specific relief, a declaratory order or compensation.

(3) In deciding in terms of subsection (1) which order or other decision is just, the High Court concerned must have due regard to the desirability of a speedy and inexpensive resolution of the application concerned.

Costs

81. A High Court may make such order as to costs of an application before the Court as it considers appropriate.

PART 7

MISCELLANEOUS PROVISIONS

Additional functions of Human Rights Commission

82. (1) The Human Rights Commission must—

(a) annually review this Act and other legislation and the common law having a bearing on the accountability and openness of governmental bodies as well as private bodies which exercise substantial influence over the nature of the South African society;

(b) make recommendations for—

(i) the development, improvement, modernisation, reform or amendment of this Act or other legislation or common law contemplated in paragraph *(a)*;

(ii) the compliance with any constitutional requirements about access to information; and

(iii) procedures in terms of which governmental bodies make information electronically available;

(c) monitor the administration of this Act;

(d) develop and conduct educational programmes to advance the understanding of the public, in particular of disadvantaged communities, of this Act and of how to exercise the rights contemplated in this Act;

(e) encourage governmental and private bodies to participate in the development and conduct of programmes referred to in paragraph *(d)* and to undertake such programmes themselves;

(f) promote timely and effective dissemination of accurate information by governmental bodies about their activities;

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Bewyslas

79. By enige regsverrigtinge berus die las om aan te toon dat—

(a) die weiering van 'n versoek om toegang; of

(b) enige beslissing geneem ingevolge artikel 17(2), 18(1), 20, 21(1), 25(3), 52(12)*(d)*, 65(5) of 71,

ingevolge hierdie Wet geregverdig is, by die party wat daarop aanspraak maak dat dit aldus geregverdig is.

Beslissing oor aansoek

80. (1) Na behoorlike oorweging van alle skriftelike en mondelinge getuienis voor 'n Hoë Hof ten opsigte van 'n aansoek, kan die Hof 'n bevel gee of 'n ander beslissing maak wat hy regverdig ag.

(2) 'n Bevel of ander beslissing ingevolge subartikel (1) sluit in, maar is nie beperk nie tot, 'n bevel of ander beslissing—

(a) wat die besluit wat die onderwerp van die betrokke aansoek is, bevestig, wysig of tersyde stel;

(b) wat van die inligtingsbeampte of hoof van 'n regeringsliggaam verlang om binne 'n tydperk vermeld in die bevel, die stappe te doen wat die Hoë Hof nodig ag;

(c) indien die aansoek teen die weiering van 'n aansoek om dringende versoek of aansoek om dringende appèl, oor die versoek om toegang tot 'n rekord ten opsigte waarvan daardie aansoek ingedien is;

(d) wat 'n interdik, tussentydse of spesifieke bystand, 'n verklarende bevel of vergoeding toestaan.

(3) By die neem van 'n beslissing ingevolge subartikel (1) oor watter bevel of ander beslissing regverdig is, moet die betrokke Hoë Hof die wenslikheid van 'n spoedige en goedkoop beslissing oor die betrokke aansoek behoorlik in ag neem.

Koste

81. 'n Hoë Hof kan die bevel rakende die koste van 'n aansoek voor die Hof maak wat dit paslik ag.

DEEL 7

DIVERSE BEPALINGS

Bykomende funksies van Menseregtekommissie

82. (1) Die Menseregtekommissie moet—

(a) jaarliks hierdie Wet en ander wetgewing en die gemenereg hersien wat betrekking het op die verantwoordingspligtigheid en oopheid van regeringsliggame asook privaatliggame wat wesenlike invloed op die aard van die Suid-Afrikaanse samelewing uitoefen;

(b) aanbevelings doen betreffende—

(i) die ontwikkeling, verbetering, modernisering, hervorming of wysiging van hierdie Wet of ander wetgewing of die gemenereg beoog in paragraaf *(a)*;

(ii) die nakoming van enige grondwetlike vereistes rakende toegang tot inligting; en

(iii) prosedures waarvolgens regeringsliggame inligting elektronies beskikbaar stel;

(c) die administrasie van hierdie Wet moniteer;

(d) opvoedkundige programme ontwikkel en aanbied ter bevordering van die begrip wat die publiek, veral benadeelde gemeenskappe, van hierdie Wet het en van die wyse waarop die regte beoog in hierdie Wet uitgeoefen kan word;

(e) regerings- en privaatliggame aanmoedig om aan die ontwikkeling en aanbieding van programme bedoel in paragraaf *(d)* deel te neem en om self sulke programme te onderneem;

(f) tydige en doeltreffende verspreiding van akkurate inligting deur regeringsliggame oor hulle aktiwiteite bevorder;

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(g) publish and make available a guide on how to use this Act as contemplated in section 5;

(h) if reasonably possible—

(i) assist any person as required by this Act; and

(ii) generally, on request, assist any person wishing to exercise a right contemplated in this Act;

(i) make the determinations as contemplated in section 43;

(j) supply the notice as contemplated in section 66; and

(k) submit reports to the National Assembly as contemplated in section 83.

(2) The Human Rights Commission has all such powers as are reasonably necessary or expedient to enable it to perform its duties referred to in subsection (1), including, but not limited to, the power to—

(a) recommend to a governmental or private body that the body make such changes in the manner in which it administers this Act as the Commission considers advisable;

(b) train information officers of governmental bodies;

(c) consult with and receive reports from governmental and private bodies on the problems encountered in complying with this Act;

(d) obtain advice from, consult with, or receive and consider proposals or recommendations from, any governmental or private body, official of such a body or member of the public in connection with the Commission's functions in terms of this Act;

(e) receive money from any source to perform its functions in terms of this Act;

(f) make donations to any private body participating in the development or conduct of, or undertaking, educational programmes as contemplated in subsection (1)*(e)*;

(g) for the purposes of section 83*(c)*(xii), request the Public Protector to submit to the Commission information with respect to—

(i) the number of complaints lodged with the Public Protector in respect of a right conferred or duty imposed by this Act;

(ii) the nature and outcome of those complaints; and

(h) generally, inquire into any matter, including any legislation, the common law and any practice and procedure, connected with the objects of this Act.

(3) An official of a governmental body must afford the Human Rights Commission reasonable assistance for the effective performance of its functions in terms of this Act.

Report to National Assembly by Human Rights Commission

83. The Human Rights Commission must include in its annual report to the National Assembly referred to in section 181(5) of the Constitution—

(a) any recommendation in terms of section 82(1)*(b)*;

(b) a statement of all money received from any source referred to in section 82(2)*(e)*;

(c) in relation to each governmental body, particulars of—

(i) the number of requests for access received;

(ii) the number of requests for access granted in full;

(iii) the number of requests for access granted in terms of section 44;

(iv) the number of requests for access refused in full and refused partially and the number of times each provision of this Act relied on to refuse access was invoked to justify refusal in full and partial refusal;

(v) the number of requests for correction and the number of cases in which a correction was made;

(vi) the number of cases in which the periods stipulated in sections 19(1) and 52(7), respectively, were extended in terms of section 21(1) and that section, read with section 52(6), respectively;

(vii) the number of urgent request applications and urgent appeal applications, and the number of cases in which those applications were granted;

(viii) the number of internal appeals lodged with the head of the body and the number of cases in which, as a result of an internal appeal, access was

(g) 'n gids oor hoe om hierdie Wet te gebruik soos beoog in artikel 5 publiseer en beskikbaar stel;

(h) indien redelikerwys moontlik—

(i) enige persoon bystaan soos vereis deur hierdie Wet; en

(ii) in die algemeen, op versoek, enige persoon bystaan wat 'n reg beoog in hierdie Wet wil uitoefen;

(i) die vastellings soos beoog in artikel 43 doen;

(j) die kennisgewing soos beoog in artikel 66 verskaf; en

(k) verslae aan die Nasionale Vergadering soos beoog in artikel 83 voorlê.

(2) Die Menseregtekommissie het al die bevoegdhede wat redelikerwys nodig of dienstig is om hom in staat te stel om sy pligte bedoel in subartikel (1) te verrig, insluitende, maar nie beperk nie tot, die bevoegdheid om—

(a) by 'n regerings- of privaatliggaam aan te beveel dat die liggaam die veranderinge aan die wyse waarop hy hierdie Wet administreer, aanbring wat die Kommissie raadsaam ag;

(b) inligtingsbeamptes van regeringsliggame op te lei;

(c) met regerings- en privaatliggame oorleg te pleeg en verslae van hulle te ontvang oor die probleme teëgekom in die nakoming van hierdie Wet;

(d) advies in te win van, oorleg te pleeg met, of voorstelle of aanbevelings te ontvang en te oorweeg van, enige regerings- of privaatliggaam, amptenaar van so 'n liggaam of lid van die publiek in verband met die Kommissie se funksies ingevolge hierdie Wet;

(e) geld van enige bron te ontvang om sy funksies ingevolge hierdie Wet te verrig;

(f) skenkings te doen aan enige privaatliggaam wat aan die ontwikkeling en aanbied van opvoedkundige programme soos beoog in subartikel (1)*(e)* deelneem of dit onderneem;

(g) vir die doeleindes van artikel 83*(c)*(xii), die Openbare Beskermer te versoek om aan die Kommissie inligting voor te lê ten opsigte van—

(i) die getal klagtes by die Openbare Beskermer ingedien met betrekking tot 'n reg verleen of plig opgelê by hierdie Wet;

(ii) die aard en resultaat van daardie klagtes; en

(h) in die algemeen, ondersoek in te stel na enige aangeleentheid, insluitende wetgewing, die gemenereg en enige praktyk en prosedure, wat met die doelstellings van hierdie Wet verband hou.

(3) 'n Amptenaar van 'n regeringsliggaam moet redelike bystand aan die Menseregtekommissie verleen vir die doeltreffende verrigting van sy funksies ingevolge hierdie Wet.

Verslag aan Nasionale Vergadering deur Menseregtekommissie

83. Die Menseregtekommissie moet in sy jaarlikse verslag aan die Nasionale Vergadering bedoel in artikel 181(5) van die Grondwet—

(a) enige aanbeveling ingevolge artikel 82(1)*(b)*;

(b) 'n staat van alle gelde ontvang van enige bron bedoel in artikel 82(2)*(e)*;

(c) met betrekking tot elke regeringsliggaam, besonderhede oor—

(i) die getal versoeke om toegang wat ontvang is;

(ii) die getal versoeke om toegang ten volle toegestaan;

(iii) die getal versoeke om toegang toegestaan ingevolge artikel 44;

(iv) die getal versoeke om toegang ten volle geweier en gedeeltelik geweier en die getal kere wat elke bepaling van hierdie Wet waarop gesteun is om toegang te weier, gebruik is om weiering ten volle en gedeeltelike weiering te regverdig;

(v) die getal versoeke om regstelling en die aantal gevalle waarin 'n reggestelling aangebring is;

(vi) die getal gevalle waarin die tydperke gestipuleer in onderskeidelik artikels 19(1) en 52(7) verleng is ingevolge onderskeidelik artikel 21(1) en daardie artikel, saamgelees met artikel 52(6);

(vii) die getal aansoeke om dringende versoeke en aansoeke om dringende appèlle en die getal gevalle waarin daardie aansoeke toegestaan is;

(viii) die getal interne appèlle aangeteken by die hoof van die liggaam en die getal gevalle waarin daar, as gevolg van 'n interne appèl, toegang

given to a record or a part thereof and a correction of inaccurate personal information was made;

(ix) the number of internal appeals which were lodged on the ground that—

(aa) a request for access was regarded to have been refused in terms of section 22;

(bb) a request for correction was regarded to have been refused in terms of section 52(8);

(x) the number of applications made to every High Court and the outcome thereof and the number of decisions of every High Court appealed against and the outcome thereof;

(xi) the number of applications to every High Court which were lodged on the ground that an internal appeal was regarded to have been dismissed in terms of section 70(7);

(xii) the number of complaints lodged with the Public Protector in respect of a right conferred or duty imposed by this Act and the nature and outcome thereof; and

(xiii) such other matters as may be prescribed.

Expenditure of Human Rights Commission in terms of Act

84. Any expenditure in connection with the performance of the Human Rights Commission's functions in terms of this Act must be defrayed subject to—

(a) requests being received with the changes required by the context in the form prescribed for the budgetary processes of departments of State; and

(b) the Exchequer Act, 1975 (Act No. 66 of 1975), and the regulations and instructions thereunder, and the Auditor-General Act, 1995 (Act No. 12 of 1995).

Offences

85. A person who—

(a) wilfully fails to comply with an undertaking contemplated in section 56*(l)*(ii); or

(b) discloses information about an impropriety contemplated in section 63(1)*(a)* knowing it to be false or not knowing or believing the information to be true; or

(c) discloses a record of a governmental body, which record is classified in terms of the regulations made in terms of section 86(1)*(c)* and has been unlawfully obtained,

commits an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding 12 months.

Regulations

86. The Minister of Justice may, after consultation with the Human Rights Commission and with the approval of Parliament, by notice in the *Gazette* make regulations regarding—

(a) any matter which is required or permitted by this Act to be prescribed;

(b) any notice required by this Act;

(c) the classification of records of governmental bodies;

(d) any administrative or procedural matter necessary to give effect to the provisions of this Act.

Short title and commencement

87. (1) This Act is the Open Democracy Act, 1998, and takes effect on a date determined by the President by proclamation in the *Gazette*.

(2) Different dates may be so determined in respect of different provisions of this Act.

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verleen is tot 'n rekord of 'n gedeelte daarvan, of 'n regstelling van foutiewe persoonlike inligting aangebring is;

(ix) die getal interne appèlle wat aangeteken is op grond daarvan dat—

(aa) 'n versoek om toegang geag is geweier te gewees het ingevolge artikel 22;

(bb) 'n versoek om regstelling geag is geweier te gewees het ingevolge artikel 52(8);

(x) die getal aansoeke ingedien by elke Hoë Hof en die resultaat daarvan en die getal beslissings van elke Hoë Hof waarteen geappelleer is en die resultaat daarvan;

(xi) die getal aansoeke by elke Hoë Hof wat ingedien is op grond daarvan dat 'n interne appèl geag is afgewys te gewees het ingevolge artikel 70(7);

(xii) die getal klagtes ingedien by die Openbare Beskermer ten opsigte van 'n reg verleen of plig opgelê by hierdie Wet en die aard en resultaat daarvan; en

(xiii) die ander aangeleenthede wat voorgeskryf word,

insluit.

Uitgawes van Menseregtekommissie ingevolge Wet

84. Enige uitgawes in verband met die verrigting van die Menseregtekommissie se funksies ingevolge hierdie Wet moet bestry word onderworpe—

(a) daaraan dat versoeke ontvang word in die vorm voorgeskryf vir die begrotingsprosesse van Staatsdepartemente, met die nodige wysigings; en

(b) aan die Skatkiswet, 1975 (Wet No. 66 van 1975), en die regulasies en instruksies daarkragtens, en die Wet op die Ouditeur-generaal, 1995 (Wet No. 12 van 1995).

Misdrywe

85. 'n Persoon wat—

(a) opsetlik versuim om 'n onderneming bedoel in artikel 56*(l)*(ii) na te kom; of

(b) inligting openbaar maak oor 'n onbehoorlikheid beoog in artikel 63(1)*(a)* met die wete dat dit vals is, of sonder wete of vermoede dat die inligting waar is; of

(c) 'n rekord van 'n regeringsliggaam openbaar maak, welke rekord ingevolge die regulasies uitgevaardig ingevolge artikel 86(1)*(c)* geklassifiseer is en wat onregmatig verkry is,

begaan 'n misdryf en is by skuldigbevinding strafbaar met 'n boete of met gevangenisstraf vir 'n tydperk van hoogstens 12 maande.

Regulasies

86. Die Minister van Justisie kan, na oorleg met die Menseregtekommissie en met die goedkeuring van die Parlement, by kennisgewing in die *Staatskoerant* regulasies uitvaardig betreffende—

(a) enige aangeleentheid wat deur hierdie Wet voorgeskryf moet of kan word;

(b) enige kennisgewing wat deur hierdie Wet vereis word;

(c) die klasssifisering van rekords van regeringsliggame;

(d) enige administratiewe of prosedureaangeleentheid wat nodig is om aan die bepalings van hierdie Wet gevolg te gee.

Kort titel en inwerkingtreding

87. (1) Hierdie Wet heet die Wet op Oop Demokrasie, 1998, en tree in werking op 'n datum wat die President by proklamasie in die *Staatskoerant* bepaal.

(2) Verskillende datums kan aldus bepaal word ten opsigte van verskillende bepalings van hierdie Wet.

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MEMORANDUM ON THE OBJECTS OF THE OPEN DEMOCRACY BILL, 1998

Constitutional right of access to information

1.1 Section 32(1) of the Constitution of the Republic of South Africa, 1996 ("the Constitution"), provides as follows:

"(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.".

1.2 Section 32(2) of the Constitution, read with item 23(1) of Schedule 6 thereto, requires the enactment of national legislation to give effect to this right within three years of the commencement of the Constitution, that is before 4 February 2000. Item 23(2) of Schedule 6 to the Constitution provides that until such legislation is enacted section 32(1) must be regarded to read as follows (which is similar to the corresponding right in terms of the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993)):

"(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.".

1.3 The right of access to information referred to in section 32(1) of the Constitution, being part of the Bill of Rights, may only be *limited* in accordance with the limitations provisions for the Bill of Rights in the Constitution, namely sections 32(2) and 36.

Principal objects of Bill

2.1 The principal objects of the Bill are—

(a) to give effect to the right referred to in section 32(1)*(a)* of the Constitution, and to partially give effect to the right mentioned in section 32(1)*(b)* of the Constitution and to section 195(3), read with section 195(1)*(g)*, of the Constitution; and

(b) generally, to promote transparency and accountability by all organs of state by—

(i) providing the public with timely, accessible and accurate information; and

(ii) empowering the public to effectively scrutinise, and participate in, governmental decision making that affects them.

2.2 To attain these principal objects, the Bill includes specific provision for—

(a) public access, on request, to information held by the state, subject to exemptions necessary to protect good governance, personal privacy and commercial confidentiality;

(b) the disclosure of information obtained in accordance with the Bill;

(c) governmental bodies to make information available that will assist the public in understanding the functions of governmental bodies, their operation and the criteria employed in making decisions;

(d) access by persons to information about themselves held by private bodies, the correction of personal information held by the state or private persons as well as the regulation of the use and disclosure of such personal information;

(e) the protection of persons disclosing evidence of contraventions of the law, serious maladministration or corruption in governmental bodies; and

(f) enforcement mechanisms in respect of the rights contemplated in the Bill in the form of internal appeals as well as applications lodged with a High Court.

Full effect to section 32(1)(b) of Constitution

3. A right of access to any information held by another person and which is required for exercising or protecting any rights which is protected as a fundamental right in a constitution is a new notion in law, not only in South Africa but also elsewhere. Consequently, it is considered desirable for the Human Rights Commission to

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MEMORANDUM OOR DIE OOGMERKE VAN DIE WETSONTWERP OP OOP DEMOKRASIE, 1998

Grondwetlike reg op toegang tot inligting

1.1 Artikel 32(1) van die Grondwet van die Republiek van Suid-Afrika, 1996 ("die Grondwet"), bepaal soos volg:

"(1) Elkeen het die reg op toegang tot—

(a) enige inligting wat deur die staat gehou word; en

(b) enige inligting wat deur 'n ander persoon gehou word en wat vir die uitoefening of beskerming van enige regte benodig word.".

1.2 Artikel 32(2) van die Grondwet, saamgelees met item 23(1) van Bylae 6 daarby, vereis dat nasionale wetgewing binne drie jaar na die inwerkingtreding van die nuwe Grondwet uitgevaardig word om aan hierdie reg gevolg te gee, dit is voor 4 Februarie 2000. Item 23(2) van Bylae 6 by die Grondwet bepaal dat totdat sodanige wetgewing verorden word, artikel 32(1) geag moet word soos volg te lui (wat soortgelyk is aan die ooreenstemmende reg ingevolge die Grondwet van die Republiek van Suid-Afrika, 1993 (Wet No. 200 van 1993)):

"(1) Elke persoon het die reg op toegang tot alle inligting wat deur die staat of enige van sy organe in enige regeringsfeer gehou word vir sover daardie inligting benodig word vir die uitoefening of beskerming van enige van hul regte.".

1.3 Die reg op toegang tot inligting bedoel in artikel 32(1) van die Grondwet, synde deel van die Handves van Regte, kan slegs ooreenkomstig die beperkingsbepalings vir die Handves van Regte in die Grondwet, naamlik artikels 32(2) en 36, beperk word.

Hoofdoelstellings van Wetsontwerp

2.1 Die hoofdoelstellings van die Wetsontwerp is—

(a) om uitvoering te gee aan die reg bedoel in artikel 32(1)*(a)* van die Grondwet, en om gedeeltelik uitvoering te gee aan die reg bedoel in artikel 32(1)*(b)* van die Grondwet en aan artikel 195(3), saamgelees met artikel 195(1)*(g)*, van die Grondwet; en

(b) in die algemeen, om deursigtigheid en verantwoordingspligtigheid deur alle staatsorgane te bevorder deur—

(i) die publiek te voorsien van tydige, toeganklike en korrekte inligting; en

(ii) die publiek te bemagtig om regeringsbesluitneming wat hulle raak, doeltreffend na te gaan en daaraan deel te neem.

2.2 Ten einde hierdie hoofdoelstellings te bereik, sluit die Wetsontwerp spesifieke voorsiening in vir—

(a) openbare toegang, op versoek, tot inligting gehou deur die staat, onderworpe aan vrystellings wat nodig is om goeie landsbestuur, persoonlike privaatheid en kommersiële vertroulikheid te beskerm;

(b) die openbaarmaking van inligting verkry ooreenkomstig die Wetsontwerp;

(c) regeringsliggame om inligting beskikbaar te stel wat die publiek sal help om die funksies van regeringsliggame, hulle werking en die kriteria wat by besluitneming gebruik word, te begryp;

(d) toegang deur persone tot inligting oor hulleself gehou deur privaatliggame, die regstelling van persoonlike inligting gehou deur die staat of privaatliggame, asook die regulering van die gebruik en openbaarmaking van sodanige persoonlike inligting;

(e) die beskerming van persone wat getuienis oor oortredings van die reg, ernstige wanadministrasie of korrupsie in regeringsliggame openbaar maak; en

(f) toepassingsmeganismes ten opsigte van die regte beoog in die Wetsontwerp, in die vorm van interne appèlle, asook aansoeke ingedien by 'n Hoë Hof.

Volle gevolg aan artikel 32(1)(b) van Grondwet

3. 'n Reg op toegang tot enige inligting gehou deur 'n ander persoon en wat benodig word vir die uitoefening of beskerming van enige regte wat as 'n fundamentele reg in 'n grondwet beskerm word, is 'n nuwe begrip in die reg, nie slegs in Suid-Afrika nie, maar ook elders. Gevolglik word dit wenslik geag dat die Menseregtekommissie

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investigate and consult as widely as possible on this matter in order to make recommendations regarding legislation which would give *full* effect to this right as required by section 32(1)*(b)*, read with section 32(2), of the Constitution.

Existing legislation inconsistent with Bill

4. No express provision is made in the Bill for amendments to existing legislation inconsistent with the Bill or the provisions of the Constitution regarding access to information. Clause 2 of the Bill contains a general override, stipulating that the provisions of the Bill (if it becomes law and takes effect) prevail over all other legislation in case of conflict. The Constitution, being the supreme law, will in any case prevail over any conflicting legislation. The eventual amendment or repeal of these inconsistent provisions in existing legislation, although not absolutely necessary, is desirable for the sake of clarity. To this end each functionary administering such inconsistent legislation should make proposals to the appropriate legislative authorities for the necessary adjustments.

Duty of confidentiality of officials

5. If the Bill becomes law and takes effect, one of its significant effects on existing legislation would be the repeal of any duty of confidentiality imposed on a government official by other legislation where information is disclosed in accordance with the Bill.

Parliamentary procedure

6.1 Section 76(3)*(d)* of the Constitution provides that a Bill must be dealt with in accordance with the procedure established by section 76(1) or (2) thereof if it provides for legislation envisaged in section 195(3) and (4) of the Constitution. Section 195(3), read with section 195(1), of the Constitution provides that national legislation must *inter alia* ensure the promotion of the following principles:

(a) Transparency must be fostered by providing the public with timely, accessible and accurate information;
(b) Public administration must be accountable; and
(c) The public must be encouraged to participate in policy making.

These principles apply to administration in every sphere of government and to organs of state and public enterprises (section 195(2) of the Constitution).

6.2 Given that the Bill provides for legislation envisaged in the said section 195(3), the State Law Advisers are of the opinion that the Bill must be dealt with by Parliament in accordance with the procedure established by section 76(1) or (2) of the Constitution.

Consultation

7.1 The following bodies/persons were consulted:

* Ministries and Government Departments/Offices (including the Premiers of provinces, the Public Protector, Attorneys-General, South African Police Service, South African National Defence Force and National Intelligence Agency)
* Chief Justice of the then appellate division of the Supreme Court and Judges President of the then provincial divisions of the Supreme Court
* Open Democracy Advisory Forum (constituted of more than 60 organisations mainly representing civil society)
* Various public enterprises and non-governmental bodies

7.2 In order to comply with section 154(2) of the Constitution a draft of the Bill was published in the *Gazette* in October 1997 for information and comment.

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hierdie aangeleentheid ondersoek en so wyd moontlik daaroor oorleg pleeg ten einde aanbevelings te doen betreffende wetgewing wat volle gevolg aan hierdie reg sal gee, soos vereis deur artikel 32(1)*(b)*, saamgelees met artikel 32(2), van die Grondwet.

Bestaande wetgewing teenstrydig met Wetsontwerp

4. Geen uitdruklike voorsiening word in die Wetsontwerp gemaak vir wysigings aan bestaande wetgewing wat teenstrydig is met die Wetsontwerp of met die bepalings van die Grondwet betreffende toegang tot inligting nie. Klousule 2 van die Wetsontwerp bevat 'n algemene voorrang, wat stipuleer dat, in geval van konflik, die bepalings van die Wetsontwerp (indien dit wet word en in werking tree) voorrang bo alle ander wetgewing geniet. Die Grondwet, synde die hoogste reg, sal in elk geval voorrang geniet bo enige teenstrydige wetgewing. Die uiteindelike wysiging of herroeping van hierdie teenstrydige bepalings in bestaande wetgewing is ter wille van duidelikheid wenslik, alhoewel nie absoluut noodsaaklik nie. Om hierdie rede moet elke funksionaris wat teenstrydige wetgewing administreer, voorstelle vir die nodige veranderings by die toepaslike wetgewende owerhede doen.

Plig van vertroulikheid van amptenare

5. Indien die Wetsontwerp wet word en in werking tree, sal een van die belangrike uitwerkings daarvan op bestaande wetgewing die herroeping wees van enige plig van vertroulikheid wat deur ander wetgewing aan 'n regeringsamptenaar opgelê is waar inligting ooreenkomstig hierdie Wetsontwerp openbaar gemaak word.

Parlementêre prosedure

6.1 Artikel 76(3)*(d)* van die Grondwet bepaal dat 'n Wetsontwerp behandel moet word ooreenkomstig die prosedure wat deur artikel 76(1) of (2) voorgeskryf word indien dit voorsiening maak vir wetgewing beoog in artikel 195(3) en (4) van die Grondwet. Artikel 195(3), saamgelees met artikel 195(1), van die Grondwet bepaal dat nasionale wetgewing onder meer die bevordering van die volgende beginsels moet verseker:

(a) Deursigtigheid moet bevorder word deur die publiek van tydige, toeganklike en korrekte inligting te voorsien;

(b) Openbare administrasie moet verantwoordingspligtig wees; en

(c) Die publiek moet aangemoedig word om aan beleidsvorming deel te neem.

Hierdie beginsels is van toepassing op administrasie in elke regeringsfeer en op staatsorgane en openbare ondernemings (artikel 195(2) van die Grondwet).

6.2 In die lig daarvan dat die Wetsontwerp vir wetgewing beoog in genoemde artikel 195(3) voorsiening maak, is die Staatsregsadviseurs van mening dat die Wetsontwerp ooreenkomstig die prosedure voorgeskryf deur artikel 76(1) of (2) van die Grondwet behandel moet word.

Oorlegpleging

7.1 Die volgende liggame/persone is geraadpleeg:

* Ministeries en Staatsdepartemente/Kantore (insluitende die Premiers van provinsies, die Openbare Beskermer, Prokureurs-generaal, die Suid-Afrikaanse Polisiediens, die Suid-Afrikaanse Nasionale Weermag en die Nasionale Intelligensie-agentskap)
* Die Hoofregter van die voormalige appèlafdeling van die Hooggeregshof en Regters-president van die voormalige provinsiale afdelings van die Hooggeregshof
* Adviesforum vir Oop Demokrasie (saamgestel uit meer as 60 organisasies wat hoofsaaklik die burgerlike samelewing verteenwoordig)
* Verskeie openbare ondernemings en nie-regeringsliggame

7.2 Ten einde te voldoen aan artikel 154(2) van die Grondwet is 'n konsep van die Wetsontwerp in Oktober 1997 vir inligting en kommentaar in die *Staatskoerant* gepubliseer.

APPENDIX TWO

SOUTH AFRICAN COUNCIL OF CHURCHES

(SACC)

University of Cape Town

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OPD 15

South African Council of Churches

Public Policy Liaison Office
P.O. Box 2591 CAPE TOWN 8000
Phone: +27 21 234261 Fax: +27 21 234262

9 February 1999

The Hon. Johnny de Lange
Chair, Portfolio Committee on Justice
Parliament of South Africa
P.O. Box 15
Cape Town 8000

Dear Mr. De Lange:

Please find enclosed our submission on the Open Democracy Bill (B67-98). I apologise for the delay in submitting our concerns. Unfortunately, this was due to the extensiveness of our comments and the need for these to be thoroughly reviewed by SACC leadership in Johannesburg.

I trust that it will still be possible to share our submission with other members of the Portfolio Committee.

We would be happy to discuss our concerns with you further, should you wish this. We would also request an opportunity to make an oral submission to the Portfolio Committee during public hearings on the Bill.

Thank you for considering our submission. We look forward to hearing from you further concerning oral submission dates.

Yours sincerely

Malcolm Damon (Rev.)
Co-ordinator, Public Policy Liaison

University of Cape Town

South African Council of Churches
Legislative Submission

Open Democracy Bill
(B67-98)

Submission to the Portfolio Committee on Justice

1 February 1999

University of Cape Town

Summary

The SACC strongly supports the Open Democracy Bill and urges its prompt adoption and implementation. However, we have serious reservations about the Bill in its current form. We have already identified our main concerns in an earlier submission, made jointly with eight other organs of civil society. In this submission, we expand upon our earlier arguments concerning what we see as the Bill's most glaring flaw: its failure to give full effect to the provisions of section 32(1)(b) of the Constitution concerning access to privately-held information vital to the protection or exercise of fundamental rights. We propose extensive revision of the Bill to address this omission and include suggested language in an appendix.

We also raise, more briefly, objections to the deletion of the Open Meetings provisions contained in early drafts of this legislation. We propose that this chapter be reincorporated into the Bill or, at the least, that the Bill be retitled to acknowledge its limited scope.

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Submission to the Portfolio Committee on Justice
Re: Open Democracy Bill (B67-98)

1.0 Access to government information is an essential component of open democracy

1.1 The South African Council of Churches (SACC) is the facilitating body for a fellowship of 25 Christian churches, together with one observer-member and associated para-church organisations. Founded in 1968, the SACC includes among its members Protestant, Catholic, African Independent, and Pentecostal churches, representing the majority of Christians in South Africa. SACC members are committed to expressing jointly, through proclamation and programmes, the united witness of the church in South Africa, especially in matters of national debate.

1.2 The SACC strongly supports the adoption of legislation that promotes open and accountable government and gives full effect to the constitutional guarantees of freedom of political choice, access to information, and just administrative action. We believe that openness and accountability – in both public and private institutions – facilitates effective citizen participation in policy debates. Popular input is vital to the formulation and implementation of policies that enhance social and economic justice, promote sustainable and broad-based human development, and enable all people to realise Christ's promise of life abundant.

1.3 The apartheid state was erected on a foundation of secrecy and exclusion. In the name of state security, the government resorted to increasingly draconian measures to suppress information and obscure the devastating impact of its policies. One of the many challenges facing our democratic government is to cultivate a new attitude of openness and transparency in both the public and private sectors. Only then can all South Africans have access to the information necessary to assess policy options, to protect and execise their rights, to fulfill their responsibilities, and to build a better future.

1.4 In this context, we welcome the Open Democracy Bill (hereafter,"the Bill") as a milestone in the construction of a culture of accountability and transparency. We commend the Minister and Department of Justice for devising legislation that gives effect to the Constitutional right of access to government information in a comprehensive and efficient manner. We appreciate the dedication of the South African Law Commission, the South African Human Rights Commission, and the countless government officials and non-governmental representatives who have worked diligently to revise and refine the Bill.

2.0 Areas of concern and scope of submission

2.1 Although the SACC strongly supports the provisions of the Bill, we are concerned that the Bill's title promises more than it delivers. In order to lay a strong foundation for an open and rights-respecting democracy, legislation must also:

- give effect to the constitutional right of access to information held by private bodies that is needed to protect or exercise a right;

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- establish a legal framework for public access to meetings of governmental bodies;
- cultivate a culture of openness by requiring government agencies to make certain categories of information available to the public as a matter of routine (the "right to know" principle);
- protect employees of private bodies who expose activities of their employers that wilfully violate fundamental rights; and
- create a "user-friendly" external review and appeal mechanism that enables ordinary citizens to be fairly heard even if they limited access to financial or legal resources.

2.2 We have already discussed many of these broad concerns--and several more specific matters--in a submission to the Select Committee on Security and Justice, dated 11 August 1998. This submission was made jointly with the Black Sash, the COSATU Parliamentary Office, the Environmental Justice Networking Forum, the Legal Resources Centre, the Human Rights Committee, IDASA, the Southern African Catholic Bishops' Conference, and the South African NGO Coalition. We reaffirm our support for the points raised in that document and commend it to the committee's attention.

2.3 At the same time, we recognise that it may be impractical for a single bill to address all of the issues associated with the establishment of open democracy. At a **minimum**, though, the Bill should give full effect to the right of access to information contained in Section 32(1) of the Constitution. We would also wish to see the Bill's open meeting provisions--present in early drafts but dropped from the tabled version--restored. If this is not done, then the Bill should be renamed the Freedom of Information Bill in accordance with its more limited aims.

3.0 Access to privately-held information needed to protect or enforce a right

3.1 Section 32(1) of the Constitution (Act No. 106 of 1996) states:

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.

Section 32(2) of the Constitution, read with item 23(1) of Schedule 6, requires Parliament to enact national legislation to give effect to this right by 4 February 2000.

3.2 The memorandum accompanying the Bill indicates that the proposed legislation is intended:

to give effect to the right referred to in section 32(1)(a) of the Constitution, and to partially give effect to the right mentioned in section 32(1)(b) of the Constitution ...

The memorandum also recommends that the Human Rights Commission undertake a comprehensive investigation and consultation process in order to develop recommendations regarding legislation that would give full effect to section 32(1)(b).

3.3 We appreciate the government's frank acknowledgement that the Bill fails to give full effect to the limited right of access to privately-held information set forth in section 32(1)(b) of the Constitution. We agree that additional parliamentary action would be

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required to fulfill the mandate contained in section 32(2) and Schedule 6 of the Constitution. However, we believe that attempting to implement these rights in separate stages would be invite confusion, frustration, and litigation and would ultimately thwart the objectives of openness and the protection of rights.

3.4 In terms of item 23(2) of Schedule 6 of the Constitution, the right of access to information is currently defined by a corresponding clause from the interim Constitution (Constitution of the Republic of South Africa, Act No. 200 of 1993):

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.

Once parliament enacts national legislation that gives effect to section 32(1) of the Constitution, this interim clause will fall away and the right of access to information will be defined solely in terms of section 32(1).

3.5 Given that the government acknowledges that the Bill:

a. gives full effect to the right contained in section 32(1)(a);
b. gives partial effect to the right contained in section 32(1)(b); and
c. does **not** give **full** effect to the right contained in section 32(1)(b)

the constitutional impact of the Bill's enactment is unclear. Two possibilities exist:

3.5.1 Due to its inability to give full effect to the rights contained in section 32(1), the Bill fails the test contained in section 32(2). The interim constitutional provision would then remain operative until parliament enacts legislation to give full effect to section 32(1)(b) or until section 32(2) automatically lapses, in terms of item 23(3) of Schedule 6, on 4 February 2000.

3.5.2 Due to its capacity to give substantial effect to the rights contained in section 32(1), the Bill will pass the test contained in section 32(2), triggering the activation of section 32(1) and the replacement of the interim provision.

3.5.3 A third possibility – that the enactment of the Bill would activate some portion of section 32(1) in lieu of the interim provision – seems untenable. Section 32(2) contains no test for partial effect and it makes no provision for separating the rights to public and private information or enacting them at different times. Moreover, the Bill gives partial effect to section 32(1)(b), making it impossible to segregate "active" provisions from "inactive" ones. [Even if the latter objection were to be addressed by the removal of measures providing access to the records of private bodies, the former objection would still hold. We are highly concerned that any attempt to separate the activation of clause 32(1)(a) and 32(1)(b) would not only be legally dubious, it would permit parliament to postpone indefinitely further action to give effect to 32(1)(b).]

3.6 Neither of the consequences envisioned in 3.5.1 or 3.5.2 are desirable. In the first case, the right of access to government information remains intact in terms of the interim provision, without any effective legislation to regulate the application and exercise of that right. This has already created some difficulty – for instance in the case of ABBM Printing & Publishing v.Transnet where the applicant was granted access to tender

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documents under Section 32 of the Constitution (read with section 23(2)(a) of Schedule 6), an outcome which may well have been excluded by the Bill's exemption on the disclosure of certain commercial information. In the second case, a constitutionally-protected right of access to information would be extended to privately-held information required to protect any right, again without any legal framework to regulate that scope or method of access. This threatens to unleash a barrage of information requests to private bodies, many of which might ultimately require adjudication by the courts.

3.7 Apart from the practical arguments against the partial realisation of the rights contained in section 32(1), there is a strong moral argument to be made for the adoption of legislation that would facilitate full recognition of these rights. The current political trend is to minimise state intervention in the private sector and to permit markets, rather than legislation, to regulate commercial activity. Although deregulation can, in some instances, prompt greater efficiency and economic growth through increased competition and innovation, it also diminishes the accountability of private enterprises to elected officials. Furthermore, some private firms may use their considerable economic resources to evade government efforts to regulate their activities in the public interest, as, for example, in the cases of environmental or consumer protection.

3.8 It is therefore essential to offset this general relaxation of accountability by enabling greater public scrutiny of the private sector. No private body – whether profit-making or not-for-profit – should be permitted to violate the constitutionally-protected social and political rights of South African citizens. While the government can and should adopt laws to reduce the danger of such violations, the prompt implementation of legislation that ensures access to a clearly defined range of privately held information will encourage citizen vigilance and will form the most effective and durable bulwark against abuses by individuals whose power is not otherwise subject to popular control.

3.9 The SACC therefore recommends that the Bill be amended to incorporate a new Part, equivalent to the current Part 3 (Access to Records of Government Bodies) that gives full effect to section 32(1)(b) by providing a parallel right and manner of access to records of private bodies: a) that contain personal information about the requester, or b) are necessary to exercise or protect a right. We annex to this submission proposed language to that effect. This would:

- establish an application process similar to the one for government records (but with the important condition that, in the case of requests for access related to the protection or exercise of any right, the applicant must include a statement of the right that he or she is seeking to exercise or protect and how the requested record would promote that objective);
- streamline the application process by eliminating urgent requests and abandoning the variable treatment of applicants based on their commercial status;
- define a reduced set of grounds for refusal of requests (but with additional grounds to protect the private body's own commercial information and to permit the refusal of requests that do not make a convincing connection between the requested information and the protection or exercise of a right) and restore the "necessity of harm" override which appeared in earlier versions of the bill;
- provide for notification of and intervention by third parties affected by a request;

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- assign review functions to the High Courts (in the absence of a more accessible and appropriate review structure)[1];
- eliminate reference to personal information banks in the Bill's definition of a private body;
- make appropriate changes to the current Part 4 (Access to, Correction of and Control over Personal Information Held by Private and Governmental Bodies) to avoid duplication or contradictions; and
- make other technical changes necessary to the integration of the above changes.

4.0 Open meetings

4.1 Section 195(1) of the Constitution states, in part:

Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

...

(e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.

(f) Public administration must be accountable.

(g) Transparency must be fostered by providing the public with timely, accessible and accurate information.

Section 195(2) of the Constitution requires national legislation be enacted to promote these principles.

4.2 Section 41(1)(c) of the Constitution further requires that:

All spheres of government and all organs of state within each sphere must –

...

(c) provide effective, transparent, accountable and coherent government for the Republic as a whole;

4.3 One of the most obvious methods of ensuring the transparency and accountability of organs of state and the timeliness and accuracy of information about their deliberations is to guarantee public access to meetings of these bodies. Currently, the Constitution only explicitly provides for public access to meetings of the National Assembly, the National Council of Provinces, provincial legislatures, and municipal councils (sections

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[1]Clearly, decision bodies concerning the disclosure of records by private bodies must be subject to external review. In the absence of some dedicated information tribunal or review board, we have adopted the approach used elsewhere in the Bill and have proposed that the High Court undertake this role. However, we do not consider this a satisfactory long-term solution as the cost and complexity of bring an application before a High Court would prevent many applicants from pursuing claims. We would prefer that a simpler, specialised review mechanism be established, but we recognise that this might more appropriately be done under the auspices of the administrative justice legislation required by section 33(2) of the Constitution. Meanwhile, we would suggest that the High Court be used as an interim review mechanism.

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59(1), 72(1), 118(1) and 160(7), respectively). However, more comprehensive legislation, comparable to the "government in the sunshine" laws in other jurisdictions, is essential to ensure that the provisions of sections 41 and 195 are applied consistently and comprehensively to all state policy-making bodies. In addition, such legislation should provide for the regulation of access to meetings, including the establishment of more detailed criteria for the closure of meetings and notice of meetings.

4.4 Early drafts of the Bill included an "open meetings" chapter that guaranteed public access to all meetings of state policy-making bodies (except the Cabinet) and governed the related matters such as notification of meetings, the publication of agendas and minutes, and the grounds for closure of meetings. This section was deleted from the Bill during Cabinet consideration. We understand that the omission of this section was prompted, in part, by concerns about its complexity and workability.

4.5 We share the government's eagerness to ensure that the implementation of the Bill does not impose unnecessary burdens on state officials. However, we believe that the right of public access to meetings of state policy-making bodies is not only consistent with the spirit and letter of the Constitution, but also an essential component of open democracy. We believe further that the protection of this right need not place onerous responsibilities on government officials. We urge the simplification and reincorporation of this chapter in a manner that establishes, in principle, the right of access and leaves many of the details of implementation to regulations. We are prepared to make specific proposals to this effect if asked to do so. Should the committee decide not to reincorporate this material into the current bill, we would strongly recommend that the title of the legislation be changed to the "Freedom of Information Bill", thereby more accurately reflecting the scope of its effect.

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APPENDIX

Proposed amendments to Open Democracy Bill to give effect to Sec. 32(1)(b) of the Constitution

●1. In the initial description of the bill, prior to the table of contents, insert the following language:

To give effect to the constitutional right of access to any information held by the state; ~~to give effect to the constitutional right to any information held by another person and which is required for exercising or protecting any right~~; to make available ...

●2. In section 1, amend the definition of "private body" as follows:

(xxiv) "**private body**" means a person, other than a governmental body [~~in possession of or controlling a personal information bank~~];

●3. In section 3, insert a new clause after the current clause (1)(b):

(b2) to give effect to the constitutional right of access to information held by another person and which is required for the exercise or protection of any right;

●4. To insert a new section following the current section 4:

Delegation of powers by head of private body

4A. The head of a private body may, subject to the conditions determined by the head, delegate a power conferred or a duty imposed on the head by this Act to any employee of the private body.

●5. In section 5(2)(c)(ii), make the following amendment:

(ii) access to a record of a private body [~~containing personal information~~]; and

●6. Following section 47, insert a new Part 4, as follows:

PART 4: LIMITED ACCESS TO RECORDS OF PRIVATE BODIES

CHAPTER 1: RIGHT AND MANNER OF ACCESS

Right of access to records of private bodies

47A. Any person must, on request, but subject to this Act, be given access to any record of a private body that--

(a) contains personal information about that person; or
(b) is required for the exercise or protection of any right.

Use of Act for criminal or civil discovery of private bodies' records excluded

47B. No request for access to a record of a private body may be made in terms of this Act for the purpose of criminal or civil discovery provided for in any other law.

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Right of disclosure of record to which access is given

47C. Subject to the common law, any person, whether or not he or she is the relevant requester, may publish, broadcast or otherwise disclose information contained in a record of a private body to which access is given in terms of this Act.

Access to records in terms of other law

47D. Nothing in this Act, except section 55, prevents a private body from giving access to a record of that body in accordance with any other law or authorises a private body to deny access to a record of that body that any other law requires to be made available.

Form of requests

47E. (1) A request for access must--

(a) be made in writing to the head of the private body concerned at his or her address or fax number or electronic mail address;

(b) provide sufficient particulars to enable an official of the private body concerned to identify the record or records requested;

(c) indicate which applicable form of access referred to in section 62(2) is required;

(d) state whether the record concerned is preferred in a particular language;

(e) specify a postal address or fax number for the requester in the Republic;

(f) in the case of a request for access to a record containing personal information, state the capacity contemplated in subsection (3) in which the requester is making the request and include--

(i) the requester's identity document or a certified copy thereof or any other reasonable proof of the requester's identity; or

(ii) if the requester is not the person to whom or which the personal information relates, reasonable proof of the capacity in which the requester is making the request; and

(g) in the case of a request for access to a record containing information required to exercise or protect a right, identify the right the requester is seeking to exercise or protect and provide a reasonable explanation of why the requested record is required for the exercise of protection of that right.

(2) An individual who because of illiteracy, poor literacy or a physical disability is unable to make a request for access to a record of a private body in accordance with subsection (1), may request the Human Rights Commission to assist him or her to make that request.

(3) A request for access to a record containing personal information may be made--

(a) by the person to whom or which the personal information relates or that person's authorised representative;

(b) if the individual contemplated in paragraph (a) is--

(i) under the age of 16 years, by a person having parental responsibility for the individual;

(ii) incapable of managing his or her affairs, by a person appointed by the court to manage those affairs;

(iii) deceased, by the executor of his or her estate.

(4) The Minister shall publish a form or forms which will satisfy the requirements of this section and which, in addition, will provide information both to the requester and to the recipient regarding their rights and duties under this Part. No person shall be required to use the form.

Preservation of records until final decision on request

47F. If the head of a private body has received a request for access to a record of the body, he or she must take the steps that are reasonably necessary to preserve the record, without deleting any information contained in it, until he or she has notified the requester in question of his or her decision in terms of section 47G and--

(a) the periods for lodging an application with a High Court or an appeal against a decision of that Court have expired; or

(b) that application or appeal against a decision of that Court or other legal proceedings in connection with the request has been finally determined,

whichever is the later.

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Decision on request and notice thereof

47G. (1) The head of a private body to whom a request for access is made must, subject to section - and Chapter 3 of this Part, as soon as reasonably possible, but in any event, within 30 days, after the request is received either--

(a) produce the requested information in the form requested at a mutually agreeable location without fee; or

(b) decide in accordance with this Act whether to grant the request and notify the requester concerned of the decision.

(2) If the request for access is granted, the notice in terms of subsection (1)(b) must state--

(a) the access fee (if any) to be paid upon access;

(b) the form in which access will be given;

(c) in the case of a record containing personal information about the requester, that the information may be corrected in terms of section 82, and the procedure for making a request for correction; and

(d) that the requester concerned may lodge an application with a High Court against the access fee to be paid or the form of access granted, and the procedure (including the period) for lodging an application with a High Court.

(3) If the request for access is refused, the notice in terms of subsection (1)(b) must state--

(a) the reasons for the refusal (including the provision of this Act relied upon to justify the refusal) in such manner as to enable the requester--

(i) to understand the justification for the refusal; and

(ii) to make an informed decision about whether to lodge an application with a High Court to utilise any other remedy in law available to the requester; and

(b) that the requester may lodge an application with a High Court against the refusal of the request, and the procedure (including the period) for lodging an application with a High Court.

(4) Failure to include complete and accurate information concerning the right to lodge an application with a High Court shall not cause any forfeiture but shall be good cause for relieving the requester of the obligation to lodge an application within the time provided in section 74A.

(5) The Minister shall publish a form or forms which will satisfy the requirements of this section. No person shall be required to use the form.

Extension of period to deal with request

47H. (1) The head of a private body to whom a request for access has been made may extend the period of 30 days referred to in section 47G(1) (in this section referred to as the "original period"), once for a further period of not more than 30 days, if--

(a) the request is for a large number of records or requires a search through a large number of records and compliance with the original period would unreasonably interfere with the activities of the private body concerned;

(b) the request requires a search for records in, or collection thereof from, an office of the private body not situated in the same town or city as the office of the head of the private body concerned that cannot reasonably be completed within the original period;

(c) both of the circumstances contemplated in paragraphs (a) and (b) exist in respect of the request making compliance with the original period not reasonably possible.

(2) If a period is extended in terms of subsection (1), the information officer concerned must, as soon as reasonably possible, but in any event, within 30 days, after the request is received, notify the requester of that extension.

(3) The notice in terms of subsection (2) must state--

(a) the period of the extension; and

(b) the reasons for the extension (including the provision of this Act relied upon to justify the extension) in such manner as to enable the requester to understand the justification for the extension.

Deemed refusal of request

47I. If the head of a private body fails to give his or her decision on a request for access within the period contemplated in section 47G(1) he or she is, for the purposes of this Act, regarded to have refused the request.

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Severability

47J. (1) If a request is made for access to a record of a private body containing information which may be refused under chapter 2 of this Part, every part of the record which--

(a) does not contain: and

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

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

(2) If a request for access to--

(a) a part of a record is granted: and

(b) the other part of the record is refused,

as contemplated in subsection (1), the provisions of section 47G(2) apply to paragraph (a) of this section and the provisions of section 47G(3) to paragraph (b) of this section.

Access fees

47K. (1) A requester whose request for access to a record of a private body has been granted may be given access to the record only if he or she has paid the applicable prescribed access fee (if any).

(2) Access fees prescribed for the purposes of subsection (1) must provide for a reasonable access fee for--

(a) the cost of making a copy of the record, or of a transcription of the content of record, as contemplated in section 47L(2)(a) and (b)(i), (ii)(bb), (iii), (iv) and (v) and, if applicable, the postal fee; and

(b) the time reasonably required to search for the record and prepare (including making any arrangements contemplated in section 47L(2)(a) and (b)(i) and (ii)(aa)) a record for disclosure to the requester.

Access and forms of access

47L. (1) If a requester has been given notice in terms of section 47G(1) that his or her request for access has been granted, that requester must, subject to subsections (3), (9) and (10)--

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

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

be given access in the applicable forms referred to in subsection (2) as the requester indicated in the request and in the language contemplated in section 47M.

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

(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 private 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 private body concerned--

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

(bb) if the private 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 private body concerned is capable of producing a printed copy of--

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

(bb) information derived from the record,

by using computer equipment and expertise ordinarily available to the private 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;

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

(3) If a requester has requested access in a particular form, access must, subject to section 47J, be given in that form, unless to do so would--

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

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

(c) amount to an infringement of copyright not owned by the private body concerned.

(4) If a requester has requested access in a particular form and for a reason referred to in subsection (3) access in that form is refused but access is given in another form, the fee charged may not exceed what would have been charged if that requester had been given access in the form requested.

(5) If a requester with a visual or auditory disability is prevented by that disability from reading, viewing or listening to the record concerned in the form in which it is held by the governmental body concerned, the head of the private body must, if that requester so requests, take reasonable steps to make the record available in a form in which it is capable of being read, viewed or heard by the requester.

(6) If a record is made available in accordance with subsection (5), the requester concerned may not be required to pay an access fee which is more than the fee which he or she would have been required to pay but for the disability.

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

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

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

(c) amount to an infringement of copyright not owned by the private body concerned.

(8) If the supply to the requester of a copy of a record is required by this section, the copy must, if so requested, be supplied by posting it to the requester.

(9) If an application with a High Court is lodged against the granting of a request for access to a record, access to the record may be given only when the decision to grant the request is finally confirmed.

(10) If a request for access to a record is granted, but a request for correction is pending in respect thereof or a part thereof, access to the record or part thereof, as the case may be, may be given only when the decision on the request for correction has been finally determined.

Language of access

47M. A requester whose request for access to a record of a governmental body has been granted must, if the record--

(a) exists in the language that the requester prefers, be given access in that language; or

(b) does not exist in the language so preferred or that requester has no preference, be given access in any language in which the record exists.

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CHAPTER 2: GROUNDS FOR REFUSAL OF ACCESS TO RECORDS

Protection of personal privacy

47N. (1) Subject to subsection (2), the head of a private body may refuse a request for access to a record of the body if its disclosure would constitute an invasion of the privacy of an identifiable individual (including an individual who died less than 20 years before the request is received) other than the requester concerned or other person contemplated in section 47F(3).

(2) Subsection (1) does not apply to a record in so far as it consists of information--

(a) already publicly available;

(b) about a person that has, in accordance with section 47BB(b), consented to its disclosure to the requester concerned;

(c) about an individual's physical or mental health, or well-being, who is--

(i) under the age of 18 years;

(ii) under the care of the requester; and

(iii) is incapable of understanding the nature of the request,

and if giving access would be in the individual's best interests;

(d) about an individual who is deceased and the requester is, or is requesting with the written consent of, the individual's next of kin; or

(e) about an individual who is or was an official of a governmental body and relates to the position

or functions of the individual, including, but not limited to--

(i) the fact that the individual is or was an official of that governmental body;

(ii) the title, work address, work phone number of the individual and other similar particulars of the individual;

(iii) the classification, salary scale or remuneration and responsibilities of the position held or services performed by the individual;

(iv) the name of the individual on a record prepared by the individual in the course of employment.

(3) In subsection (2)(d), "individual's next of kin" means--

(a) an individual to whom the individual was married, with whom the individual lived as if they were married or with whom the individual cohabited, immediately before the individual's death; or

(b) a parent, child, brother or sister of the individual; or

(c) if--

(i) there is no next of kin referred to in paragraphs (a) and (b); or

(ii) the requester concerned took all reasonable steps to locate such next of kin, but was unsuccessful,

an individual who is related to the individual in the second degree of affinity or consanguinity.

Health of requesters

47O. (1) In this section "health practitioner" means an individual who carries on, and is registered in terms of legislation to carry on, an occupation which involves the provision of care or treatment for the physical or mental health or well-being of individuals.

(2) The head of a private body may refuse a request for access to a record of the body about the requester's physical or mental health, or well-being, which was provided by a health practitioner in his or her capacity as such if --

(a) the disclosure of the record to that requester is likely to cause serious harm to his or her physical or mental health, or well-being; and

(b) the head of the private body has disclosed the record to, and consulted with, a health practitioner who--

(i) carries on an occupation of the same kind as the health practitioner who provided the record; and

(ii) has been nominated by the requester or his or her authorised representative; and

(c) that health practitioner so consulted is of the opinion that the serious harm contemplated in paragraph (a) is likely to result.

(3) If the requester is--

(a) under the age of 16 years, a person having parental responsibilities for the requester must make the nomination contemplated in subsection (2)(b)(ii); or

(b) incapable of managing his or her affairs, a person appointed by the court to manage those affairs must make that nomination.

(4) If--

(a) access has been given to a record of a private body containing information about the requester's physical or mental health, or well-being, which was provided by, or originated from, a health practitioner; and

(b) that access was given without that health practitioner's knowledge; and

(c) that health practitioner can be located by taking all necessary steps,

the head of the private body concerned must notify that health practitioner that access has been so given.

Protection of third party commercial information

47P. (1) Subject to subsection (2), the head of a private body may refuse a request for access to a record of the body if the record contains--

(a) trade secrets of a third party;

(b) financial, commercial, scientific or technical information, other than trade secrets, supplied in confidence by a third party and treated consistently as confidential by that third party, the disclosure of which could reasonably be expected to cause harm to the commercial or financial interests of that third party; or

(c) information supplied by a third party the disclosure of which would be likely to put that third

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party at a disadvantage in contractual or other negotiations or cause it prejudice in commercial competition.

(2) Subsection (1) does not apply to a record in so far as it consists of information--

(a) already publicly available;

(b) about a third party who has, in accordance with section 47BB(b), consented to its disclosure to the requester concerned;

(c) about the safety of goods or services supplied by a third party, and the disclosure of the information would be likely to result in better informed choices by persons seeking to acquire those goods or services; or

(d) about the results of any test or other investigation regarding a public safety or environmental risk.

Protection of commercial information

47Q. (1) Subject to subsection (2), the head of a private body may refuse a request for access to a record of the body if the record contains--

(a) trade secrets of the private body concerned; or

(b) financial, commercial, scientific or technical information about the private body concerned the disclosure of which could reasonably be expected--

(i) to cause harm to the commercial or financial interests of the private body concerned;

(ii) to put the private body concerned at a disadvantage in contractual or other negotiations; or

(iii) to cause the private body concerned prejudice in commercial competition.

(2) Subsection (1) does not apply to a record in so far as it consists of information--

(a) already publicly available;

(b) about the safety of goods or services and the disclosure of the information would be likely to result in better informed choices by persons seeking to acquire those goods or services; or

(c) about the results of any test or other investigation regarding a public safety or environmental risk.

Safety of individuals and security of structures and systems

47R. The head of a private body may refuse a request for access to a record of the body if its disclosure would be likely--

(a) to endanger the life or physical safety of an individual; or

(b) seriously to endanger the maintenance or enforcement of methods for the security of a particular building, installation or information storage, computer or communication system.

Relevance to exercise or protection of a right

47S. The head of a private body may refuse a request for access to a record of the body if--

(a) the requester fails to identify a right, the exercise or protection of which would be furthered through the disclosure of the requested record; or

(b) the requested record could not reasonably be expected to further the exercise or protection of the right cited in the request.

Privileged from production in legal proceedings

47T. The head of a private body may refuse a request for access to a record of the body if the record is privileged from production in legal proceedings unless--

(a) the person entitled to the privilege has waived the privilege; or

(b) the legal proceedings to which the record relates have been finally determined.

Frivolous or vexatious requests

47U. The head of a private body may refuse a request for access to a record of the body if the request is manifestly frivolous or vexatious.

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Records that cannot be found or do not exist

47V. (1) The head of a private body may refuse a request for access to a record of the body if--

(a) a thorough search to find the record has been conducted, but it cannot be found; or

(b) there are reasonable grounds for believing that the record does not exist.

(2) If the head of a private body refuses a request for access to a record in terms of subsection (1), he or she must, in the notice referred to in section 47G(1)(b), give a full account of all steps taken to find the record or to determine whether the record exists, as the case may be, including all communications with every person who conducted the search on behalf of the body.

Published records and records to be published

47W. (1) Subject to this section, the head of a private body may refuse a request for access to a record of the body if--

(a) the record is to be published within 60 days after the receipt of the request or such further period as is reasonably necessary for printing and translating the record for the purpose of publishing it;

(b) the record can be copied at a library to which the public has access;

(c) the record is available for purchase by the public; or

(d) the publication of the record is required by law within 90 days after the request concerned is received.

(2) The head of the private body concerned must, in the notice referred to in section 47G(1)(b), in the case of a refusal of a request for access in terms of--

(a) subsection (1)(a) or (d), state the date on which the record concerned is to be published;

(b) subsection (1)(b), identify the title and publisher of the record; or

(c) subsection (1)(c), identify the title and publisher of the record and state where it can be purchased.

(3) If the head of a private body is considering to refuse a request for access to a record in terms of subsection (1)(a) or (d), he or she must notify the requester concerned--

(a) of such consideration; and

(b) that the requester may, within 30 days after that notice is given, make representations to the head of the private body why the record is required before publication.

(4) If notice is given to a requester in terms of subsection (3), the head of the private body concerned must, after due consideration of any representations made in response to the notice, grant the request, unless there are reasonable grounds for believing that the requester will suffer no substantial prejudice if access to the record is deferred until the record is published.

(5) If the record in respect of which a request for access has been refused in terms of subsection (1)(a) is not published within 60 days after receipt of the request or such further period as is reasonably necessary for printing and translating the record for the purpose of publishing it, the requester must be given access to the record.

Records already open to public

47X. The head of a private body may refuse a request for access to a record of the body if the record is open to public access in accordance with any other legislation, unless the Human Rights Commission determines that the manner in which access may be obtained and the fee payable for access in terms of the other legislation concerned is more onerous than the access fee payable in terms of this Act.

Mandatory disclosure in public interest

47Y. Despite any other provision of this Act, but subject to Chapter 3 of this Part, the head of a private body must grant a request for access to a record contemplated in section 47N(1), 47O(2), 47P(1), 47Q(1), 47R, 47S, or 47T if--

(a) disclosure of the record would reveal evidence of substantial--

(i) abuse of authority, illegality or neglect in the performance of the duties of an official of a governmental body;

(ii) injustice to a person, including a deceased individual;

(iii) danger to the environment or the health or safety of an individual or the public; or

(iv) unauthorised use of the funds or other assets of a governmental body; and

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(b) the public interest in the disclosure of the record clearly outweighs the need for non-disclosure contemplated in the provision in question.

Necessity of harm

47Z. No provision in this Chapter may be interpreted to require or permit the head of a private body to refuse a request for access if the harm that that provision is intended to guard against could not reasonably be expected to occur if the request were granted.

CHAPTER 3: THIRD PARTY INTERVENTION

Notice to third parties

47AA. (1) If the head of a private body is considering a request for access to a record contemplated in section 47N(1) or 47P(1), the head of the private body must inform a third party to whom or which the record relates of the request, unless all necessary steps to locate that third party have been unsuccessful.

(2) The head of a private body must inform a third party in terms of subsection (1)--

(a) as soon as reasonably possible, but in any event, within 21 days after that request is received; and

(b) by the fastest means reasonably possible.

(3) When informing a third party in terms of subsection (1), the head of a private body must--

(a) state that he or she is considering a request for access to a record contemplated in section 47N(1) or 47P(1), as the case may be, and describe the content of the record;

(b) furnish the name of the requester concerned;

(c) in the case of a record contemplated in--

(i) section 47N(1), describe the provisions of section 47N; or

(ii) section 47P(1), describe the provisions of section 47P;

(d) in any case where the head of a private body believes that the provisions of section 47Y might apply, describe those provisions, specify which of the circumstances referred to in section 47Y(a)(i) to (iv) in the opinion of the head might apply and state the reasons why he or she is of the opinion that section 47Y might apply; and

(e) state that the third party may, within 21 days after the third party is informed--

(i) make written or oral representations to the head of the private body why the request for access should be refused; or

(ii) give written consent for the disclosure of the record to the requester.

(4) If a third party is not informed in writing of a request for access in terms of subsection (1), the head of the private body concerned must, on request, give written notice stating the matters referred to in subsection (3) to the third party.

Representations by third parties

47BB. A third party that is informed in terms of section 47AA(1) of a request for access, may, within 21 days after the third party has been informed--

(a) make written or oral representations to the head of the private body concerned why the request should be refused; or

(b) give written consent for the disclosure of the record to the requester concerned.

Decision on representations for refusal and notice thereof

47CC. (1) The head of a private body must, as soon as reasonably possible, but in any event within 30 days after every third party is informed as required by section 47AA--

(a) decide, after giving due regard to any representations made by a third party in terms of section 47BB(a), whether to grant the request for access; and

(b) notify the third party so informed and a third party not located as contemplated in section 47AA(1), but that can, after taking all necessary steps, be located before the decision is taken, of the decision.

(2) If a third party cannot be located as contemplated in section 47AA(1), any decision whether to grant the request for access must be made with due regard to the fact that the third party did not have the opportunity to

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make representations in terms of section 47BB(a) why the request should be refused.

(3) If the request for access is granted, the notice in terms of subsection (1)(b) must state--

(a) the reasons for granting the request (including the provision of this Act relied upon to justify the granting) in such manner as to enable the third party--

(i) to understand the justification for the granting of the request; and

(ii) to make an informed decision about whether to lodge an application with a High Court or to utilise any other remedy in law available to the third party; and

(b) that the third party may lodge an application with a High Court within 30 days after notice is given, and the procedure for lodging that application; and

(c) that the requester will be given access to the record after the expiry of the applicable period contemplated in paragraph (b), unless an application is lodged within that period.

(4) If the head of a private body decides in terms of subsection (1) to grant the request for access concerned, he or she must give the requester access to the record concerned after the expiry of 30 days after notice is given in terms of subsection (1)(b), unless an application with a High Court is lodged against the decision within the applicable period contemplated in subsection (3)(b).

●7. Delete current sections 49 (which is incorporated in the proposed new Part 4 as section 47B) and 50 (which is replaced by provisions of the proposed new Part 4 and proposed section 4A).

●8. Following section 74, insert a new section:

Applications regarding decisions of heads of private bodies

74A. (1) A person who has been--

(a) refused access to a record of a private body in terms of section 47G(3); or

(b) aggrieved by a decision of the head of a private body, in terms of section 47G(2), concerning

(i) the fee to be assessed for access; or

(ii) the form of access to be granted

to a requested record of that body

may appeal against the decision by way of an application.

(2) An application referred to in subsection (1) must be lodged within 30 days after the requester has been notified of the decision of the head of the private body in terms of section 47G(1)(b).

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APPENDIX THREE

NATIONAL ASSOCIATION OF DEMOCRATIC LAWYERS (NADEL)

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OPD27

National Association of Democratic Lawyers
Human Rights Research and Advocacy Project

(Association Incorporated Under Section 21 of the Companies Act 61 of 1973 - Company Registration Number 97/06363/08)

Equality and Justice

Submission

On the

Open Democracy Bill

To the

Portfolio Committee on Justice

(23 March 1999)

University of Cape Town

(Drafted by Rikky Minyuku of the Nadel Human Rights Research and Advocacy project)

Members: D I Adam, A H Adhikari, R J De Kock, Adv M Domon, Adv N Erasmus, B Hockey, Adv D J Jacobs, S Nkanunu, M L Norton, R Nyman, V C Saldanha, B Williams

We thank the Committee for providing the opportunity for Nadel to make a written and oral submission on the Open Democracy Bill.

1. INTRODUCTION

We would like to begin by emphasising the fundamental importance of this Bill for building democracy in our country and for overcoming the legacy of Apartheid. This Bill will play an important role in establishing an open, participatory and accountable democracy and is necessary to give effect to the constitutional right to freedom of information and the right to just administrative action.

This submission will cover three areas. First, it will deal with the positive and commendable aspects of the Bill. Secondly, it examines broadly what we regard as the problematic areas of the Bill. Finally, it will cover in detail the problems surrounding the exemptions in the Bill.

2. POSITIVE ASPECTS OF BILL

A] We would like to commend the process by which the Bill has been developed as being inclusive and broad. Nonetheless there is cause for worry in terms of future process. We strongly urge the Committee to ensure the process continues to be participative despite the pending problems of time and capacity constraints that will be caused by the short time-span of the next session and changes to committee membership. Some continuity is essential and it is imperative that this Bill be prioritised for the session. We urge the Committee to commit to a second round of hearings and input from communities.

B] The Bill is also worthy of praise for its innovation in dealing with the changing nature of information technology. This is demonstrated by the wide definition of "record" including computer generated data and encompassing both software and hardware. This is a question that other countries have grappled with and had to accommodate to ensure that the principles of open democracy are maintained.

C] This praise extends to the decisive manner in which the Bill deals with "commercial requesters". Again, this is an issue international jurisdictions have grappled with. The choice has merit in that it takes into account the South African context of development and differentiates requests for commercial profit as opposed to those for personal access

D] The Bill is proactive in establishing a duty to distribute information without request in the form of guides and manuals. There is however a need to extend this "Right to Know" perspective and this will be discussed below.

3. GENERAL OVERVIEW OF THE BILL

As stated above the Open Democracy Bill is a critical piece of legislation in promoting effective and accountable government, participative democracy and an open culture of respect for constitutional rights. The measures of the Bill must give effect to the constitutional right set out in section 32(1) of the Constitution. The system created to do this must be accessible to the poorest and most marginalised sectors of society.

The following criticisms of the Bill are made in the interest of ensuring that the Bill is accessible and that the measures it sets out are practical.

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A] Nadel endorses the submission presented by the Human Rights Committee. To this end we wish to emphasise the need to shift from a "freedom of information" framework to a "right to know" model. Along with strengthening the principle foundation of the legislation, this model will address the South African context more effectively. It incorporates the reality that most South Africans do not have the resources or capacity to pursue the measures in the Bill and the real need to build open democracy.

B] Nadel endorses the submission made by the South African Council of Churches. In particular we agree with the need for a horizontal application of the Bill in order to give full effect to the intent of section 32(1) of the constitution. This change will result in an extension of the protection for whistleblowers to the private sector and remove the major weakness of the otherwise well-drafted chapter 5.

C] Nadel fully endorses the submission made by the Black Sash for the section on open meetings to be returned to the Bill. These provisions are critical in giving effect to the constitutional and democratic values of open and transparent government. The provisions *inter alia* are fundamental to making the Bill an *Open Democracy Bill*, as opposed to being simply a freedom of information statute.

D] Nadel endorses the submission made by Idasa on the enforcement mechanisms of the Bill. We agree fully that the current provision for external review by the High Court is inaccessible, expensive, time consuming and cumbersome. The alternative proposal of a tribunal system would deal with these shortcomings. We also wish to emphasise that the additional duties assigned to the Human Rights Commission will require the provision of sufficient resources - this need not be dealt with in the Bill, but efficient external mechanisms will have to be developed.

E] We believe that the exclusion of the section, entitled "*Disclosure of governmental decision-making guidelines*", is detrimental to the intended effect of chapter 1 part 2 of the Bill and the proposed "Right to Know" model. This section provides for the distribution of information that would significantly help applicants identify the type and nature of information to which they may want access. It is a logical and reasonable corollary to section 6 of the Bill and would enhance the purpose of this section.

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4. EXEMPTIONS

The Bill contains two different types of exemptions. This section will deal first with exemptions based on the grounds set out in chapter 2 of the Bill, including the public interest override. The section will also deal with exemptions based on the type of institution to which the act applies.

A] GROUNDS FOR EXEMPTION

It is submitted at the outset that Nadel believes strongly that the foundational principle of this section should be " maximum disclosure". To this end we wish to reiterate the general principles for exemptions found at p4-5 of the Open Democracy Advisory Forum Policy Principles:

" a) ***Narrow Exemptions***: the exemptions must be drawn as narrowly as possible, to exclude from disclosure the minimum of information necessary to safeguard the interests that the

exemptions protect.

b) ***Real Justified Exemptions:*** the exemptions should be constructed so that there is a tight fit between their scope and the principles that justify them. The exemptions should protect sensitive information only: they should not be blanket immunities for particular bodies or organisations. They should operate to protect information the content of which requires exemption from disclosure; not to privilege particular government departments.

c) ***Harm:*** information should be exempt from disclosure only when its release would cause real, not speculative, harm.

d) ***Public Interest Override:*** some exemptions at least should be subject to a public interest override. In the case of those exemptions, in other words, even information which falls within the ambit of the exemption, and is therefore prima facie protected, should be disclosed if the public interest warrants it. The public interest should be taken to warrant overriding an exemption if the national interest in accountable and participatory government that disclosure serves outweighs the secrecy interest that exemption serves. "

With regard to particular grounds for exemption there are some general comments to be made. The section needs to be drafted in plain and accessible language. This is imperative to ensure that applicants understand fully the reason(s) for refusal of disclosure based on the grounds in the Bill. There is however merit in the detail of the section as it ensures that exemptions are construed as narrowly as the principle of maximum disclosure intends.

Secondly, it is important to note that there are two different standards for the general public interest override. There is a broad override based on whether public interest in disclosure outweighs the need for non-disclosure. There is a narrow override based on the above and the additional circumstances that are outlined in section 44(1) of the Bill. The merits of each application of the override for each ground of exemption will be discussed below, where the Bill's application is questionable.

The following are the sections of chapter that need to be improved or re-examined

i) Mandatory Protection of Personal Privacy

This provision allows a refusal of disclosure if such disclosure would constitute the invasion of privacy of an identifiable person. The section then sets out particular situations where the exemption does not apply.

The unqualified reference to "privacy" has the effect of strengthening the private interest and undermining the right to access. Other countries like Canada and Sweden have dealt with this problem by referring to a Privacy/Secrecy Act that defines, at length, what constitutes personal information. On the other hand, the similar exemption in the US act takes effect if disclosure constitutes an "unreasonable" or "unwarranted" invasion of privacy. It is submitted that legislation may be desirable in future as "privacy" and "personal information" may have distinct meanings for different acts. This does not however address the loophole in the current Bill. It is suggested that the Bill include an expansive definition of "personal information". The reinstatement of the necessity of harm exemption override would have a qualifying effect similar to the American qualification of unreasonableness.

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ii) Records supplied in confidence

This provision allows a government body to refuse a request for access to records that contain information supplied in confidence by a third party. This exemption is based on the disclosure jeopardising a future supply of similar information or information from the same source. The exemption also applies if it is in public interest that similar information is supplied or the same source is used.

We submit that the exemption is overly broad. It creates a dangerous space for furtive dealings between government and particular private parties. Other jurisdictions have differing approaches. In Canada the exemption is limited to information obtained from within government at all levels, international organisations of state or institutions and foreign governments. The Australian exemption is limited to cases where disclosure would found an action for breach of confidence. The lesson that can be extracted is a need for a tighter definition of "third party" for the application of this section.

iii) Law enforcement

This exemption applies to information about law enforcement techniques, methods, procedures and guidelines. It also applies to information about specific investigations and prosecutions. The exemption is triggered by the likelihood of disclosure bringing about negative consequences.

It is submitted that the test for activating the exemption is weaker than that contained in earlier draft. The inclusion of the "necessity of harm override" could deal with this weakness.

Secondly, in other jurisdictions this exemption applies only to *lawful* methods etc. It is imperative that this qualification be added to the Bill.

iv) Operations of Government

This exemption protects information, which contains opinions, advice, recommendations, and accounts of consultation or deliberations for the purpose of assisting to formulate policy or taking decisions in the exercise of government power.

The section also states instances where the exemption does not apply: factual information or analysis thereof, reports on the performance or efficiency of a project or of a scientific expert and there is a fifteen-year limit on application.

The aim of the section is to deny access to information about the process of policy making and exercising of government power while such process is taking place. Thus it is not clear why the protection period is extended to fifteen years. Once certainty is reached it is desirable that information about the basis of the decision be accessible.

B] EXEMPTION BY DEFINITION

The second form of exemption is based in the definition section, which outlines which bodies the Bill does not apply to. Nadel wishes to express grave concern at the exclusion of the bodies in section 1(2), the exclusion of private bodies that perform public functions and the exclusion of the courts and judicial officers. The former two are covered in detail by the

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submissions on open meetings and horizontality made by the Black Sash and the South African Council of Churches. Thus, we will deal specifically with the latter.

There are principled and substantive reasons why the courts and judicial officers should fal. under the application of this Bill. The contributing role these bodies played in the Apartheid system cannot be ignored with regards to the Bill's aim to develop an open, accountable and democratic culture. Thus the courts and judicial officers have to play a role and demonstrate their commitment to this culture.

Secondly, the experiences of other countries with similar legislation have shown that such a Bill impacts on the way bodies make decisions and record information. In the South African context the battle to transform institutions of the state can only be enhanced by public scrutiny.

It is important to emphasise that the impartiality and independence of the judiciary is of paramount importance for our democracy. This, however, does not exempt the judiciary from the duty to be transparent and accountable. The two have to be balanced, provision being made to extend open democracy in a manner that promotes the protection of the impartiality and independence of the courts as the constitution outlines in section 165(3).

The question may be asked, what information do these bodies have that are not already publicly available? The following are scenarios drawn from interviews with judges, academics, and lawyers. They demonstrate that these bodies do hold information that is of interest to the public:

- Case 1:

Citizen A is a survivor of rape. She has been waiting for the trial of the accused in her case for 18 months. When she discovers that a high profile case has been fast-tracked on the same bench, she wishes to discover how the bench prioritises cases?

- Case 2:

Citizen B is an awaiting trial prisoner. He has been waiting for two years in jail, as he could not afford bail. He would like to know why the courts have delayed his case?

- Case 3:

Citizen C is a judge of the high court. The Judge-president represents his bench on the Judicial Services Commission. Citizen C is unhappy about a decision taken by the JSC. He wants to see the minutes of a meeting where the Judge-president received a mandate from his bench on the position

The above demonstrate that the courts and judicial officers have records of meetings where procedural decisions are taken. They also should have processes and procedures documented to ensure fairness and transparency. However, for the above citizens the information they seek is not accessible.

Having established a principled and substantive case for the inclusion of the courts and judicial officers in the application of this Bill, there remains the task of suggesting how they can be accommodated. Similar legislation in France, the Netherlands, Sweden and New Zealand

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applies to the courts and judicial officers. This application is severely limited to protect the above-mentioned democratic principle of the independence of the judiciary. In most cases it applies only to requests for information on administrative action.

In terms of this Bill, there is scope for application of section 1 part 2 to the courts and judicial officers. This would impose a duty to produce and distribute a manual of its functions and an index of the records that are held by the courts and judicial officers. This manner of incorporating the courts is useful it that it imposes a duty to be transparent, while giving the courts the power to decide what information outside of statutory restrictions will be available to the public. Re-introducing the section on "*Disclosure of governmental decision-making guidelines*" will also benefit the public access interest while not impeding the court's independence.

The provision for the courts and judicial officers under these sections would provide a framework within which the above cases could request information and would resolve the first case entirely.

Application can go further and allow request of information on administrative action. It would be unavoidable in the above situation, as access to scrutinise procedures and processes would lead to questioning on their fairness. We submit that this is desirable and can only contribute to the transformation and effectiveness of our judicial system.

Thus, Nadel strongly objects to the exclusion of the courts and judicial officers from the application of this Bill. We have established that the Bill can and should include them. We submit

That the explicit exclusion of the courts and judicial officers should be removed and a specific section outlining the application to the courts be included. This section should set out which sections of the Bill apply [we suggest Chapter1, part2 entirely and the rest of the Bill with regards to administrative action only]. The section should also include special provisions to ensure that the impartiality and independence of the courts is protected and not impeded by the measures of this Bill.

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C] NECESSITY OF HARM OVERRIDE

Previous drafts of the Bill contained a section entitled " Necessity of harm" which prevented disclosure being refused on the basis of an exemption, if the harm envisaged by the exemption is unlikely to occur. We believe strongly that this test is important and will prevent unreasonable refusal of disclosure. We submit that this section should be re-introduced to the Bill.

5. CONCLUSION

This legislation is of critical importance in establishing the foundations for an open and democratic society. We, at Nadel consider these values as essential elements of a constitutional state and a human rights culture Thus we support the tabling of this legislation.

Nonetheless we believe that in order to achieve the desired ~~affect~~ effect, the best Bill possible must be passed. This entails amending the current draft:

- To reflect the full ambit of the constitutional right to access information.
- To ensure that the principles apply as widely as possible encompassing all sections of our state that have been in the dark in the past.
- To ensure that it is workable in practice.
- To ensure that the principles of open democracy do not remain remote, but translate into real cultural change.

To this effect we hope that our recommendations and criticism will contribute to strengthening the bill and developing an open democratic culture.

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APPENDIX FOUR

HUMAN RIGHTS COMMITTEE OF SOUTH AFRICA

(HRC)

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OPD 25

Open Democracy Bill

Submission by the Human Rights Committee

23 March 1999

University of Cape Town

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The "right to know" approach
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It is our understanding that this round of public hearings is focussing on the broad principles of an Open Democracy Bill. Our submission therefore does not refer to the detail in the bill, but presents a holistic view of what HRC would like to see in an Open Democracy Bill. We hope this will be of assistance to Parliament at this stage of the process. We would appreciate a later opportunity to address the new Parliament on specifics when the bill is re-introduced in August.

National Director: Venitia Govender
Board Members: Adv Steven Goldblatt (Chairperson), Mr. Ghalib Galant (Deputy Chairperson), Ms Berenice Jacobs, Ms Rhoda Kadalie, Ms Nobuntu Mbelle, Mr Silas Nkanunu, Dr Faizel Randera, Ms Wendy Watson, Mr Khaya Zweni.

Introduction

One of the central ideals of the Constitution is an aspiration to an open and participatory democracy. Central to this aspiration is the right of access to information. Section 32 of the Constitution expressly provides every citizen with the right of access to information, but requires government to pass legislation to extend this right and to create effective mechanisms for its enforcement.

Making the constitutional right of access to information a reality is essential to ensure:

- an open and democratic society,
- good governance,
- transparent exercise of power
- accountability
- and a participatory democracy

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The bill will not only cover this government but all governments to come after it. Like the Constitution, it should be clear, concise, firm and principled in its approach. The bill signals a definite step away from our past which was characterised by secrecy and deliberate concealing of important information. It shows why chunks of our history are missing and why we needed a TRC and why we still do not know what happened in certain state structures. One of the factors which contributed to the development and growth of the Apartheid state's covert operations was lack of information. Never again should this be allowed to happen.

The Open Democracy Bill, in giving effect to the right of access to information, should not be a tool which government or powerful

private entities can use to restrict access to information. The premise upon which the bill should be built, is maximum disclosure. Any individual or state body attempting to withhold information should bear the burden of proving that the information is exempt from disclosure.

Neither should the bill be accessible only to the rich and powerful. It must create a system that is designed to serve all South Africans, particularly the poor and marginalised sectors.

Our submission contains suggestions to improve the bill's capacity to make the right of access to information a reality for all South Africans.

The ethos and principles underlying the bill

In 1994, the Deputy President appointed an Open Democracy Task Group. In 1995, the Task Group published Policy Proposals which were to lay the foundation for the first draft of the bill.

The Policy Proposal Document refers to the legacy of the South African past that needs to be addressed before an open democracy can be achieved.

"This effort to achieve an open democracy will have to contend with the legacy of the South African past. Obstacles to a participatory and accountable democracy include a high rate of illiteracy and an authoritarian tradition which for generations has inculcated in our people a deferential and fearful attitude towards the institutions of governance, and in our civil service a secretive and unresponsive culture....To overcome this legacy, the Act will have to pay special attention to the need actively to assist citizens to obtain access to official information."

- high rate of illiteracy
- authoritarian tradition
- citizenry with a deferential and fearful attitude towards the institutions of governance

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- secretive and unresponsive culture permeating our civil service

Bearing this in mind, the drafting team established principles that the bill should adhere to. **HRC believes that these important principles must not be lost sight of in the drafting and deliberations process.** It is for this reason that we re-state these principles in the next few paragraphs:

⇒ **Maximum Disclosure**
⇒ **Proactive mechanisms**
⇒ **Speedy response to requests**
⇒ **"Citizen-Friendliness"**

⇒ **Maximum Disclosure**

"The governing principle of the Open Democracy Act ought to be the greatest possible openness of government". [Policy Proposals: 1995]

Adherence to this principle requires:

Narrow exemptions: The exemptions should be drawn as narrowly as possible, to exclude from disclosure the minimum of information necessary to safeguard the interests that the exemptions protect.

The exemptions therefore need to be detailed, yet in plain language, in order to make them accessible to citizens and governmental officials.

Well-justified exemptions: The exemptions should be constructed so that there is a tight fit between their scope and the principles that justify them. The exemptions should protect sensitive information, they should not be blanket immunities for particular bodies or organisations.

Although the first draft of the bill did not exempt any government departments, the tabled version specifically exempts Cabinet, the

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Courts and the judiciary from the ambit of the bill. HRC submits that no government body should be exempt from the ambit of the bill. Only sensitive information should be exempt.

The blanket exemption of Cabinet is particularly problematic. One of the key elements of our Apartheid past was the secrecy which shrouded the deliberations and decision making processes of Cabinet and its committees. Today as a result, there are holes in our country's history.

We have only ever experienced a system of blanket immunity for Cabinet. We have been socialised to the extent that we feel we are only entitled to some information and not to all information. HRC implores the Justice committee to move away from this premise and move towards the principle of maximum disclosure where only sensitive information is exempt from disclosure and not whole government structures.

Harm: Information should be exempt from disclosure only when its release would cause real, not speculative harm.

In previous drafts of the bill, the chapter dealing with exemptions culminated in a section entitled "*Necessity of harm*". The section prevented information being refused on the basis of an exemption, if the harm envisaged by the exemption was unlikely to occur. This section is no longer in the bill. We submit that this section should be re-incorporated into the bill as it will help prevent the unreasonable refusal of information.

Public-interest override: Some exemptions should be subject to a public-interest override. Thus, even if information falls under the cover of the exemption, and is prima facie protected, it should be disclosed if disclosure would be in the public interest.

The bill subjects some of the exemptions to a public-interest override. We support the retention of this section.

Maximum disclosure an interpretative guideline: The bill ought to incorporate the principle of maximum disclosure explicitly as a general interpretative guideline. This would mean that whenever

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there was doubt, it should be resolved in favour of disclosure and openness.

We suggest that an "interpretation clause" expressly stating this principle, should be included in the bill.

⇒ **Pro-active mechanisms**

In order to ensure that the Open Democracy Bill creates a culture of transparency within government, the Task Group recommended that government bodies be required to take pro-active steps to facilitate access to information under their control. These include:

Manuals: Government bodies should publish manuals containing information inter alia on their structure and functions, appeal procedures and descriptions of the classes of information in their possession.

Section 6 of the Bill obliges each government department to publish such a manual within 12 months of the commencement of the Bill. We support this provision.

How to use the Act: Information about how to use the Act should be made available through schools and post offices. It should also be included in the telephone directory as part of each government body's entry.

Section 5 of the bill requires the Human Rights Commission to publish a guide in all 11 official languages, on how to use the Act. We support this provision.

Section 7 of the Bill provides for information on how to contact each department's information officer to be published in the telephone directory. We support this provision.

Reading room material: Government bodies should hold certain documents and records in a conveniently accessible place for inspection, study and copying by citizens. These should include a complete set of the unreported judicial and administrative judgements

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and authoritative rulings on questions of law and policy used by the body in its decision making processes.

In previous drafts of the bill, a section entitled "*Disclosure of governmental decision making guidelines*" was included. However, this has been left out of the tabled bill. The section compelled government bodies to make available for inspection any guidelines which are used to make decisions or recommendations to confer rights, privileges, grants or benefits, or to impose obligations, liabilities, penalties or detriments. These would include objectives, rules, criteria, precedents, procedures or interpretations.

HRC suggests that this section should be re-introduced into the bill. In the alternative, it should be included in the Just Administrative Action Bill.

⇒ **Speedy response to requests**

Official information can only be used to hold government accountable, or to participate in a decision making process, if the information is obtained speedily. The time periods proposed in the bill (government has 30 days in which to respond to a request), coupled with the time delays inherent in the external review High Court proceedings, put adherence to this important principle in jeopardy. We propose a shorter time period for response to requests for "already packaged" and available information. Requests for information that needs to be sorted and compiled should understandably be subject to the 30 days period.

⇒ **"Citizen- Friendliness"**

"*One of the great impediments threatening the success of the Open Democracy Act is the novelty and the unfamiliarity of the democratic culture required to nurture it. South African citizens are not used to demanding information from their government, and they are unaccustomed generally to using the instruments for holding government accountable.*"[Policy Proposals: 1995]

Solutions?

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Education: Open democracy education should form part of human rights education at schools and a public education drive should be undertaken when the bill becomes law. Civil Society has a role to play here.

Active assistance:

- Enforcement mechanisms must be cheap, simple, quick and easy to use. The system proposed in the bill for external review does not meet these criteria.
- Right to know, not need to know: The information requester should not have to demonstrate a need for the information or an interest in it.
- Burden of proof must be on government to show that the information is exempt
- Information officers should have a duty to assist requesters (e.g. To reduce oral requests to writing, redirect misdirected requests)
- Reasons for refusal and information on how to appeal must be given when requests are turned down.

The "right to know" approach

The bill currently provides mainly for access to information upon request, with provision made for complex exceptions and appeals. This approach is not accessible to the vast majority of South Africans who lack the resources and capacity to engage in an adversarial process.

In order for the bill to fulfil its promise of open democracy, the most vital categories of information should be made automatically available to the public. An "information shop" should be constructed, where ordinary people can access public records.

Government has already begun to lay the foundation for a "right to know" approach, in fact, the Government Communication and Information System (GCIS) credo is " the right to know". These initiatives and policy shifts have however not being incorporated into the framework of the Open Democracy Bill. We will briefly mention a few initiatives that are relevant.

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The Internet and IT approach

The Department of Communications has initiated various projects aimed at improving access to government information, particularly via the Internet:

- **Public Information Terminals** (PITs): The Post Office has committed R2 million for the development of the pilot and prototype of PITs. The idea is to provide communities who do not have access to the Internet, with access to information terminals in Post Offices. Citizens can use the terminals to access government information normally inaccessible to rural areas and other remote areas.

- Other pilot projects include **Community Information Centres**, **One-Stop Government Information Shops** and **Internet 2000**. This last mentioned project commenced in recognition of the lack of knowledge amongst the majority of South Africans of the Internet and how to use it. Internet 2000 is a long-term project aimed at creating a knowledge based society with regards to the Internet and Information Technology. The first phase of the project will focus on primary schools.

- The **Government Communication and Information System (GCIS) website** was launched in January 1999 and contains the basic framework for an Internet Government Information Shop. (It appears as if each Government Department is responsible for creating and maintaining their own website. While some Departments have very detailed sites containing up to date information on their structure, functions and records, others have not yet created their websites. Notable in this last category are the Justice, Home Affairs and Health Departments. Parliament is also lagging behind when it comes to on-line information. The official Parliamentary website has not been updated since November 1998.)

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The Paper approach

Government bodies are obliged to publish various reports and documents. The bill, in sections 42 and 43, exempts information officers from having to respond to requests for information which is already published or about to be published. However, there is an important proviso to the exemption: The request may not be refused if the Human Rights Commission determines that the manner in which access may be obtained and the fee payable for access is too onerous. cumbersome, causing of requiring trouble

It is important therefore to mention that the current manner in which official publications are distributed is not always accessible. A document that is tabled in Parliament is not accessible to the majority of South Africans, particularly those who do not live in Cape Town. Publication in the Government Gazette is also problematic. Besides being packaged in an inaccessible format, Government Printer outlets are not accessible to the majority of South. Africans

Publication of documents on the Internet makes them accessible to a larger number of people. However, the Internet solution is a long-term project. It will take a number of years before all South Africans are up to speed on how to access and use the Internet to obtain government information. Furthermore, access to the Internet is not yet affordable for the vast majority of South Africans. In the light of these facts, HRC submits that there is a need to create "Paper-based" community information terminals. Again there are various initiatives under way in other government departments notably Arts and Culture and Communications.

A positive development is the creation in the Legal Deposit Act of 1997[the Act commenced on 1 July 1998], of **Official Publications Depositories (OPDs)**. Government bodies are obliged to send all documents published by them to each provincial OPD.

The OPDs shall serve as centres for promoting public awareness of, and access to, information held by the government; and will provide public access to databases and other information sources to which the public may gain access under any law.

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At the time of writing this submission, we were unable to find out whether the Minister of Arts and Culture had established or designated any of the provincial OPDs, what type of information they contained, where they were located and whether they were accessible to the public.

We submit that the Open Democracy Bill should take cognisance of these developments, both the Internet and Paper approaches. The bill should establish a broad framework to develop a right to know approach for the most important government information.

Towards such an approach, we suggest that government departments should be required to classify their information. The first category of information, that which is "safe" ,"uncontroversial" and frequently sought after information, should automatically be published and made accessible to the public through the various outlets mentioned above.

This will increase the flow of information to the public, while also easing the government's administrative burden of having to reply to repetitious individual requests for the same public records.

The "classification" process should be done in an open and inclusive manner involving input from the users of the information: the public and organised civil society.

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Problematic Areas and HRC's recommendations

In summary of the points mentioned above and looking at the bill as a whole, we would like to make the following recommendations:

1) The bill should provide a framework for implementing a "**right to know**" approach. This involves obligating government to "put out" certain "safe" categories of information. Besides ensuring easy access for citizens, this approach also relieves government of the administrative burden of having to respond to repetitious individual requests for the same public records.

2) The Bill should give **full effect to the constitutional right of access to information** (Section 32):

- The bill should be extended to apply to **information held by private bodies**. *We endorse the submissions by the South African Council of Churches and the Legal Resources Centre on this issue.* Private bodies are increasingly wielding traditionally public power and should therefore not be exempt from having to provide access to information which citizens may need in order to empower them to protect or exercise their rights. Section 32 of the Constitution provides for access to information held by private bodies. If the bill does not give full effect to section 32, besides creating legal uncertainty, it could be subject to a Constitutional Court challenge.

- The section on **Open Meetings** which appeared in previous drafts of the bill and which is an essential component of open democracy, should be put back into the bill. *To this effect we endorse the submission by the Black Sash.* If the Justice committee would prefer to see open meetings provisions in a separate piece of legislation or in the various Acts regulating government bodies, we suggest that the Open Democracy Bill should set down the minimum principles and framework which should be adhered to and an obligation for such separate provisions to be drafted within a certain time limit.

3) If the right of access to information is to be meaningful, the **enforcement procedure** must be cheap, speedy, accessible, uncomplicated and informal otherwise the Act will only be used by the rich and powerful to defend their interests. The High Court external review procedure proposed in the bill is not accessible to the majority of South Africans. External review by the High Court, as currently envisaged by the Bill, does not provide a remedy that is cheap, speedy and accessible – in fact, the reverse. Hence a creative, innovative – and cost effective – alternative, such as a tribunal, must be considered. *We endorse the submission by Idasa on this issue.*

4) The **Human Rights Commission** has been allocated certain important duties under the bill. The addition of functions to the Commission should be followed by the necessary budget increase and re-structuring within the Commission. We suggest that the bill

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should stipulate that a dedicated Open Democracy unit, with separate and adequate resources, should be set up within the Commission. The Human Rights Commission should also be obliged to consult with organised civil society when drafting its report to Parliament in terms of section 83 of the bill.

5) The **whistleblower protection** section is a welcome addition to the bill. We submit that the section should be extended to provide appropriate protection to whistleblowers in the private sector. Private sector companies often carry out state functions or fulfil state tenders. As these companies are being paid with taxpayers' money, it is important to protect whistleblowers who expose corruption, maladministration or illegal acts. Furthermore, white collar crime has been identified in the NCPS as a priority crime.

6)The drafting of the **exemptions** should be guided by the principle of maximum disclosure. *We endorse Nadel's submission on the issue of exemptions.* The principle *of* maximum disclosure requires narrow well justified exemptions, a necessity of harm override, a public interest override, adherence to the principle of severability and maximum disclosure as an interpretative guideline. No government body should receive a blanket exemption.

Conclusion

The Open Democracy Bill is an important piece of legislation primarily because it purports to give effect to a Constitutional right which bears a particular significance in South Africa. It is therefore profoundly important that it give full effect to the right and to the spirit of openness which pervades throughout the Constitution.

The Human Rights Committee would like to thank the Justice Portfolio Committee for the opportunity to make this submission and we look forward to making further inputs on the detail of the bill.

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APPENDIX FIVE

THE LEGAL RESOURCES CENTRE

(LRC)

University of Cape Town

OPD 26

SUBMISSION
(By The Legal Resources' Centre, Cape Town)

PROBLEMS WITH THE OPEN DEMOCRACY BILL (ODB)
(with particular reference to shortcomings from an environmental perspective)

I. OVERVIEW

This overview summarises the two key respects in which the ODB is flawed (and more particularly, fails to give effect to its mandate). The next section sets out in more detail particular provisions that are problematic and suggests how they could be amended. Finally, the endnotes provide the academic basis and support for the arguments made in the body of the submission.

The two main ways in which the ODB is deficient are the following:

- Firstly, it is potentially unconstitutional in a number of ways. Some provisions would appear to be unconstitutional limitations of the right of access to information contained in section 32(1) of the Constitution. Then, there is the potential for a constitutional challenge on the basis of an infringement of the right to freedom of expression (section 16 of the Constitution) – a right which includes the "freedom to receive or impart information or ideas". Thirdly, and very significantly from our perspective, the ODB seems to infringe the right to the environment (protected in section 24 of the Constitution). In this regard, the drafters of the ODB are apparently oblivious of the recognition of the need for access to environmental information contained in the National Environmental Management Act 107 of 1998 – something that clearly needs to be addressed in the ODB.
- Secondly, for a piece of legislation purportedly designed to "give effect to [the right of access tc information]", the ODB has a remarkably tortured "snakes and ladders" structure which could well end up denying access to information to the people who need it most. Further, the bureaucratic obstacles and

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procedures that have to be dealt with prior to any granting of access to information will not only prove to be an ill-afforded expense to the state and result in administrative snarl-ups. They will in all likelihood serve as a basis for refusing access to information to the sort of people who will not be in a position to appeal to the courts, and could act as a foil to officials bent on hiding corruption.

In our submission, then, the ODB fails to make provision for "open and accountable administration at all levels of government" – as it is required to do in terms of Constitutional Principle IX (of Schedule 4 of the 1993 Constitution) and to accord sufficient recognition to the rights of access to information, expression and the environment.

To remedy all of these deficiencies would require a fundamental overhaul of the Act. This is obviously not possible in the time remaining. However, by small alterations to various provisions of the ODB many of the problems with the legislation can be alleviated or solved. Accordingly, we have isolated a number of provisions, summarised the ways in which they are problematic and suggested concrete amendments to be adopted by Parliament. The footnotes also contain examples of concrete approaches adopted in foreign countries that could be utilised by the drafters of the ODB. As many of the problems with the provisions derive from their vague terminology and the broad discretion they afford officials, the more concrete provisions and examples contained in foreign statutes and cases can provide valuable assistance in remedying the problems of the ODB.

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II. PROBLEMATIC PROVISIONS & OMISSIONS OF THE ODB

1. Sections 29(1) & 31(1), read with section 44

Objection:

The structure set up by sections 29(1) and 31(1), read with section 44, is impermissibly weighted against access to information and in favour of considerations like privacy and third party commercial information[1]. This finds expression in a number of ways.

(1) Firstly, sections 29(1) and 31(1) both contain mandatory nondisclosure provisions (i.e., there "must" be a refusal of a request if the conditions set out in those sections are satisfied). This does not reflect the balancing that is required to take place in terms of the Bill of Rights, nor the appropriate emphasis on the right of access to information[2].

According to the Bill of Rights, the right to information can be limited, but this limitation must be in accordance with the section 36 limitation clause – which states that there must be a weighing up of "all relevant factors". Mandatory nondisclosure provisions (even if they are to some extent qualified by section 44(1)) do not permit the kind of balancing of constitutional rights that should take place under section 36 of the Constitution. The right of access to information is sacrificed in favour of competing interests like privacy and commercial confidentiality, rather than being balanced against them in a nuanced way. The presence of the word "must" in sections 29(1) and 31(1) is accordingly impermissible and unconstitutional.

(2) Under section 29(1), all that is required to trigger non-disclosure is an "invasion of privacy". This is hopelessly too weak and again displays insufficient regard for the right of access to information, as well as the right to freedom of expression[3]. The exaggerated deference given to privacy is starkly different to the approach adopted in other countries[4]. It also does not satisfy the

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requirements of section 36(1)(e) of the Constitution, which demands that a limitation not be more excessive than it need be. (Deleting all identifying characteristics in a document could, for example, satisfy the privacy concerns while granting access to information[5].)

(3) Under section 31(1)(b), a requester can be refused information simply on the basis that disclosure could "reasonably be expected to cause harm to the commercial or financial interests" of a third party. This test is again much too low and out of step with comparable provisions in foreign jurisdictions, to which reference should be made in terms of section 39(1) of the Constitution[6]. It again gives much too little weight to the rights of access to information and freedom of expression and therefore represents an impermissible balancing under the limitation clause of the Bill of Rights[7].

(4) Although section 44(1) provides some sort of limitation on privacy and commercial confidentiality, the standard required to be met in order for this section to kick in is too high. This again displays an unconstitutional balancing of competing interests.

In this regard, it is notable that, while the person opposing disclosure has to prove relatively little harm to privacy or commercial confidentiality to have disclosure refused under sections 29(1) and 31(1), the requester has then to show "substantial danger" to the environment and/or public safety for section 44(1) to apply. This downplays the right to the environment and public safety compared with the right to privacy.

Secondly, it is significant that two requirements have to be met under section 44(1), the second of which relates to "public interest". Thus, in order for information which is otherwise barred to be disclosed under section 44(1) it must be shown that disclosure is in the interests of the public. The upshot of this is that, under the scheme set up by the ODB, the personal interest of the requester is disregarded and rendered entirely subject to another person's privacy rights. For, no matter what the requester's personal interest in the information might be,

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her interest in obtaining the information cannot trump another's privacy rights unless there is also some public interest component present.

Thirdly, why must the considerations in section 44(b) "clearly outweigh" (rather than simply outweigh) the need for non-disclosure protected in sections 29 to 35?

Remedy:

(1) Change "must" to "may" in the first sentences of sections 29(1) and 31(1);

(2) Change "an invasion of privacy" in section 29(1) to "an unreasonable invasion of privacy";

(3) Change "be expected to cause harm" in section 31(1)(b) to "be expected to prejudice to an unreasonable degree" (note, too, in this regard, the test set out in *Kleppe*, which is set out in footnote 7);

(4) Insert a rider at the end of section 29(1) something along the lines of "provided that the information officer shall not refuse a request for access to a record if the invasion of privacy that would otherwise occur can be remedied by blacking out the identifying characteristics of the person concerned".

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2. Section 38(2)

Objection:

This provision, which affords an information officer a discretion to refuse a request for access to a record in order to protect the commercial activities of governmental bodies suffers from a similar defect as section 31(1) of the ODB. Again, too much weight is given to commercial confidentiality and too little to access to information. In this regard, it should be noted that the information does not even have to be confidential to be protected. Further, because governmental bodies' financial activities are at stake there is a serious risk that a requester could be denied access to this information in order to avoid corruption and graft being exposed. This would fail to give effect to Constitutional Principle IX, which

required provision to be made for freedom of information "so that there can be open and accountable administration at all levels of government".

Remedy:

Replace "be expected to cause harm to the commercial and financial interests" in section 38(2)(b) with "be expected to prejudice to an unreasonable degree the commercial and financial interests".

3. Section 36

Objection:

This provision allows an information officer to refuse a request for access to a record "if its disclosure would be likely substantially to harm the defence or security of the Republic" by one of the five means set out in section 36(1). The five bases for disclosure in terms of section 36(1) are, however, very vague and leave much too much discretion in the hands of the information officer[8].

Particularly objectionable in this regard are clauses 36(1)(a)(i) & (ii) – which make reference to "aggression against the Republic" and "sabotage or terrorism aimed at the people of the Republic or a strategic asset of the Republic", respectively – and clause 36(1)(c) – which permits non-disclosure if disclosure will "jeopardis[e] the effectiveness of arms". These provisions are eerily reminiscent of those to be found in apartheid statutes like the Internal Security Act, both in terms of their generality and their potential for misuse. They will inevitably result in greater non-disclosure (thus undermining "open and accountable administration"), particularly because of the relatively junior status of the information officer. Their open-endedness is also likely to engender much litigation and encourage allegations of "over-breadth".

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This section also has the potential to infringe the right to freedom of expression. Expression that advocates "aggression" would be protected under section 16(1) of the Constitution, unless it involved "incitement to imminent violence" or "propaganda for war" and thus was excluded under section 16(2)[9]. Yet the information that might be required for such expression could be denied under section 36 of the ODB. Therefore, this section potentially infringes the constitutionally protected right to freedom of expression.

Remedy:

List specific categories of national security information to which access may be withheld (as well as mentioning the periods for which such information should be classified in this way); alternatively use less overbroad and vague language in the section.

(The specific categories mentioned in footnote 8 could well be adopted in this regard.)

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4. The omission of any clauses relating to environmental information comparable to those in section 31(1) of the National Environmental Management Act 107 of 1998 ("NEMA)

Objection:

NEMA was enacted to give effect to the commitments required by the state in terms of the right to the environment (section 24 of the Constitution). One of the ways it did this was by providing for access to environmental information. This access to environmental information was catered for in a number of clauses, one of the crucial ones being section 31(1) of NEMA[10].

The access to environmental information afforded by NEMA is therefore constitutionally required[11]. However, section 31(1) of NEMA was expressly said to endure only until the promulgation of the ODB[12]. The ODB was therefore

required to preserve or perpetuate section 31(1) of NEMA. This it has not done. On the contrary, sections 29 to 38 of the ODB afford less access to information than is currently available under section 31(1) of NEMA[13]. Accordingly, the ODB is constitutionally deficient in this regard and in violation of the right to information. Further, failure to preserve or provide comparable provisions in the ODB also means that Parliament is appearing to turn its back on the environmental vision and principles endorsed by it in NEMA as recently as 1998. It also potentially means that South Africa will fail to comply with important international environmental agreements that it may well become party to in the future.

Remedy:

There should be special treatment of environmental information in the ODB on the lines contained in section 31(1) of NEMA; alternatively it should be expressly stated in the ODB that section 31(1) of NEMA continues to govern in respect of the environmental information mentioned there[14].

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5. Section 8

Objection:

This provision, the voluntary disclosure of information (or Right to Know) provision in the ODB, represents an important facet of the right to information[15]. It is also required by the right to the environment (section 24)[16], as well as the right to freedom expression (section 16). For, if the public is not sufficiently and timeously informed about serious public safety and environmental risks they will not be able to adopt or advocate measures to combat such risks.

Section 8 of the ODB does not, however, give due recognition to this aspect of the right. Instead, it gives too much importance to privacy concerns of "third parties", as well as excessive respect for the right to just administrative action

(which it does not appear to recognise can be limited if the counterveiling considerations (and particularly counterveiling rights) are weighty enough)[17]. There should be greater flexibility to deal with situations in which there is an "immediate risk of serious danger to the public or potentially serious detriment to the environment" (to use the phraseology of section 30 of NEMA) – in which cases the fixed time periods and the set procedures should be able to be dispensed with. Failure to do so will significantly increases the chances of major accidents, such as the one that occurred at the Union Carbide factory at Bhopal, India in 1984, taking place in South Africa.

Remedy:

There should be a general provision allowing for an override of the time periods and procedures when there is an immediate risk of serious danger to the public or potentially serious detriment to the environment, in which case disclosure should take place "forthwith" or at least "as soon as possible".

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6. Section 45(3)

Objection:

(1) Section 45(3)(b) requires the information officer to "furnish the name of the requester" to the third party to whom the record relates. There should not be mandatory disclosure of this information in all circumstances. The privacy/ confidentiality concerns of the requester could in certain circumstances require that his/her name be kept secret. Intimidation could also result from the requester's name being revealed, something that would be inimical to the purpose of the right of access to information provisions.

(2) Section 45(3)(e) provides that, even in urgent situations, the third party must have 10 working days in which to respond to the information officer. Again this fixed time period would not necessarily be warranted in all circumstances. The urgency of the situation might well justify the third party being given an

abbreviated time period in certain instances. This must therefore be provided for in the section.

Remedy:

(1) Add a rider to section 45(3)(b), something along the lines of "unless the interests of the requester or the interests of justice militate otherwise";

(2) Add a proviso to section 45(3)(e), something along the lines of ":provided that the time period afforded the third party in this section may be abbreviated in exceptional circumstances".

7. Section 2

Objection:

This provision, which states that "This Act applies despite the provisions of any other legislation", appears to imply that even provisions in other statutes which demand greater access to information would have to bend the knee. This would not be a permissible purpose of the ODB, however[18]; nor would it accord with other constitutional provisions or Constitutional Principle IX.

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Admittedly, section 12 of the ODB could be seen to ameliorate the problem. But the separation of these two provisions could lead to some uncertainty. There might therefore be unnecessary and expensive litigation, while the chances of any future expansion of the right to information (to cater, for example, for South Africa's international obligations) might also be needlessly diminished.

Remedy:

The precise meaning of section 2 should therefore be clarified. Section 2 should also ideally be merged with section 12 to form one all-encompassing section.

The revised section should clearly state that any legislative provision which requires less access to information than that provided for in the ODB must give way to the ODB; but that the legislature is in no way constrained by the ODB from giving greater access to information in other statutes[19].

8. Section 39(1)

Objection:

This provision gives the information officer the right to refuse a request for information if a record itself is merely a draft or if the record is still being used by a governmental body in an as yet unfinished process. This itself is not objectionable and is necessary for the proper functioning of government. However, the terminology employed in the section is far too wide. For example, phrases like "could reasonably be expected to frustrate the deliberative process in a governmental body" are capable of any number of subjective interpretations and could result in many documents that governments wish to shield from scrutiny being refused to the public. A more objective test is needed.

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Remedy:

An approach similar to that adopted in the United States' Freedom of Information Act (at 5 USC 552(a)(2)) should be followed. In 5 USC 552(a)(2) an objective test is employed and distinct categories of documents that must be disclosed are mentioned. Categories of documents that must be "made available for public inspection and copying" include:

(1) "final opinions, including concurring and dissenting opinions, as well as orders made in the adjudication of cases";

(2) "those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register";

(3) "administrative staff manuals and instructions to staff that affect a member of the public";

(4) "copies of all records, regardless of form or format, which have been released to any person under paragraph (3) and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records".

9. Section 86(c)

Objection:

This provision gives the Minister of Justice the power to make regulations regarding "the classification of records of governmental bodies". Although this provision appears quite innocuous, it could be one of the most important provisions in the ODB. For, classification of the records could well end up dictating, in large part, what records the information officer decides to disclose. Therefore, the ODB should specify the criteria that may be employed in classification, as well as detailing the sort of categories that can be used. It is essential that the classification done pursuant to this section is done in accordance with a transparent procedure and system.

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Advocate Paul Farlam

Instructed by:

Legal Resources Centre

Per: **Angela Andrews**

12 JULY 1999

CAPE TOWN

III. CLARIFICATORY ENDNOTES ON THE PROBLEMATIC PROVISIONS & OMISSIONS OF THE ODB

[1] This undue emphasis is in fact reflected the whole way through the ODB beginning with the "Objects" section (section 3), where it is stated that the first object of the ODB is "to give effect to the constitutional right of access to any information held by the state ... without jeopardising good governance, privacy and commercial confidentiality".

[2] Cognizance should be paid to the fact that Federal Courts in the United States, when interpreting the U.S. Freedom of Information Act (5 U.S.C. 552), have consistently emphasised that the Act creates a presumption for disclosing information. The same is required to be true of the ODB in terms of the Constitution: the right contained in section 32(1) of the constitutional Bill of Rights requires that there be a presumption of access to information, that can only be checked in terms of the limitation clause (section 36) of the Constitution. Mandatory non-disclosure provisions, which presumptively favour concerns like privacy and commercial confidentiality are therefore clearly in conflict with the stance that the ODB is meant to adopt.

[3] The right to freedom of expression (section 16 of the Constitution) must also be read as requiring information to be divulged. This is particularly so in the light of section 16(1)(b), which states that the right to freedom of expression includes the "freedom to receive or impart information or ideas".
A similar approach to freedom of expression has been adopted in the United States of America. See, for example, *Saxbe v Washington Post Company* 417 U.S. 843 (1974), where Powell J stated:

> "The first amendment is one of the vital bulwarks of our national commitment to intelligence of government. It embodies our nation's commitment to popular self-determination and our abiding faith that the surest course of developing sound national policy lies in a free exchange of ideas on public issues. And public debate must not only be unfettered, it must also be informed. For that reason, this court has repeatedly stated that First Amendment concerns encompass receipt of information and ideas as well as the right of free expression".

[4] See, for example, the comparable provision in the Australian FOI Act dealing with privacy (section 41). Section 41(1) states that a document is exempt from disclosure if its disclosure under the Act "would involve the unreasonable disclosure of personal information about any person". Note, too, that in the United States, the federal Freedom of Information Act (5 U.S.C. 552) exempts records from disclosure where disclosure would constitute a "clearly unwarranted invasion of personal privacy". See, for example, *Department of Justice v Reporters' Committee for Freedom of the Press* 489 U.S. 749 (1989).

[5] This was stated by the United States' Supreme Court in *Department of Air Force v Rose* 425 U.S. 352 (1976).

[6] For example, the comparable provision in Australia's Freedom of Information Act, 1982 (as amended), namely section 43(1) exempts documents from disclosure under that Act if they concern:

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"(c) information (other than trade secrets ...) concerning a person in respect of his or her business or professional affairs or concerning the business, commercial or financial affairs of an organization or undertaking, being information:
(i) the disclosure of which would, or could reasonably be expected to, *unreasonably affect* that person adversely in respect of his or her lawful business or professional affairs ..." (emphasis added).

The Australian provision, incidentally, dovetails with the definition of "commercially confidential information" contained in section 1 of the National Environmental Management Act 107 of 1998 ("NEMA"), where that term is defined as meaning "commercial information, the disclosure of which would *prejudice to an unreasonable degree* the commercial interests of the holder" (emphasis added).

The weighting given to access of information as opposed to commercially confidential information in the Australian and NEMA provisions mentioned above is also echoed in the United States. There, privileged commercial information for the purposes of the US's Freedom of Information Act (5 U.S.C. 552) has been defined, by the Environmental Protection Agency, as involving *inter alia* information that causes "substantial harm to the competitive position of the person from the information was obtained". This definition has in turn been elaborated on by the Federal Courts: most notably, in *National Parks v Kleppe* 547 F.2d 673, 681 (D.C. Cir. 1976), where the court said that corporations resisting disclosure on this basis must prove that "(1) they actually face competition, and (2) substantial competitive injury would likely result from disclosure".

[7] In this regard it needs to be emphasised that there is no right to confidentiality of commercial information in the Bill of Rights. This factor should therefore not be so highly prized that it can outweigh access to information except where there are compelling reasons to the contrary. This has in fact already been stated by our Courts in regard to the section 32 right in *ABBM Printing and Publishing (Pty) Ltd v Transnet Ltd* (1997) 10 BCLR 1429 (W). There the court held that a blanket claim to confidentiality in relation to third parties could not be sanctioned as far as information sought in terms of the section 32 right was concerned – although the court did retain a discretion to impose limitations so as to strike a balance between the competing interests of access to information and confidentiality.

[8] This is in marked contrast to the approach adopted in the United States (under Executive Order 12958 (Classified National Security Information) of April 17, 1995, which provides that seven distinct categories of information may be classified and so rendered immune from disclosure, and that, furthermore, does not include any reference to a catch-all category. The seven categories (listed at section 1.5 of the Executive Order) are:
(1) military plans, weapons systems or operations; (2) foreign government information; (3) intelligence activities (including special activities), intelligence sources or methods, or cryptology; (4) foreign relations or foreign activities of the United States, including confidential sources; (5) scientific, technological or economic matters relating to the national security; (6) U.S. government programs for safeguarding nuclear materials or facilities; & (7) vulnerabilities or capabilities of systems, installations, projects or plans relating to the national security.

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Interestingly, too, Executive Order 12958 requires that information that implicates the national security be classified into different categories, as well as providing for automatic declassification after a period of time. Classifiers are also required to identify or describe the damage to national security entailed.

[9] Note in this regard a case like the "Pentagon Papers case" (*New York Times Co v United States* 403 U.S. 713 (1971)), which held that the government could not prevent publication of the contents of a classified study dealing with the Vietnam War. The publication of this study, the United States Supreme Court held, was protected under the right to freedom of expression.

Significantly, too, the U.S. Supreme Court in the Pentagon Papers case stated that "the word 'security' is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic".

[10] Under section 31(1)(a) of NEMA,
"every person is entitled to have access to information held by the State and organs of state which relates to the implementation of this Act and any other law affecting the environment, and to the state of the environment and actual and future threats to the environment, including any emissions to water, air or soil and the production, handling, transportation, treatment, storage and disposal of hazardous waste and substances".
Such information can only be refused in terms of section 31(1)(c) of NEMA:
"(i) if the request is manifestly unreasonable or formulated in too general a manner;
(ii) if the public order or national security would be negatively affected by the supply of the information; or
(iii) for the reasonable protection of commercially confidential information;
(iv) if the granting of information endangers or further endangers the protection of the environment; and
(v) for the reasonable protection of privacy".

[11] Section 24 of the Constitution requires the state to take reasonable measures to protect the environment. Disclosure of information provisions constitute reasonable measures if regard is had to international conventions such as the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, and other international instruments referred to in footnote 16. In interpreting the meaning of constitutional provisions section 39(1)(b) requires that the interpreter must consider international law. In so far as the ODB extinguishes provisions in NEMA which are protective of the environment it is constitutionally required to replace them with equally reasonable provisions. To the extent that the ODB does not do so it is unconstitutional.

[12] The fact that section 31(1) of NEMA was limited to the period "pending the promulgation" of the ODB does not indicate that there were doubts as to whether such access to information was constitutionally required. The provisional nature of the provision is very largely attributable to the fact that it was envisaged that the ODB would in all likelihood be more expansive in affording access to information than NEMA. It was therefore never envisaged that less access to environmental information would be afforded after the section 32(2) legislation was promulgated. Instead, it was envisaged

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that greater access to environmentally important information would be available in terms of the section 32(2) legislation.

[13] The limitations on access to information contained in section 31(1) of NEMA are noticeably less severe than those contained in sections 29 to 38, read with section 44, of the ODB. For example, "substantial danger to the environment" is not required to be demonstrated for information to be obtained under NEMA (as it is under section 44(1)(a)(iii) of the ODB.
(It should also be noted that the NEMA restrictions, unlike the ODB ones, display the correct balance between access to information and the right to environment, on the one hand, and the right to privacy and the importance of commercial confidentiality, on the other.)

[14] It would appear to be permissible for the ODB to permit section 31(1) of NEMA to continue to exist and apply to environmental information. This is because there does not seem to be any reason why the "national legislation" referred to in section 32(2) should be construed as being one Act of Parliament. After all, "national legislation" is defined in section 239(a) of the Constitution as being subordinate legislation made in terms of an Act of Parliament. Therefore, it would seem that the section 32(2) national legislation could not only involve more than one Act of Parliament (or provisions of different Acts) but also subordinate legislation: provided that such legislation is enacted within the 3-year period set out in Article 23(3) of Schedule 6 of the Constitution. However, some reference would have to be made to the continued existence of section 31(1) of NEMA in the ODB, as well as the ambit of information governed by it.

[15] The right to be provided with certain information by the state without a request being made by a requester, on account of the public importance of such information, has been recognised as being an important constituent of the right of access to information by South African courts. See, for example, *Qozeleni v Minister of Law and Order* 1994 (3) SA 625 (E).

[16] It has become internationally accepted to impose various positive duties on states to gather and collate environmental information and then to disseminate such information (including to the public).
As far as the duty to provide information to the public is concerned, a recent expression of this is to be found in Art 5(c) of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (1998), which provides that each Party must ensure that:

> "In the event of any imminent threat to human health or the environment, whether caused by human activities or due to natural causes, all information which could enable the public to take measures to prevent or mitigate harm arising from the threat and is held by a public authority is disseminated immediately and without delay to members of the public who may be affected".

Further recognition of the duty to disseminate information to the public is found in the 1974 Nordic Convention (which requires certain information to be published "in the local newspaper or in some other suitable manner"), the 1992 Industrial Accidents Convention Act and the 1991 Convention on Environmental Impact Assessment in a Transboundary Context. (See, too, the Seveso II Directive on the control of major-accident hazards, adopted by the EEC Council on 9 December 1996, which requires both passive

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information (i.e., permanent availability of information that can be requested by the public) as well as active information (i.e., pro-active measures by competent authorities: e.g., distribution of leaflets or brochures).)
There are also statutory provisions in a number of foreign countries that impose a duty on the state to collect information and then disclose it to the public: see, for example, the United States' Emergency Planning and Community Right to Know Act 42 U.S.C. 11001 and Canada's Hazardous Materials Review Act 1988, as well as Ontario's Act Respecting Environmental Rights in Ontario 1993.
As regards the gathering, collation and dissemination of environmental information in general at the international level, notable documents include the 1992 Biodiversity Convention and Art 204, the 1982 UN Convention on the Law of the Sea, the 1992 Climate Change Convention and the 1972 Oslo and London Conventions.
(For an overview of many of these documents, as well as other provisions and case law, see Du Bois and Glazewski "The Environment and the Bill of Rights" in *The Bill of Rights Compendium* at 2B-86ff.)

[17] Note that, for example, even if a very serious environmental or public safety risk is involved, the information must still only be disclosed "as soon as reasonably possible", rather than "as soon as possible" or "forthwith", terms used in Art 11 of the 1992 Convention on Transboundary Effects of Industrial Accidents and Art 2 of the 1986 Convention on Early Notification of a Nuclear Accident, respectively. Section 8(1) of the ODB therefore does not reflect the appropriate balancing of rights in crisis situations – such as nuclear risks.
Secondly, the fixed time periods, as well as the elaborate procedure that is mandated, do not take into account the devastating consequences of non-disclosure in certain circumstances – something that would surely warrant the administrative justice provisions being overridden in those situations.

[18] It must be recognized that the fact that the ODB can enumerate various limitations on the right of access to information does not mean that it can circumscribe the maximum amount of information to which citizens can be given access. This would not accord with the purpose of the legislation, which is to "give effect to" the right in section 32(1) of the Constitution. For, rights are intended to increase, not diminish, peoples' powers against the state; or to put it differently, rights delineate the inviolable core, not the possible periphery or circumference, of rights. Therefore, while the section 32(2) legislation can set out the limits of what a citizen can demand as of right, it cannot set out the limits of what the legislature can permissibly bestow.

[19] In other words, a provision like section 30 of NEMA, which requires more information to be disclosed in emergency environmental situations (and which, unlike section 31(1) is not a temporary provision) should not, and must not, be affected by the ODB. On the other hand, it must be clear that a provision like section 41 of the Atmospheric Pollution Prevention Act 45 of 1961 (which attempts to restrict access to information) is overridden by the ODB.

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APPENDIX SIX

SOUTHERN AFRICAN CATHOLIC BISHOPS' CONFERENCE

(SACBC)

University of Cape Town

OPD 31

Southern African Catholic Bishops' Conference

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Submission to the Portfolio Committee on Justice on the Open Democracy Bill (B67-98)

23rd March 1999

University of Cape Town

1. The words open and democracy appear in various places in the Constitution of the Republic of South Africa (Act 108 of 1996). Often, they accompany each other; sometimes they are found alongside such concepts as human dignity, equality and freedom. Taken together, these profound notions underpin the Constitution, expressing the desire of the nation to move away from the secrecies and oppressions, the indignities and constraints of the past, towards a freer, more humane and more just future.

2. Given this, a statute with the title 'Open Democracy Bill' might be expected to achieve something more than simply effecting the right of access to state-held information. Regrettably, though, with the sole exception of the provisions relating to whistleblowers, the Bill fails to go beyond this point, as if an open and democratic society could be brought about simply by ensuring that citizens have access to state-held information. If the Bill is going to limit itself to dealing with freedom of state-held information then we suggest that the title 'Open Democracy' be put aside and that a title be found which more accurately reflects its limited scope.

3. That the present Bill is but a shadow of its former self is demonstrated by the fact that earlier drafts contained far-reaching provisions relating to open meetings of governmental bodies. Someone somewhere evidently took seriously the notion of an open democracy, realising that it

consists of something more than the freedom to read minutes and reports after the fact. Unfortunately, the executive - under pressure from the administration, we may surmise - took fright at the thought of members of the public hanging around the corridors of power and having the temerity to want to be present while officials - paid by them and acting on their behalf - go about their business. So the open meetings clauses have been struck out, and with them much of the promise of this legislation.

4. This tendency to narrow the idea of open democracy can be seen as well in the absence of proper provision for access to privately-held information. Whereas the Constitution establishes that anyone, on their own behalf, or that of others or of the public in general, may seek to enforce a right (s38 of the Constitution), this Bill once again opts for the restrictive path, limiting access to privately-held information to those instances where the information sought is personal to the applicant. The Bill therefore not only fails to do justice to s32(1)(b) of the Constitution (which speaks of 'any rights', rather than personal rights), it once again shows itself to favour limitation and restriction, rather than openness.

5. The omission of the 'necessity of harm' exemption override is likewise indicative of the restrictive mindset that appears to have been responsible for the present draft. Previously, the assumption was one of openness: information should be given, even where it fell into one of the exempted categories, unless actual harm could reasonably be expected to follow. Now, these categories stand as legalistic obstacles to the flow of information, operative regardless of the unlikelihood of any harm actually resulting from the provision of information. The new assumption is thus one of closure. The only way remaining to prise open these categories is in terms of the public interest override (clause 44).

6. Concerning the matter of enforcement, it is hard to imagine how anyone could envisage the High Court as the appropriate forum for the adjudication of disputes around freedom of information. Surely the aim must be to encourage and facilitate maximum participation of people in the exchange of information, and to make it as easy as possible for them to have their disputes settled. The High Court - prohibitively expensive, time-consuming, formal - is a closed avenue for 99 out of 100 citizens. So, once again, whether by design or by oversight, a statute which is supposed to enhance openness instead perpetuates exclusion. Other possibilities exist, some of which have been mentioned in other submissions; these promote openness and accessibility and should be included in the Bill.

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7. Apart from the content of the Bill, there is also serious concern about the process, specifically the fact that it has taken so long to be introduced. This Bill, along with the Administrative Justice Bill (so far only in draft) and the non-discrimination statute required by s9(4) of the Constitution (so far only in incomplete draft) has to be passed by 4th February 2000. In essence this means by the time Parliament rises at the end of this year, probably in November. Between now and then we have an election. New committees will be formed, and amidst the usual teething problems and logistical challenges the Justice Committee is going to have to attend to these three Bills, each of which is vital to the consolidation of our democracy, and each of which deserves maximum public participation. That these bills are inevitably going to be rushed through is cause for much regret, and the Committee would be performing a service if it could find out from the executive precisely why there have been such long delays when the deadline of February 2000 has been known for over two years.

8. The Bill is by no means a positively bad statute, or one with which we have principled problems. It makes a serious and largely successful attempt to provide for freedom of access to state-held information (although there is undoubtedly room for improvement). The problem lies more in what the Bill claims to do but in fact doesn't do. It doesn't satisfy the letter of the Constitution relating to privately-held information (s32(1)(b)); it certainly doesn't meet the spirit of the Constitution in engendering openness and transparency in government - on the contrary, it adopts a restrictive and exclusive approach to public participation; and, finally, by taking the impressive-sounding title 'Open Democracy Bill' it pretends to be something it isn't. The task of the Committee is to put back onto the skeleton that remains some of the flesh that the executive has stripped off over the last couple of years.

University of Cape Town

Mike Pothier
Research Officer.
March 1999

APPENDIX SEVEN

SOUTH AFRICAN HUMAN RIGHTS COMMISSION

(SAHRC)

University of Cape Town

OPD 32



COMMENTS

Parliamentary Portfolio Committee on Justice

Open Democracy Bill
(B 67 -98)

March 1999

(012) 3224482.

SOUTH AFRICAN HUMAN RIGHTS COMMISSION
Cape Town Office
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1. Introduction

The Open Democracy Bill is a central and important piece of legislation: not only must it give effect to the constitutionally entrenched right of **access to information**, but it also is the one piece of legislation which will give life to the aspiration of **open and accountable governance**. The South African Human Rights Commission welcomes the tabling of the bill, and its consideration by Parliament.

Constitutional Principle IX required provision for ***"freedom of information so that there can be open and accountable administration at all levels of government"***. Section 32 of the Bill of Rights provides for access to information and gives life to the constitutional principle.

While open and transparent government – "government in the sunshine" - and the free flow of information is a noble and praiseworthy notion, the drafters of the Constitution were mindful that access to information needed to be legislatively regulated, and that such legislation could include ***"reasonable measures to alleviate the administrative and financial burden on the state"***. The final right is suspended until the legislation is passed, and parliament was given three years to generate the legislation, which is currently before parliament.

The South African Human Rights Commission ("the Commission") has two interests in the bill: on one hand it wishes to be satisfied that the bill in fact gives effect to the right; on the other, the Commission is tasked with supporting, monitoring, educating and training around the bill, and the Commission wishes to be clear on its mandate, and its ability to deliver.

The Commission is in the process of planning a conference on the issues in this bill, and the administrative justice bill, which will take place in July / August of this year, before deliberations on these bills take place. The conference would be open to all who have an interest in the bill, and would ~~be~~ particularly include members of this committee. The purpose of the conference would be to generate a detailed and comprehensive submission to parliament, in addition to partly fulfilling the recommendation in the bill that the Commission consult broadly on the possibility of extending the legislation to include access to privately held information (paragraph 3, Memorandum to the Bill).

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The Commission understands that the bill will be subject to further discussions, and possibly further hearings, during the parliamentary session following the elections. The conference report, and any further documentation will be made available in order to assist and facilitate these deliberations. In the interim, the Commission will restrict its comments to broad areas of concern.

The broad areas of concern are as follows:

- The **horizontal** application of the right to information
- The **"give effect to"** clause & the **timeframe**
- **Enforcement** mechanisms
- **Whistleblowers**
- **Drafting** style
- The role of the **Commission** as set out in the legislation

2. The Horizontal Application Of The Right To Information

Section 32 of the Constitution provides for the right to information. There are 2 components to this right:

a) The right to any information held by the state

b) The right to any information held by private bodies / persons which is required for the protection of *any* right.

The Bill as it stands makes provisions for mechanisms to obtain information from the state – the so-called **vertical** application of the right as between citizens and the State. However, the second component, the so-called **horizontal** application of the right is not fully provided for in the bill.

The bill does provide for access by individuals to information about themselves held by private persons, the correction of this information, and protection against the abuse of this information. However, this

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access is limited to information held ***about the requester him or herself***, as opposed to *any* information, which is the ambit of section 32.

The drafters of the bill acknowledge that the legislation does not give full effect to section 32 (1) (b). In paragraph 3 of the Memorandum to the bill, they suggest that the Commission investigate and consult in order to make recommendations **"...regarding legislation which would give full effect to this right..."**. The conference planned by the Commission later this year will consider this aspect very closely, with a view to making workable recommendations to this committee.

3. The "give effect to" clause, and the time frame

The Commission notes that the Constitutional mandate to parliament in section 32(2), is to pass legislation which ***"gives effect"*** *to* the right as set out in section 32(1) of the Constitution. Section 23 of Schedule 6 of the Constitution requires that the legislation be passed before February 2000.

In the certification judgement, the Constitutional Court accepted the interim right to information as set out in section 23 of Schedule 6, on the basis that Parliament needed time to provide the necessary legislative framework for the implementation of the right. The court noted that this kind of legislation often involves detailed and complex provisions defining the nature and limits of the right, and the requisite nature for its enforcement.

It is unfortunate that Parliament has so little time to consider this legislation. In addition to the short amount of time available, this committee has the additional pressure of having to consider two other critical pieces of legislation, the Administrative Justice Bill, and the Equality Legislation. Given the time and capacity constraints, concerns have been raised about the ability of parliament to finalize the legislation before the three-year time limit expires in February 2000.

We trust the commitment and capacity of this committee, and any other committee which will take its place after the elections. However, in the event of the legislation missing the deadline, it is important that there is clarity on what the Constitutional position is, and there have been differing opinions on what this would be. Following the judgement of the Constitutional Court in the certification of the final Constitution (reference), it was stated as follows:

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> ***"... if the contemplated legislation is not enacted timeously, the transitional arrangement in Schedule 6, as well as the section 32(2), fall away and the suspended section 32(1) automatically comes into operation."***

This provides clarity on the situation, although there are views that failure to pass the legislation in time will result in the version of the right set out in section 23 of Schedule 6 being made final.

It is clearly preferable for the legislation to be passed, so as to give effect to the right to information and to ensure the wider purpose of the constitutional principle of open and accountable administration at all levels of government. To have the situation where the general, but undefined right comes into being without legislation has two main pitfalls:

- <u>For the state:</u>

  The Constitution places the legislature on terms to pass the legislation within the three-year period under the sanction of **unqualified implementation**. The legislation, if passed timeously, may provide for ***"reasonable measures to alleviate the administrative and financial burden on the state"***. Such measures are important and desirable to make section 32 a workable right, without ambushing the ordinary functioning of government departments. Legislation passed subsequently would need to rely on the general limitation clause, should it wish to set out exemptions to the right.

- <u>For citizens</u>:

  A bald right to information, without clear mechanisms for access, principles of refusal, and dispute resolution mechanisms, is a hollow "paper" right. The details governing freedom of information belong in legislation, not in a Constitution, and without the details in an accessible legislative framework, the right will not be utilized by the public.

In addition to this issue, is the question of whether legislation which does not cater for the horizontal application of the right will amount to legislation which "*gives effect*" to the right, which is required by section 32(2), and the Constitutional status of legislation giving effect to only half of the right, will be questionable.

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4. Enforcement mechanisms

The bill sets out internal appeal procedures. Should these be exhausted, and an aggrieved applicant (or respondent) remains dissatisfied, the bill sets out the High Court as the forum for relief. Apart from certain procedural changes, such as an automatic presumption of urgency and a greater discretion as to costs, proceedings follow standard High Court procedure.

The Commission believes that the High Court is an inappropriate forum. It is inaccessible, both geographically, and in terms of costs, and it does not present a speedy remedy. It also lacks flexibility around issues of procedure, and as a result many matters may be diverted on questions of procedure, thereby preventing a development of sound jurisprudence, particularly on the question of the exemptions. This is particularly relevant to access to information, where there is no existing precedent, and a body of jurisprudence needs to be developed from scratch.

Effective and appropriate enforcement mechanisms are crucial to the successful implementation and functioning of the bill. They play a critical role in facilitating the culture change which is necessary to move from a closed an unco-operative beaurocracy, to open and transparent governance. Following implementation of an access to information system, there is bound to be a large number of appeals owing to a limited understanding amongst information requesters and providers, and a system which relies on an inquisitorial system, rather than the adversarial system, is likely to be more effective.

There are various options which could replace the use of the High Court, and the court system at all. These include the creation of a tribunal system, or the use of an ombudsman or Information Commissioner to resolve disputes. These options need careful consideration, with emphasis on the short-term cost implications of setting up new beaurocracies, and the long term cost implications of clogging up the court system even further.

Discussions around alternative enforcement mechanisms need to take into consideration developments in other constitutional legislation, most notably the administrative justice bill, and the Equality Legislation.

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5. Whistleblowers

Part 5 of the bill provides for the protection of whistleblowers. These kinds of provisions are important and necessary. However, attention needs to paid to whether these provisions are best placed in a bill of this nature. Whistleblowing and freedom of information are different issues. The former relates to anti-corruption strategies, and the latter to open government and the responsibility of government.

In addition to the context of the provisions, the four sections in the bill are too brief and much more clarification and detail is required.

6. Drafting Style

The drafting style of the bill is unnecessarily detailed and tortuous. The irony of this drafting style is that it obscures the subject matter of the bill, thereby hindering access to the information of the bill.

This is particularly so in the sections dealing with the exemptions, which is probably the most important substantive area of the bill.

It may be necessary to contract the services of a "plain language" expert to modify the drafting of the bill to make it accessible to the person on the street. This was successfully achieved in the Bill of Rights, and did not detract from the essential content of each section.

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7. The role of the SAHRC

The bill provides the Commission with a wide range of functions. These may be found in sections 5, 27, 43, 63, 66, 77, 82 and 83, and can be summarised as follows:

- The annual publication of a guide on how to use the act, in each official language, and disseminate the guide (section 5);
- Receive reports annually from governmental bodies setting out certain statistics regarding requests for information (section 27);

- Make determinations regarding provision of information already open to the public (section 43);

- Receiving disclosure by whistleblowers (section 63);

- Preparation of a notice setting out the procedures available to whistleblowers, for circulation in government bodies (section 66);

- Litigate on behalf of illiterate ~~or~~ disabled individuals, where there are important matters of principle (section 77);

- Additional functions set out in section 82:

    - annual review of the Act
    - recommend amendments to Act
    - monitor the administration of the Act
    - develop & conduct public education programmes
    - encourage government and private bodies to develop their own programmes
    - promote provision of information by government
    - assist any person wishing to exercise a right in terms of the Act

- The Commission is also granted the following powers:

    - Making recommendations to private or public bodies regarding the administration of the Act
    - Train information officers
    - Consult with public and private bodies regarding problems with the Act
    - Receive advice or proposals from public or private bodies
    - Receive money to perform its functions
    - Donate money to private bodies conducting education around the Act
    - Request certain information from the Public Protector
    - Inquire into any matter connected to the Act

- Report annually to the parliament on the Act (section 83).

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The Commission believes that it is appropriate for these functions to be allocated to the South African Human Rights Commission, as they deal with a protected right in the Bill of Rights, and many functions set out in the Bill can be synergised with existing projects. However, we are concerned that having been given the extensive mandate in the bill, that the Commission is financially enabled to deliver on that mandate.

Section 84 entitles the Commission to defray any expenses related to functions in terms of the Act. In addition, the Commission is entitled to receive money from any other source, which introduces the possibility of fundraising for specific projects. The Commission foresees that, in order to effectively deliver the mandate assigned to it in the bill, an increase in its annual budget will be required, and is in the process of developing this budget for inclusion in a further submission.

8. Conclusion

The Open Democracy is a groundbreaking and vital piece of legislation, which provides a concrete and specific realisation of a constitutionally guaranteed right.

The Commission wishes the bill speedy passage through parliament, with a view to its timely enactment.

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APPENDIX EIGHT

DEPARTMENT OF LAND AFFAIRS

University of Cape Town

OPD 42

Memorandum

Department of Land Affairs .
Kgoro ya tša Naga . UMnyango wezoMhlaba
Departement van Grondsake

OPEN DEMOCRACY BILL
[B 67-98]

COMMENTS BY GEOFF BUDLENDER
DIRECTOR-GENERAL: DEPARTMENT OF LAND AFFAIRS

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Introductory remarks

1 Implementation of the core of the proposals in the Bill would greatly improve the quality of public administration in South Africa. Despite the new Constitution, parts of public administration remain resistant to the need for public accountability and open government.

2 The express constitutional imperative behind the Bill is sec 32 of the Constitution, or the right of access to information. Another set of relevant constitutional imperatives is contained in sec 195, which deals with the basic values and principles which are to govern public administration.

3 The essence of this submission is the need to harmonise the requirements of sec 32 and sec 195 for open government and effective administration. If we succeed in achieving open government, but at the cost of making public administration ineffective, the people of South Africa will not have been well served. Conversely, of course, an "effective" but closed government will also not serve the people of South Africa well.

4 To put it simply: the time which a Department is required to spend on the administration of this law will be at the expense of the time which is spent on carrying out its programmes. When Parliament instructs government Departments on what they are to do, it needs to make choices about what it regards as priorities.

5 It is also necessary to make a considered judgment on the *financial* costs of any such proposal. Open government is undoubtedly a very important public good. There are also other important public goods, and funds spent on one are inevitably at the expense of another.

6 This staff and financial trade-off will apply to all governmental bodies. It applies even more strongly to the Human Rights Commission. The Bill imposes very onerous duties on the HRC. I do not know whether the cost in staff time and other expenditure has been calculated. Given the relatively small budget and personnel of the HRC, it seems likely that unless there is a guarantee that the HRC's budget and personnel will be increased to provide for the costs of administering this Bill, its performance of its compulsory functions under this Bill may disable it from performing its other functions.[1] [See in this regard the comment below on clause 84.]

7 The demands on each "government body" will vary depending on the size and functions of the body. A small to medium-size national Department like Land Affairs would probably require a full-time staff member with some legal training and experience, probably at the level of Deputy Director, to act as information officer. That person will need some support staff. One can imagine that large municipalities will require substantial staff to carry out their duties under the Act.

8 The most significant cost to a Department such as Land Affairs will not the be cost of the information officer, his/her deputy, and the support staff. It is the time which line staff will have to spend on searching for information and preparing it for the requester. This function can not be carried out by the information officer: that person can only manage and direct the responses to the requests for information. Government bodies carry out too many functions, at too many sites, for a central information officer to play any role in searching for the information, or more than a very limited role in preparing it for the requester.

9 We already have practical experience of this in the work of national Departments in preparing Answers to Questions in Parliament. This is demanding work. I suspect that Members of Parliament would be surprised by the amount of time which goes into preparing an Answer for the Minister, and by the cost of answering the typical Question. Usually the information requested is not readily available on the records of the Department, or not available in the form which is required. Significant work goes into locating and extracting the information, and then putting it into an appropriate form.

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1 The proposed authority to the HRC to receive donations - clause 82(2)(f) - is of course no guarantee that donations will be raised. It would be very strange for a law to impose statutory duties on a body in the hope that the body will receive donations to enable it to carry out those duties.

10 **This raises a fundamental question in relation to the Bill: should there be any limit to the work which a government body is required to do in order to provide information? My strong view is that it is unwise to compel a government body to divert substantial and potentially unlimited time from carrying out its programmes - which are designed to serve the public interest - to answering questions which will often (usually?) serve a limited private interest.**

11 If a significant fee is charged, it will lead to some cost recovery for government, and act as a deterrent to frivolous questions. However, in the case of government departments, they will not receive those fees (which will go to the revenue fund), and the nett effect will be that time is diverted from their programmatic work.

12 Any realistic consideration of this matter must also recognise the fact that the South African public service is still relatively inexperienced, not particularly well organised, and not particularly well resourced for the major transformational activities it is required to undertake. Government is attempting reforms and new programmes on a scale, and at a pace, which would be beyond the ambitions of more experienced, more stable, and better resourced and organised governments in other parts of the world.

13 The existence of these highly ambitious programmes does not negate the need for open government. On the contrary, one could argue that it is precisely at a time of change that one most needs to ensure rational and open government. However, the measures for open government need to have regard to the facts of limited resources and limited experience in public administration.

14 We have to be realistic and ask why, if experienced and sophisticated public administrations are not able to reach the highest standards of open government as set out in the Bill, we should expect that the present South African administration will do better. If other democratic societies have made the compromise between effective government and open government at a less idealistic level, what is it that should make us think we can achieve much higher levels, and still achieve effective government?

15 A final question is this: who will the requesters be under this law? Who will be able to exercise these rights effectively? The bitter truth, which by now we should have learnt from much of the other rights legislation enacted in the first five years of the new government, is that the poor are often the last to gain. They do not have adequate access to knowledge of their new rights, or adequate means to enforce them. Provisions in the law dealing with manuals and entries in telephone directories can not and do not solve

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these serious problems. If the requesters are not mainly the poor or those acting on their behalf, and if the obligations created by the law divert government from its efforts to serve the poor, that should give us all pause for thought.

16 These are uncomfortable questions to ask - but they do need to be asked *and answered*. If not, we run the risk of seeing the enactment of legislation which reflects the highest and noblest aspirations, but which will fail in its implementation. The result would be widespread cynicism and a sense of failure. It would be better to make limited promises which are kept, than extravagant promises which will fail.

The possibility of incremental implementation

17 The Bill creates the possibility of incremental implementation. Clause 87(2) provides that different parts of the law can be brought into operation at different times. This is a very practical approach. For an initial period, the core requirements of open government can be introduced. More sophisticated and demanding measures can be introduced once the administration has developed the mechanisms, systems and habits which are necessary to ensure achievement of those core goals. An over-reach in the early years is likely to result in substantial under-achievement. Legal requirements which are in practice unachievable will be regarded by many as a nuisance to be circumnavigated, rather than as legitimate requirements of open government.

18 I would suggest that the Committee should put a phased implementation plan on the table, for consideration by the President and the Minister. For example, Part 5 (Protection of Whistle-Blowers) should be implemented immediately. It is probably the single most effective mechanism against corruption or other improper behaviour, and it imposes a very limited administrative burden or cost. Similarly, Part 4 (Access to Personal Information) is a core element of open government, and of the accountable use of power by both public and private bodies. It could and should be implemented immediately.

19 Against this background, I have the following comments on specific provisions of the Bill. I regret that the limited time available to me does not permit a more detailed analysis of the Bill.

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COMMENTS ON SPECIFIC PROVISIONS OF THE BILL

PART 1: DEFINITIONS AND APPLICATION

Clause 1(v): The definition of "government body" is very wide, it seems quite deliberately so. It includes every national and provincial department, every municipal council, and a large number of other bodies. Conservatively, it must cover at least 1000 bodies. It is not clear from clause 1(2) whether it includes other governmental bodies such as schools, for example. If this is the case, the number of bodies covered is enormous. Some of the implications of this are set out below.

PART 2: GUIDES AND MANUALS

Clause 5: This will be a very large guide, containing details in respect of at least 1000 bodies - in each official language. The cost is going to be very high (see my comments on the limited budget of the HRC). The cost should be quantified before a decision is made in this regard.

Updating the guide every 12 months will be a major task for the HRC. It will not be possible to decide whether annual publication is "necessary" without every year obtaining all the information from every government body, and comparing it with the current published version.

While a general guide would be very helpful to users, requiring inclusion in this guide of the details of every government body - clause 5(2)(b) - seems to be over-kill.

Clause 6: A manual on each body would be useful - but again, the level of detail required is vast, and will require a great deal of staff time in analysing and preparing the information, for limited benefit. For example:

- a description of the subjects on which the body holds records and the categories of records - clause 6(2)(d)(i)

- a description of "all remedies available in respect of an act or failure to act" - this would require a detailed analysis of every statute, proclamation and regulation administered by the body concerned - clause 6(2)(i)

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Again, the requirement of annual re-publication "if necessary" is either so vague as to be ineffective, or extremely onerous.

I suggest that the information which has to be published should be reduced to more manageable proportions.

Clause 7: This places a very large burden on the head of GCIS. In order to carry out his/her statutory duty, he/she will have to identify every "government body" in terms of the law (probably an impossible task). Even on a conservative estimate of the number of government bodies which are affected, I estimate that this means that *every telephone directory* will carry at least 40 to 50 extra pages of information. Does GCIS have the budget for this? Has the cost been accurately estimated (my guess is several million rand)? And is it really necessary for the Western Cape directory to carry details of the local councils in the Northern Province?

PART 3: ACCESS TO RECORDS OF GOVERNMENT BODIES

Clause 17: I do not understand why non-commercial requesters should be exempted from paying a request fee. If in any event they have to pay an access fee in terms of Clause 24, why exempt them from this (presumably) lower fee?

The work required to determine the access fee is going to be substantial. To do this requires making contact with the relevant parts of the body, an initial search by the officials concerned for the information, and an analysis of the work which will be necessary to extract it and prepare it.

One can predict with certainty that certain non-commercial requesters will deluge certain government bodies with requests for access. The government bodies will spend a great deal of time investigating matters which will not be followed up if the access fee is significant. The time will be wasted, and will divert effort from the programmes of the body concerned.

I respectfully submit that there is no rational basis for exempting certain requesters from the request fee. To do so will have unintended consequences which can already be predicted.

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Clause 18: It is proposed that members of parliament, provincial legislatures and municipal councils will be exempt from payment of deposits or access fees - Clause 24(6). This will have far-reaching consequences. It means that there will be more than 10 000 people who at any time can demand information from a government body, and no matter how complex the request is, or how much information is required, the government body is compelled to do the work necessary to answer the request. The possible consequences are mind-boggling.

In fact, elected officials are the people who have least need for this special treatment. If relevant information is requested and not supplied, they have other channels for taking this up. Questions can be asked in Parliament, and the matter can be taken up through political channels.

There is a real risk that some elected officials will ask for information simply in order to "prove" that they are "doing their job". I have been informed that at least one political party has instructed its Members of Parliament to ask a certain number of Questions per week. If this is true, it seems to be based on the view that the number of questions asked by a Member of Parliament is an indicator of the Member's diligence. This is of course a very simplistic and in fact misguided view. It is analogous to the view that the number of Bills introduced by a Minister is an indicator of that Minister's diligence. However, once this is used as a "measure of performance", there is a very real risk that multiple questions will be asked for no reason other than to run up a satisfactory tally of questions.

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Clause 19: Thirty days may sound like a substantial period, but in reality it is not. These are the basic steps which will have to be taken during that period: register the request; consider whether it is excluded on any of the variety of grounds set out in Chapter 2; if not, identify where in the Department those records are likely to be found; send it to the relevant part of the Department (which may be away from the head office); at that site, conduct the research necessary to establish whether the information is available; estimate the time necessary to collect it and prepare it; submit that information to the information officer; consider the response from the line functionary; and prepare a response to the request. If the response is a refusal, it the information officer must prepare a considered account of the relevant findings of fact and reasons for the refusal.

This must all be done within thirty days, while continuing to carry out the work of the Department on which members of the public rely. It can be done, but only at the expense of the latter work. The question which Parliament needs to decide is one of priorities.

Clause 24(6) Please see the comments in respect of Clause 18 in respect of the provision that holders of elected offices do not pay any fee at all.

Clause 25: The problem of time is compounded by Clause 25(1). The information must be provided "upon payment" of the access fee, or "immediately" if no access fee is payable. This means that as soon as the request for access has been received, the officials must immediately start preparing the information, as it is otherwise obviously impossible to comply with this requirement. If the requester does not pay the access fee, all this time and effort is simply wasted.

The government body must surely be given a reasonable time to research, prepare and deliver the records once the acccess fee or deposit has been paid.

Chapter 2: The most striking aspect of the grounds for refusal is that none of them seems to relate to the time and effort involved in researching and preparing the information.

The effect of this is that government officials can for a fee (and in the case of elected officials, for no fee at all) simply be turned into "researchers" for a member of the public, whatever the motive of the person concerned, and irrespective of whether there is any broader public interest in provision of the information. What this means is that requests for information "trump" all the other work of a government body. If there is a conflict between the body's general functions and these specific statutory duties, the general functions must take second place while the information is being researched and provided.

This is a far-reaching proposition. It is difficult to see any public policy justification for it. The right to information is important, but it is not the only important thing to which government bodies must attend. I do not believe that it is the function of government to act as a research agency.

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Clause 40: Why "manifestly" frivolous or vexatious? The test is an objective one: either the request is frivolous or vexatious (in which case it should be refused), or it is not.

Clause 43: I suggest "... if the record is open to public access in accordance with any other legislation or in any other manner". For example, the Department of Land Affairs has a large variety of deeds, survey and mapping records which are made available to the public, not all of them in terms of specific legislation.

PART 6

Clause 68(4)(a) For the reasons set out above, an appeal fee should be payable by all requesters.

Clause 71(2)(a) I suggest the insertion of the word "substantial" or "material" before "prejudice"

Clause 73(2) It is difficult to see why all applications to the High Court in this Court should automatically be deemed to be urgent. This privileges litigants under this law over every other litigant in the courts. Why should this be so? There is nothing inherently urgent about an application under this law. If there is indeed urgency, the applicant should have no difficulty in proving it.

PART 7

Clause 84 The intention of this clause is not clear to me. If it is intended to provide that the budget *must* provide funds for the functions of the HRC under this law, then this is again a privileging of this law over all other laws. All the other functions of government are subject to budgetary constraints. There is no apparent reason for dealing differently with the functions of the HRC under this law. This would be a truly extraordinary provision. But perhaps I misunderstand the intention and meaning of this Clause.

G M BUDLENDER
4 October 1999

University of Cape Town

APPENDIX NINE

CONGRESS OF SOUTH AFRICAN TRADE UNIONS – OPD 33 (COSATU)

University of Cape Town

COSATU SUBMISSION On the Open Democracy Bill [B67-98]



University of Cape Town

PRESENTED to the Portfolio Committee: Justice

23 March 1999

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Executive Summary of Recommendations

1. The bill should incorporate the **right to know principle**, which will facilitate greater proactive disclosure of information. There is a need for a multi-stakeholder process to analyse which records in the possession of the departments should be routinely made available. As part of this exercise the GCIS, in collaboration with the Human Rights Commission, should provide guidelines to departments, which records should be proactively disclosed, based on an evaluation of public information needs. The infrastructure of the Post Office and the Tele-Centres/Multi-purpose Community Centres should be utilised to disseminate information to the public. Proactive disclosure of information should be extended to the private sector and the minister should be empowered to prescribe accordingly.

2. **Horizontal application:** The bill should be substantially amended to comply with section 32(1)(b) of the Constitution, i.e. access to information held by private bodies required for the exercise or protection of rights.

3. The Bill needs to clearly define use of the term (information required for) **protection of rights**

4. The **whistle-blower provisions** should be extended to the private sector to protect whistle-blowers in the sector. Further, the body charged with enforcing this bill should be empowered to assist whistle blowers.

5. The **relationship between the bill and other information disclosure statutes** should be such that there is no unintended restriction of disclosure. The law that favours disclosure should prevail in the event of a conflict between these laws.

6. **Ground for refusing access to records:** The bill should define trade secrets/commercially confidential information. In addition, the overly broad language of the third party commercial information needs to be narrowed. The necessity of harm exemptions override should be reintroduced in the Bill. The exercise and protection of rights must be a component of the mandatory disclosure in the public interest.

7. **External Review:** An intermediate body/mechanism should be established to adjudicate information disclosure disputes. COSATU proposes the establishment of the Open Democracy Appeals Board to settle disputes regarding information disclosure as such an intermediate body. More investigation is required regarding the mediation of information disclosure disputes. The High court will hear appeals regarding the interpretation of the law while the Appeals Board will hear appeals on decisions regarding denial of access to records by both the public and private sector.

8. **A phased/staggered implementation process** should be considered: first to appoint information officers and secondly to educate the public on how to use the legislation. The Human Rights Commission should receive sufficient resources to enable it to perform the duties imposed by this law. In addition, the Commission should establish a specialised body to deal with the bill.

9. To facilitate greater access, the information officer should be **empowered to waive fees**, where such waivers will allow for access to disadvantaged people.

10. The bill should be redrafted in **plain language** to make it accessible and readable.

Proposed substantive and technical legal **amendments** are contained in Annexures appended to the submission.

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2. Introduction

The apartheid system cultivated a culture of secrecy entrenched in the public and private sector. Remnants of this culture remain pervasive in the private sector and sections of the public sector. For an open democracy to thrive, this culture should be uprooted wherever it manifests itself. A new beginning for our society is codified in the Constitution, which is imbued with the vision of an open and participatory democracy.

People require accurate and accessible information for meaningful participation in decision making. In addition, they need information to make informed choices, exercise and protect their rights. Further, information is required to hold the state and private corporations accountable.

Against this background, we welcome the Open Democracy Bill (hereafter the 'Bill') as an important legislative intervention to secure the constitutional right to access information. Efforts to inculcate an open democracy will have to contend with a high rate of illiteracy in our society, an authoritarian and inward-looking culture in the public service and resistance to information disclosure in the private sector.

COSATU's approach to the bill is twofold, i.e. to underline areas which we support and to draw attention to its shortcomings. [1] There are many positive elements of the bill that we support. However, despite the fact that the bill was developed over a long period of time, it has serious flaws and/or shortcomings in certain key areas.

This is a submission to the first stage of the parliamentary process. The bill needs to be redrafted to take into account the concerns raised regarding its shortcomings. We present legal formulations, which could assist the process of redrafting the bill. These proposals indicate possible legal drafting which could be used to capture our concerns. COSATU will participate in the second stage of the parliamentary process when the bill is redrafted and considered in the next session of parliament.

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3. Incorporating the "Right to Know" (RTK) principle in the bill

Currently, the bill primarily deals with access to publicly held information upon request, commonly known as freedom of information. In the light of resource disparities, a requester-driven approach may place the bill beyond the reach of the disadvantaged.[2] Within a requester-driven approach the main beneficiaries will be the rich and powerful, thus deepening the uneven

[1] COSATU supports the broad thrust of the submission by various NGO's given the to Select Committee on Security and Justice on the 11 August 1998.

[2] For instance, in the United States of America, the vast majority of requests come from commercial rather than non-commercial requesters.

balance between commercial and noncommercial information seekers. Further, the advance in information technology has led to an exponential growth in the flow of information, but ironically, many people are shut out of the information superhighway. This underpins the need for a proactive approach to information disclosure, a key feature of RTK.

Information is power and if the state puts in place mechanisms to provide information to poor individuals and communities they will be empowered to participate in decision-making processes. In our view, information is not just a check and balance against the state, but a necessary condition to empower people's participation in decision-making. This conception is important to distinguish COSATU's view of the right to information from more liberal interpretations of the right. The liberal approach tends to be mainly concerned with the right for individuals to request information in the possession of the state, and less concerned with placing obligations, which will lead to the fuller realisation of the right for a greater number of people.

Against this background, COSATU believes that the 'right to know' principles should be incorporated in the bill. A right to know paradigm would take access to information one step further, recognising that certain categories of information are so important that government should actively disseminate it to the public without the need for special requests.

A right to know paradigm is illustrated in the relative advance made regarding environmental information. Pollution Release and Transfer Registries (PRTR) or Toxic Release Inventories (TRI) have been established in many countries to require that polluters report to the government their use of specified potentially harmful chemicals to the environment.[3] Emissions data is systematically collected and disseminated to the public by national government, often by electronic means such as the Internet. Recently, PRTR has been proposed in South Africa in the Environmental Management White Paper and Act.[4]

There are a number of benefits associated with the PRTR approach. First, it is an effective way to ensure public access to environmental information and facilitate public participation in environmental decision-making. Secondly, it creates economic efficiency by drawing attention to inefficient production practices, thereby reducing emissions. Thirdly, it is an important tool to government in evaluating the impact of existing pollution control and reduction policies.

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[3] PRTR has been adopted as an international principle of the Rio Declaration and Chapter 19 of Agenda 21. The OECD Council has also recommended that its member states implement PRTR. 36 countries and the European Union agreed to develop a PRTR systems in their jurisdictions by signing the Convention on Access to Information, Public Participation in Decision-making and access to Justice in Environmental Matters. PRTR has a already been established in Canada, England, Wales, the Netherlands, and the United States.

[4] In the White Paper on Environmental Management Policy for South Africa government commits itself to "collecting, analysing and disseminating information and providing resources to meet these needs." In addition, the Department of Environmental Affairs and Tourism will establish an information clearing house, p.59, 1998.

Section 31 of the National Environmental Management Act, Act no. 107 of 1998, provide an interim mechanism to access information held by the state. Secondly, state organs are given the right to access information held by any person "relating to the state of the environment and actual and future threats to the environment. These clauses are interim because the Open Democracy Bill is still to be passed.

though
The bill, albeit in a limited way, contains sections tilting towards a right to know paradigm. Section 8 provides mandatory disclosure of government records indicating public safety or environmental threats. Section 6 directs departments to proactively disseminate certain basic information about their functions. The right to know should go beyond these provisions, however, by requiring the government to actively disseminate a broad range of important information in a way that is easily accessible, understandable, and usable by the public.

There is a need for more proactive disclosure regarding the mechanisms to access rights and remedies when rights are violated. A duty to proactively disclose information should therefore be imposed on the public and private sectors, especially but not limited to socio economic rights. Proactive disclosure of information regarding socio-economic rights will benefit the poor and marginalised communities, thereby increasing awareness and enforcement of these rights. [5]

The right to know raises several questions and/or challenges that should be given consideration:

- prioritisation of information to be proactively disclosed;
- whether government provides analytic tools to help the public to use the data;
- the target audience for the dissemination of information;
- the amount of information to be released to avoid 'drowning' the public with irrelevant information;
- the reporting burden to be placed on the private sector; and
- enforcement of reporting requirement.

Furthermore, from the environmental experience, is has been seen various technical questions, arise at the implementation stages.[6] As the environmental case illustrates, drafting laws to implement a right to know paradigm will require significant attention to detail. It also requires creating a balance with other information disclosure laws.

In the light of these considerations the RTK will have to evolve and be refined from time to time. At the moment, it will be premature to advance a comprehensive list of records that must be proactively disclosed. The amendments we put forward propose a legal framework which would facilitate a manageable process. To realise the objective of incorporating the right to know paradigm in the bill, COSATU proposes the following:

- mandating governmental bodies to proactively disseminate information in their possession. Governmental bodies, with the assistance of the GCIS should consider existing records that should be proactively disclosed. In addition, to mandate governmental bodies to collect

[5] A recent report for the EU Foundation for Human Rights written by CASE, November 1998, "Assessing the Knowledge of Human Rights among the General Public & Selected Target Groups", indicates that there is minimal public awareness of socio-economic rights, partly due to limited if not nonexistent mechanisms to proactively disclose information on socio-economic rights.

[6] In the environmental case these include: determining the list of chemicals to be reported, determining which sectors of industry must report, setting the threshold levels of use and/or release of pollutants below which reporting is not required, specifying exemptions for small businesses, developing uniform methodologies for calculating data and assessing and communicating relative degrees of risk to the public.

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information, other than environmental information, from private bodies, which they should actively disseminate.

- placing a duty on private bodies, particularly corporations to actively disseminate information in the public interest (e.g. consumer information such as labeling of goods and services),
- mandating the Government Communication and Information Systems (GCIS) after consulting the relevant civil society bodies, to assist governmental bodies to identify records that should be proactively disseminated in line with the prescriptions by the Minister of Justice;
- to empower the Minister to prescribe locations where information should be disseminated. This should meet the broad criteria of accessibility, and consideration should be given to utilising the infrastructure of the Post Office and the Tele-centres or Community Multipurpose Centres. Popular forms of media such as pamphlets, etc. should be utilised as a means to disclose information as they are easily accessible; and
- an amendment to section 8 to mandate governmental bodies to actively collect and disseminate environmental information. It must be noted that the provisions of the National Environment Management Act regarding the disclosure of information are interim pending the passing of this legislation.

For these proposed technical amendments refer to Annexure A.

4. Limited access to privately held information

Background

Section 32(1)(b) of the Constitution provides that everyone has a right of access to "any information that is held by another person and that is required for the exercise or protection of any rights". Further, section 32(2) requires that national legislation be enacted to give effect to the right in section 31(1). Undoubtedly, the bill seeks to enforce the mandate of the constitution, but falls short of fulfilling this obligation, particularly with regard to horizontal application of this right.

The bill only gives partial effect to section 32(1)(b) in section 50(1) of the bill, which grant access to "any record of a private body containing personal information about that person." In terms of the memorandum to the bill, the Human Rights Commission is entrusted with the task to "investigate and consult widely so as to develop recommendations regarding legislation which would give full effect to this right as required by section 32(1)(b) read with section 32(2) of the Constitution." Failure to give full effect to this right in the current bill is problematic for a number of reasons elaborated below.

The imperatives of granting access to privately held information

Access to information held by private bodies, especially corporations, is important for several reasons. Corporations, even though they are privately owned, exercise enormous social power.

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Many bodies in the private sector routinely take decisions that have a profound impact on people. In many cases they exercise what for all practical purposes is public, rather than private, power. This is exacerbated by the fact that South Africa has a highly unequal concentration of ownership.

Increasingly, the distinction between 'private' and 'public' is blurring and progressively being eroded. Many traditional services historically provided by the state are now provided by the private sector, for example health care, transport, policing, etc. The change in ownership does not necessarily result in a change in the nature of goods, products and/or services that are provided by these entities to consumers. Therefore power is not the sole prerogative of the state but substantially resides in the private sphere as well. It is imperative that these institutions be held accountable for their actions and decisions.

Communities and consumers require information to protect themselves against health hazards and other forms of environmental threats. This information may have critical implications for people's right to life, security of persons, health, etc. A failure to disclose the relevant information, or denial to the public of the right to information, means that persons who might be affected would not know, for instance, what chemicals and how much of such chemicals are being emitted from the factories around which they live or work, or whether any prescribed standards are being broken. Further, the public generally, would not know what measures should be taken to correct the situation.

In addition, science and industry develop thousands of new kinds of potentially dangerous consumer products, many of which are extremely complicated, leaving consumers puzzled and confused. Consumers' good health and safety are often threatened due to lack of information concerning the quality, safety and reliability of products and goods and services that they buy.

Prices for essential services and products such as bank transactions, insurance policies, bus and train fares, fuel consumption, etc are often increased without prior notification and proper justification. Lack of information makes it extremely difficult for communities to decide whether price hikes are fair and in turn this severely constrains dialogue between the service provider and the communities.

Consumers also regularly complain about being denied access to certain services or facilities such as overdrafts, personal loans, etc, by financial institutions. As these institutions are not required by legislation to give reasons, their conduct often lends credibility to suspicions that their services are racially motivated or discriminatory on other prohibited grounds.[7] Disclosure of information is therefore important to protect and exercise rights, to make informed choices, as well as building mutually beneficial relations between companies and consumers.

The Constitution, particularly the Bill of Rights protects consumer rights in the broad sense, which will only be adequately protected if the right to have access to information is extended to apply in respect of private bodies.

[7] It is noteworthy that the Fair Lending Practices Draft Bill, proposed the Minister of Housing, would force banks to disclose their reasons for not providing loans to check whether this is not based on discriminatory grounds.

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Further, workers require information to exercise and protect their rights. If the bill provided for a situation where trade unions or workers could request information vital to the protection or exercise of the right to fair labour practices, or the right to form trade unions (even in situations where workers were unorganised), this would strengthen the enforcement of human rights throughout South Africa. Furthermore, information is required to exercise and protect the right to equality, to ensure the absence of discrimination in hiring, promotion and salaries, and generally to promote democratisation of the workplace.

In broad terms, access to information held by private bodies will be required where their decisions would have a detrimental or positive effect on access to socio-economic rights. For instance, one would be entitled to pricing information if the pricing policies on basic foodstuffs by private suppliers detrimentally affected people's access to food (as enshrined in section 27(1)(b) of the Constitution. [8]

The duty to respect the bill of rights is capable of, and suitable for application to private bodies, and therefore can be brought within the ambit of section 8(2) of the Constitution. Section 8(2) envisages that a right can be applicable to private parties to an extent. The State also bears the duty to "protect" the relevant socio-economic right [section 7(2)] by regulating prices etc. In this situation one would also be able to claim the relevant information directly from the State in terms of section 32(1)(a).

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Current information disclosure initiatives

The ODB coexists with a range of provisions in other legislation. As an omnibus bill, it should be comprehensive and complement the range of provisions in other legislation, which are partial and limited.

The Companies Act 61 of 1973 places limited disclosure duties on companies. Companies are required to publish an annual report, with chairperson's and director's reports and audited financial statements.[9] The proposed amendments to the Companies Act currently before parliament seek to improve information disclosure by companies in line with international norms.

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[8] Section 27 of the Constitution pertains to the right to health care, food, water and social security.

[9] It is remarkable that the SAB has for the first time disclosed information on salaries of its top directors, as a listing requirement on the London Stock Exchange, Sunday Times, 7 March 1999. This confirms our view of the massive wage gap prevalent in the private sector and the absence of a clear justification for the perpetuation of the apartheid legacy of secrecy in the corporate sector. The proposed amendment to the Company's Act currently under consideration by parliament recognises the limited disclosure requirements in the Act. In short the amendments seek to improve the disclosure of director's remuneration levels through the inclusion in annual financial statement of companies the remuneration received by directors, pensions payable and received by directors and past directors, and details of director's service contracts. In the past, disclosure was limited to aggregate amounts rather than specific amount earned by individual directors and no reference was made to details of service contracts. Further, the amendments require greater transparency with regard to who owns shares in nominee companies. The Bill is the beginning of a process to realign South Africa's Company legislation with international trends in this regard.

The King Report (1994) presented a Code of corporate practices and conduct and included in its recommendations that companies to whom the report applied disclose the total pay of executives and non-executive directors, details of employment policies, including staffing levels, skills levels, new jobs created, retrenchments, affirmative action policies and training programmes, environmental matters including planned pollution control, etc. In our view, the report has several flaws including the fact that it does not go far enough to entrench workplace democracy. Despite the fact that Code has been adopted by the JSE as a listing requirement, in every other respect it is unenforceable. There is no enforcement mechanism other than peer pressure.

The LRA, Act 66 of 1995, has significantly expanded the scope of employers' duties of disclosure but within the parameters of collective bargaining.[10] It recognises that effective collective bargaining is impossible without adequate information disclosure. Further, the Employment Equity Act imposes a variety of duties of consultation and disclosure on designated employers.

Although, the LRA and the Employment Equity Act have begun to address information disclosure they do not comprehensively address workers' information needs. The Employment Equity Act is limited by the fact that it applies to designated employers or those who choose to be designated employers in terms of this Act. The LRA contains certain conditionalities that must be satisfied before information is disclosed. One of them is that the trade union must be representative. In instances where trade unions are not representative or power is unevenly distributed between employers and employees, such as in agriculture, unions may find it difficult to use the LRA as a vehicle to request information. Further, the right to disclose information may be withdrawn for a specified period in the event of a dispute about alleged breach of confidentiality (section 16(14).

There are voices in business who regard the bill as an unnecessary intrusion often arguing that information disclosure by employers or companies is already covered in other legislation.[11] While

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[10] In terms of section 16(2), of the LRA all relevant information that will allow a trade union representative to perform functions under section 14(4) of the Act, must be disclosed. Under section 16(3), whenever an employer is consulting or bargaining with a representative trade union, the employer must disclose all relevant information which will allow the union to engage effectively in consultation or collective bargaining. These provisions are made subject to broad grounds of refusal, including confidentiality, commercial prejudice and privacy. A workplace forum, in terms of section 84, is entitled to be consulted by the employer about proposals regarding a whole range of issues, including restructuring, organisational changes, closures, mergers, transfers of ownership, job grading, criteria for increases or bonuses, education and training, product development and export promotion. The employer is further obligated under section 89, subject to similar grounds of refusal, to disclose to a workplace forum all relevant information that will enable it to engage effectively in consultation and joint decision-making. In addition, there are disclosure requirements set out in section 189 in respect of dismissals for operational requirements.

[11] See for instance SACOB paper to the FXI Conference on the Open Democracy Bill, 26 January 1996.

It is argued that "matters pertaining to information disclosure in respect of wage negotiations are provided for under the LRA; matters affecting the disclosure of corporate information are or can be addressed under the Companies Act or the Competition Act; products/service information is or can be dealt with under Consumer Legislation, environment protection can or should be dealt with under the specific environmental legislation, p.3, 1996.

some of the concerns may be genuine, particularly the need for synergy between information disclosure laws, there is however, an attempt to limit as far as possible information disclosure requirements from business. The bill is an overarching freedom of information statute, which must set standards for information disclosure. It is further important to emphasise that access to privately held information in terms of the Constitution is contingent upon the exercise or protection of rights. Some of these rights may be sufficient to override the need to protect commercial information and personal privacy.

Implications of partial enforcement of section 32(1) of the Constitution

Several challenges arise from giving partial effect to the right contained in section 32(1)(b). The truncated enforcement of section 32(1) gives rise to constitutional dilemmas. Section 32(2) does not envisage staggering legislation, one to give effect to section 32(1)(a) and the other to give effect to section 32(1)(b).[12] The dilemma will arise from the understanding that any legislation purporting to give effect to the constitutional requirement may in fact trigger the *whole right* thus repealing the transitional provisions.

Secondly, failure to provide an orderly mechanism for accessing information held by private bodies may lead to chaos and in some case undue disclosure of information. In the absence of an orderly mechanism stipulating the manner and form of access as well as exemptions, it will be left to the courts to adjudicate this matter. Lack of precedent and jurisprudence in this regard may lead to uneven information disclosure subject to the interpretation of the courts.

Recommendations

Against this background, COSATU recommends that the bill be amended to give full effect to section 32(1) of the constitution. In extending the bill to private bodies it is important to take into account a number of factors. A private body is a generic term encapsulating both juristic and natural persons, i.e. organisations and individuals. While all private bodies must give access to information required for the exercise and protection of rights, the mechanism to realise this needs to be carefully balanced to take into account the fact that private bodies do not possess similar capacity.

It may be inappropriate to place the same duties on a major corporation and a 'spaza' shop in the township or on a private individual. Therefore it is important not to place too onerous requirements on private bodies, especially individuals given the capacity constraints. A distinction should be made between the categories of 'persons' and the corresponding duties specified. Further the possibility of empowering the Minister to designate large companies to comply with the prescribed provisions should be investigated. These designated private entities would be

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[12] Until legislation envisaged by section 32(2) of the new Constitution is passed, the Interim Constitution provision remains in force: "Everyone 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."

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required to appoint information officers and hold internal appeals. In the context of these large corporations it may be inappropriate to confer the responsibility to process requests for information to the head of the corporation. Appoint information officers will thus facilitate and perhaps accelerate the processing of requests for information. Most corporations have a media/public relations capacity which could possibly be given the mandate to process requests for information.

The amendments contained in Annexure B seeks to achieve the following:

- to provide right of access to records of private bodies required for the exercise and protection of rights. Upon requests any person should be given access to a record of a private body required for the exercise and protection of rights and subject to ground for refusing access;

- define forms of requests and manner of access. A requester must write to the head of a private body and among other provide his or her details including contact details;

- outline grounds for refusal access to records. Subject to the public interest override a private body may refuse access to a record on the ground that it contains personal information or third party commercial information;

- provide for ~~an~~ an enforcement and appeal mechanism. Any person who is refused access to a record of a private body may apply or appeal to the Open Democracy Appeals Board. The person may lodge an application with the High Court only after the Board has made its decision and the appeal such be limited to interpretation of law;

- allow for third party intervention. This section provides for the notice of third parties whenever the head of a private body contemplates disclosing third party information. However, it may be appropriate to place this duty on all private bodies and this constitutes one of the possible exemptions that the Minister may grant in his or her regulations; and

- empower the Minister to prescribe by regulation a procedure for dealing with requests for information regarding access to records of private bodies for certain categories of small businesses, NGOs and private individuals.

5. Clarifying the meaning of rights

In our view, the Bill should clearly define the meaning of "any rights" as provided in terms of section 32(1)(b) to give guidance to the courts. There appears to be conflicting interpretations of the meaning of "any rights" by the courts in adjudicating disputes regarding information disclosure in terms of the Interim Constitution. [13]

[13] In the case of Directory of Advertising Cost Cutters v Minister of Post and Telegraphs and Broadcasting and Others 1996(3) SA 800 (T), Van Dijkhorst J gave a narrow interpretation to this section and held that it only applied to the fundamental rights set out in the Bill of Rights and concluded that it could not be invoked where

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There have been cases which have held in respect of section 23 of the Interim Constitution that rights in this context refers to constitutional rights. However, there are other cases which say it extends to all rights however derived – this would include constitutional rights, statutory rights, common law rights (e.g. contractual and delictual rights). COSATU prefers the more expanded approach, which interprets the notion to mean any rights however they are derived.

6. Protection of Whistle-Blowers

We support the section on whistle-blowers as an important intervention to prevent and eradicate corruption in our society.[14] The bill is limited to the public sector, unwittingly creating the impression that corruption in the private sector is less serious. In our view, there should be zero-tolerance of corruption in both the public and private sectors. Therefore, the bill should be extended to protect whistle-blowers in the private sector.

Whistle blowers should be permitted to approach the enforcement agency for advice prior to blowing the whistle and for support once they have blown the whistle. Lack of protection may serve as a deterrent to blowing the whistle thereby defeating the objectives of the bill. If these objections cannot be realised in this bill, they should be addressed in a separate bill, especially one dedicated to deal with corruption.

7. Relation to other information disclosure laws

We are concerned that sections 2, 12 and 43, dealing with the relationship between this bill and other legislation may unwittingly interfere with existing statutory rights to information.[15] We suggest that these sections be rewritten so as to ensure that where there is conflict between legislation, the legislation most favourable to access must be followed. Proposed technical amendments are contained in Annexure C.

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contractual or delictual rights were involved. In Van Niekerk v The City Council of Pretoria Case No. N6/10611 TPD a reported judgement of Cameron J dated 28 October 1996, this interpretation was rejected. Cameron J held that section 23 rights included all rights including contractual rights and rights arising from delictual claims. This reasoning was followed in the unreported judgement of Traverso J in Aquafund (PTY) Ltd v Premier of the Province of Western Cape Case No. 12055/96 (15 April 1997).

[14] A Whistle-blower is a person usually employed in the public or private sector who reveals among others corruption, abuse of authority and unauthorised use of public funds.

[15] Sections 2, 12 & 43 state:

"2. This Act applies despite the provisions of any other legislation."

"12. Nothing in this Act, except section 56, prevents a governmental body from giving access to a record of that body in accordance with any other law."

"43. The information officer of a governmental body may body refuse a request for access to a record of the body if the record is open to public access in accordance with any other legislation, unless the Human Rights Commission determines that the manner in which access may be obtained and the fee payable for access in terms of the other legislation concerned is more onerous than the request fees access fee payable in terms of this Act."

8. Grounds for Refusing Access to Records

The Open Democracy Task Team recommended that "construction of the exemptions from the right to access information ought to be governed by the principle of maximum disclosure." This requires the exemptions to be narrowly drawn, content based rather than organisation-based or class-based, and rigorously connected to their underlying rationales. COSATU believes that this should be the test against which exemptions are examined. The bill currently provides for sixteen (16) grounds for refusing information. Two of these are mandatory, namely protection of personal privacy and protection of third party commercial information, the remainder are discretionary.

Exemptions from government's duty to disclose information while appropriate in general, contain several flaws. The trade secrets/confidential information exemptions are overly broad. Although the protection of this information is fair in principle, the provisions of section 31(1) are too broad and may curtail the right to access information. It is a matter of concern that the bill does not define commercially confidential information while it provides for mandatory protection of third party commercial information.

In terms of section 31(1) the information officer of a governmental body "must refuse a request for access to a record of the body if it contains among others trade secrets, financial, commercial scientific or technical information, other than trade secrets, supplied in confidence by a third party." In addition to the overly broad language in section 31(1), the right to access information may be undermined by stating that a governmental body **"must refuse a request."** This language may lead to increased conservatism among information officers who may read the word "must" and conclude that they have no discretion in deciding whether to provide access to available information. We recommend a narrower and more flexible approach such as is included in the Environmental Management Act, Act no. 107 of 1998.[16]

Previous drafts of the bill had a section called "Necessity of Harm" – which prevented information being refused on the basis of an exemption, if the harm envisaged by the exemption was unlikely to occur. We recommend that this section be reintroduced in the bill as it will prevent unreasonable refusal of information. [17]

COSATU welcomes the public interest override contained in section 44.[18] This section applies different criteria for different exemption clauses. For all exemptions the override operates if

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[16] The National Environmental Management Act, defines commercially confidential information as "commercial information, the disclosure of which would prejudice to an unreasonable degree the commercial interest of the holder: Provided that details of emission levels and waste products must not be considered to be commercially confidential notwithstanding any provision of this Act or any other law."

[17] "No provision in this Chapter shall be interpreted to require or permit the information officer of a governmental body to refuse a request for access if the harm that the provision is intended to guard against could not reasonably be expected to occur if the request were granted." Revised Draft May 1996.

[18] Section 44 reads as follows:

giving due weight to the importance of open accountable and participatory administration, the public interest in disclosure outweighs the need for non-disclosure contemplated by the provision as per section 44(2). However, some overrides only operate if further circumstances exist, for instance if the record would reveal evidence of substantial abuse of authority by an official of a governmental body.

However, the wording of the public interest override may be unnecessarily prohibitive, particularly section 44(1)(a) which provides that "the disclosure of the record would reveal evidence of **substantial**." This creates the impression that less substantial abuse of authority by a public official, etc, is permissible. In our view, evidence of abuse of authority, corruption etc, should dictate the disclosure of a record and should not be subject to the condition that it reveals "substantial abuse".

Proposed amendments related to exemptions are contained in Annexure E. The purpose of the amendment is to:

- define commercially confidential information and narrow the exemptions on this ground;
- clarify section 41 which will deny access to a record if that record cannot be found or does not exist. Steps should be taken to collate information where records do not exist;
- place a duty on the information office to refer requesters to institutions that possess such information in the instance of refusing information on the grounds that it is publicly available;
- add the protection and exercise of rights as a component of the public interest over-ride;
- reintroduce the necessity of harm override;
- reformulate section 44(1)(a) by deleting the word "substantial"; and
- extend the public interest and the necessity of harm overrides to the private sector with contextual changes.

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44(1) Despite any other provision of this Act, but subject to Chapter 3 of this Part, the information officer of a governmental body must grant a request for access to a record contemplated in section 29(1), 30(1), 33(a), 34(1)(c)(ii), (iii) or (vi) or (d) or 35 if ------

(a) disclosure of the record would reveal evidence of substantial ----
(i) abuse of authority, illegality or neglect in the exercise of a power or performance of a duty of an official of a governmental body;
(ii) injustice to a person, including a deceased individual;
(iii) danger to the environment or the health or safety of an individual or the public, or
(iv) unauthorised use of the funds or other assets of a governmental body; and
(a) giving due weight to the importance of open, accountable and participatory administration, the public interest in the disclosure of the record clearly outweighs the need for non-disclosure contemplated in the provision concerned.

(2) Despite any other provisions of this Act, but subject to Chapter 3 of this part, the information officer of governmental body must grant a request for access to a record contemplated in section 32(1) or (3), 33(b), 34(1)(a), (b), (c)(i), (iv) or (v), 36(1), 37(1), 38(1) or (2) or 39(1), if giving due weight to the importance of open, accountable and participatory administration, the public interest in the disclosure of the record clearly outweighs the need for non-disclosure contemplated in the provision concerned.

9. External review

The current bill provides for external review to take place in the high court. We believe that the high court is not best suited for a first point of adjudication of freedom of information disputes. It is not accessible, speedy or cheap. Even with the automatic assumption of urgency, which is provided for in the bill, it is unlikely that the time frames for court applications and dates of hearings envisioned in the bill will be accommodated in the high court. Further, the high court is formal, adversarial and prohibitively expensive.

We therefore support the proposal for an interim or intermediate procedure between the internal and external review by the courts. Such a procedure would be directed towards conciliation and mediation with a view to facilitating settlement of matters, and would utilise an informal and inquisitorial procedure. Although the idea was subsequently dropped, the Task Group identified several advantages associated with a tribunal as opposed to the high court procedure.

We recommend the establishment of the Open Democracy Appeals Board. The proposal for the Board is modeled on the Water Board established in terms of the National Water Act, No.36 of 1998. Its main focus will be to consider appeals referred to it regarding decisions to deny access to records by a governmental or private body. The role of the High Court will be to adjudicate appeals regarding the interpretation of law.

The Open Democracy Appeals Board will consist of a chairperson, a deputy chairperson and additional members as determined by the Minister. The chairperson and deputy chairperson may be appointed on a full-time or part-time basis. Additional members of the Board will be appointed on a part-time basis. Refer to Annexure F for proposed technical amendments.

The issue of mediation and conciliation of disputes needs further investigation. For instance the National Water Act empowers the Minister of Water Affairs to refer disputes to a mediation mechanism.[19]

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[19] Section 150(1) of the National Water Act provides as follows:

150. (1) The Minister may at any time and in respect of any dispute between any persons relating to any matter contemplated in this Act, at the request of a person involved or on the Minister's own initiative, direct that the persons concerned attempt to settle their dispute through a process of mediation and negotiation.

10. Accessibility of the Bill (plain language)[20]

One broad observation is that the bill is not easy to read or follow, making it inaccessible. While the intention was to make the rights contained in the bill accessible – even to illiterate people – the result is a long, bureaucratic bill, crammed full of practical detail that ironically make the bill itself inaccessible. For instance, when examining the exemptions provisions it becomes apparent that they are drafted in a convoluted and confusing way. The bill needs to be drafted in accessible or plain language. The bill falls short of some of the plain language features (footnote 9) especially regarding cross-references and does not contain flow charts like the LRA.

Legislation is most often written for lawyers even when they are not the most frequent users of the law. For this reason we recommend a legal structure which facilitates an understanding by the most likely reader. Plain language texts (compared with traditional legal texts) has the following benefits:

- greater clarity of provisions;
- greater certainty of rights and responsibilities;
- quicker access to information;
- wider profile of people who can understand its contents;

---

[20] Plain Language Features:

(a) Organisational Features

The legislation is written from the point of view of the most likely reader. That means that:

- The most important information often appears first,
- Provisions are structured to limit the number of cross references,
- Similar information is grouped together, and
- If the reader is required to follow a procedure the provisions are written in the sequence of the procedure.

(a) Language Features

- Unless it is legally necessary, provisions are drafted in the active voice (as opposed to passive voice). Then the reader knows who is responsible for the actions;
- Sentences in traditional legal text are notoriously long. In plain language drafting, sentences are kept reasonably short so that the reader is able to carry information from beginning of the sentence to the end;
- There are no Latin words. The concepts, however conveyed in those words are conveyed in English.
-

Navigational aids: Plain language texts assist readers find the information they are looking for. To assist the reader, the following are included:

- A contents page;
- Footnote (or side bar notes) to provide examples, summarise a cross reference or refer to different parts of the legislation which has a bearing on the provision.;
- Headers at the top of the page with the chapter name and section number and an index at the back of the legislation , which will help readers locate information on a particular topic.

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- less time is spent explaining the law;
- less disputes about the interpretation of provisions; and
- texts which follow plain language statutes are more likely to be plain themselves (e.g. forms, regulations, etc.).

11. Information Officers and Access Fees

We commend the drafters' sensitivity to the high rate of illiteracy in our society. In particular, the designation of the information officers (section 4) and the duty to assist requesters (section 14) would contribute to facilitating access to government held information.

We recommend that the information officer assist requesters to craft less costly alternatives where it will be costly to produce the information that has been requested. In addition, where access fees would cause economic hardship to the requester and disclosure will promote transparency, the information officer should waive the payment of such fees. Specific guidelines regarding waiver of fees on this ground could be incorporated in regulations. The waiver of fees should be extended to the private sector. For the proposed technical amendments refer to Annexure D.

In our view, access fees should be limited to reproduction and postal costs. Exorbitant fees will practically place the bill beyond the reach of people who lack the requisite resources. Therefore section 24(3) is important in this regard. In terms of this section a personal requester has to pay only for reproduction and a commercial requester must pay an access fee for reproduction and for search and preparation, an approach we broadly support. However, we are concerned that the requirement in terms of section 24(4) that non-commercial requesters pay similar amounts to commercial requesters, may unwittingly restrict access by organisations who do not possess the resources. Thus the fee waiver will also be important in this regard.

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12. Implementation

The bill would demand a sea change in attitudes in both the public and private sector, which under apartheid have become accustomed to operate under a blanket of secrecy. It should complement and consolidate the Batho Pele initiative (the White Paper on Transforming Public Service Delivery), i.e. ensuring a responsive, accountable and transparent public service in line with values for public administration contained in the constitution.[21]

A wholesale implementation of the bill, while desirable, may become unworkable. Therefore a staggered approach should be considered with a number of pilots identified. During the first

[21] According to section 195(1) of the constitution public administration must be governed by the democratic values and principles enshrined in the constitution, including the following principles

(e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.
(f) public administration must be accountable.
(g) Transparency must be fostered by providing the public with timely, accessible and accurate information

phase the appointment and training of information officers is critical. Secondly, this must be accompanied by public education and training on the use of the legislation.

The capacity of the Human Rights Commission to execute the duty imposed by this bill should be greatly enhanced to avoid a situation of creating an 'unfunded' or under capacitated mandate. It is important that the commission set up a dedicated structure to deal with the Open Democracy Act and allocate adequate resources to such a structure.

13. Conclusion

COSATU supports the broad objectives of the bill to encourage transparency and accountability in the public and private sectors. It is instrumental in ridding our society of the spectre of secrecy that characterised the apartheid system. The bill is, however, defective in key areas such as its failure to give full effect to section 32(1)(b) and in other respects underlined in the submission.

For the bill to receive our unqualified support, these areas should be addressed. We have forwarded proposals, which are geared towards enhancing the bill in key areas of concern. We hope that the portfolio committee will interrogate this submission and we are open to discussion on any issue canvassed in this submission.

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APPENDIX TEN

CONGRESS OF SOUTH AFRICAN TRADE UNIONS – OPD 64C

(COSATU)

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OPD64c

COSATU SUPPLEMENTARY SUBMISSION ON THE OPEN DEMOCRACY BILL [B67-98]



PRESENTED to the Ad-hoc Joint Committee on the ODB

15 October 1999

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1. Introduction

The objects of the Open Democracy Bill are commendable, as they will promote open governance thereby enhancing democracy. Entrenching open democracy will contribute to uprooting the culture of secrecy pervasive in both the private and public sector. For open democracy to thrive accurate information should be actively disseminated to the public The 'information age' underscores the importance of information in decision-making and in everyday transactions.

COSATU made a detailed submission to the previous portfolio committee on Justice on the 23 March 1999. We hoped that the initial public hearings will translate in further drafting work being undertaken to address the substantive flaws in the bill. It is disappointing that the process is starting *de novo* and no serious attempt has been made to redraft the bill to address the defects, which had been identified during the last hearings.

The purpose of this supplementary submission is twofold. First, to update elements of the previous submission by incorporating new developments. Second, to reiterate the positions outlined in the previous submission by way of underlining additional concerns on the of bill. We will focus on the following four issues namely:

- access to privately-held information.
- the right to know;
- whistle-blowers; and
- enforcement mechanisms.

Over the last few months we have done further research and solicited legal opinion especially on the horizontal application of the bill and the right to know paradigm. COSATU worked closely with the Open Democracy Campaign Group, which is a loose coalition of civil society organisations, comprising:

- Black Sash;
- Environmental Justice Network;
- Human Rights Committee;
- IDASA;
- Legal Resources Center;
- NADEL;
- South African NGO Coalition; and
- Southern African Catholic Bishop's Conference.

We broadly endorse the submission made by other members of the Open Democracy Campaign Group, particularly around enforcement mechanisms, the need to regulate access to meetings, and the need to review the blanket exclusion of cabinet and the judiciary. While we are not addressing these issues in detail in the submission our approach is to call for a balance between making structures like cabinet comply with the legislation with reasonable grounds for refusing information and access to meetings. This submission, however, focuses, specifically on areas canvassed in our previous submission. It must be read in conjunction with the initial submission presented before the Justice Portfolio Committee on the 23 March 1999. Other members of the group will deal with the other issues in detail.

2. Access to privately-held information

Section 32(1) of the Constitution provides that:

> *Everyone has the right of access to –*
> *(a) any information held by the state*
> (b) *any information that is held by another person and that is required for the exercise or protection of any rights.*

Section 32(2) requires that legislation be enacted to give effect to this right by the 4 February 2000. Until this legislation is passed the transitional arrangement remains in force.[1] This means that the right of access to privately held information is held in

[1] The transition arrangement is that until legislation is passed section 32(1) will read as follows: "Everyone has the right of access to all information held by the state or any of its organs in any sphere of government in so as that information is required for the exercise or protection of any of their rights." Further in terms of schedule 6 item 23(1) if legislation envisaged by section 32(2) is not enacted by the due date, the demand for national legislation lapses. In addition, *Certification Judgement I* (paragraph 82) states that if legislation is not enacted within 3 years section 32(2) and item 23(2)(a) falls away and suspended section 32(1) automatically comes into operation.

abeyance until given effect in legislation or is automatically triggered by the lapsing of the requirement to pass legislation. The bill as tabled only gives very partial effect to privately held information limited to access to personal information. Thus, the bill substantively fails to give effect to its constitutional mandate.[2]

The current bill is clearly flawed as it fails to give full effect to the section 32(1) right, including access to privately held information. The following analysis maps a number of likely scenarios that may arise from this flaw in the bill. In the main our belief is that if the bill is passed in its current form the right to access information will automatically come into effect. However, this will be unregulated and will depend on the court's interpretation. This scenario is undesirable for it will lead to confusion. Holders of information would not know which information they can justifiably withhold and under what circumstances. Requesters would not know how to lodge requests for information. In this vein we are in favour of incorporating the right to access privately held information in the bill.

Scenario 1

The following observations are premised on legal opinion provided to the Open Democracy Campaign Group. **If no law on access to information is passed** in the current parliamentary session (and consequently no such law is passed prior to the expiry of the stipulated three year period), section 32(2) will automatically fall away. Some doubts have been cast on whether section 32(1) of the constitution immediately kicks in.

Doubts were expressed on the basis that item 23(2) of Schedule 6, by virtue of which the provision is currently suspended, does not specifically say that section 32(1) revives after three years. Rather, the clause states that section 32(1) is suspended (with the wording of section 32(1) being deemed to correspond in general terms with the interim Constitution's equivalent right) "[u]ntil the legislation envisaged in sections 32(2) of the ...new Constitution is enacted." Therefore, there are views that suggests, the transitional clause enumerated in item 23(2) - which contains no reference to the access to information held by private persons – would continue to define the right of access to information in a more restrictive way.

The doubts and fear alluded to above are, however, unfounded. There are three reasons for concluding that, even if the legislation envisaged in section 32(2) is not enacted within the stipulated time period, the section 32(1) right automatically comes into operation on the expiry of the three year period provided for in items 23(1) and 23(3) of Schedule 6.

[2] The Bill as tabled only grant access to privately held information to access and correct personal information held by any body controlling a data base. This is a limited access to information concerned mainly with personal information whereas the constitutional right is much wider as it grants access to privately held information required for the exercise or protection of a right.

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First, the constitutional court itself interpreted the transitional arrangement put in place by item 23 in the First Certification Judgement along the line enumerated above.[3] The Constitutional Court understood that section 32(1) would come into effect after three years, at the very latest. This is therefore how section 32(1), read with item 23 of Schedule 6, and must be interpreted.

The **second** reason for concluding that section 32(1) must come into effect after a maximum of three years is that an indefinite suspension of the section 32(1)(a) right would have meant that the section 32/item 23 scheme did not comply with the requirements of Constitutional Principle IX.[4] Constitutional Principle IX required that the Constitution provide for access to information in order to ensure and facilitate open and accountable government. Access was not permitted to be restricted to situation where it was needed for the exercise of or protection of a right. Therefore, if the suspension of the section 32(1) right had not been restricted to a fixed, and relatively short, period under item 23(1) this would have not satisfied the requirements of Constitutional Principle IX. This is therefore not an interpretation that should, or could be adopted at the present time.

The **third** reason for reaching the conclusion outlined above is that the alternative reading would result in an absurdity – something that should always be avoided when interpreting legislation. The absurdity would be this: Item 23(2) suspends the operation of the section 32(1) right until the legislation envisaged in section 32(2) is enacted. But after three years, such legislation can never be enacted. Therefore section 32(1) would never come into effect, something that would surely never have been intended as (i) section 32(1) is a fully-fledged constitutional provision that can only be amended with difficulty, and (ii) item 23 is clearly intended merely as a "transitional provision". Therefore, the alternative reading cannot be adopted for this reason as well.

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[3] Certification of the Constitution of the Republic of South Africa, 1996 (10) BCLR 1253 (CC) at section H (At 1291C-1292G; paras [82]-[87]). In this regard it is worth reiterating that, at para [42]and [43] of the First Certification Judgement, the Court emphasised that:

> "a future court should approach the meaning of [a particular provision of the 1996 Constitution] basis that the meaning assigned to it by the Constitutional Court in the certification process is its correct interpretation and should not be departed from save in the most compelling circumstances If it were otherwise, an anomalous and unintended consequence would follow. A court of competent jurisdiction might in the future give meaning to the relevant part of the [Constitution] which would have made that part of the [Constitution] not certifiable...at the time of the certification process."
>
> This interpretative maxim has particular resonance in the present situation because, if the Constitutional Court had adopted a reading of the section 32/item 23 arrangement on the lines suggested then it would have been able to certify that this part of the Constitution complied with the Constitutional Principles.

[4] Constitutional Principle IX stated that "Provision shall be made for freedom of information so that there can be open and accountable administration at all levels of government."

Scenario 2

The second scenario is a case where a law that partially protects the right in section 32(1) is passed. On the basis of the preceding argument, **it is clear that no matter what legislation is passed, and no matter what the extent of the compliance with section 32(1), the right in section 32(1) will come into force at the latest by February 2000.** It is not, however, as clear whether part of section 32(1) can come into effect prior to that date, as a result of the enactment of legislation giving effect to that right.

On the one hand, it could be argued that there is no reason why the right in section 32(1) could not be given effect to on a piecemeal basis. For, the term "national legislation" can, in terms of section 239 of the Constitution, include more than one law. So, section 32(1) could be given effect to by more than one parliamentary statute, or an Act of Parliament and subordinate legislation. And these could be enacted at different times.

On the other hand, one might contend that, although legislation can be enacted at different times to give effect to the right, until such legislation is enacted (or until three year period expires), the section 32(1) right remains suspended.

Whichever of the views expressed above is favoured, there is no doubt that it is not possible for only part of section 32(1)(b) to come into effect after February 2000.

Whether or not section 32(1) is activated by any legislation enacted in the current parliamentary session, section 32(1) will be in full force and effect from February 2000. But there still remains the question of whether legislation like the ODB which only gives partial effect to the section 32(1) right will have the status of section 32(2) legislation if, by the end of the three year period, the whole section 32(1) right has not been given effect to by national legislation. Again the question is a difficult one, and therefore one which cannot be answered with any confidence.

However, it can be proposed that where there is clearly a *lacuna* in the legislation, the Court will step into the breach until such time as there is legislation regulating that area. Therefore, if the ODB is passed in its current form, access to privately held information would be left to the court to interpret. However, it is desirable that national legislation be passed to give effect to the constitutional right to access privately held information. As argued in the SACC's submission if the ODB offers no further clarification of the limitations on that right, the mechanism by which it can be exercised, and the manner in which it is to be enforced, confusion will ensue. Holders of information will have little guidance concerning what information they must disclose and what they may justifiably withhold.

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In the absence of any intermediate appeal and review mechanism, applicants seeking to challenge a refusal to disclose information will have recourse only to a High Court – a slow, costly and adversarial remedy. If the review process is out of reach of most applicants, private bodies will have the incentive to err on the side of non-disclosure, rejecting all but the most trivial and unthreatening requests and telling other applicants to join the lengthening queue outside the courthouse.

Against this background and in recognition of the complications that will arise from giving partial effect, we have argued for detailed provisions regulating access to privately held information. Pursuant to this objective, alongside the SACC we submitted a model to give effect to the right to access privately held information. Detailed provisions regulating access to privately held information remains our preference. Nonetheless we recognise the complexities that may well arise for instance the need to differentiate between *natural and juristic persons*. Secondly, on pragmatic grounds we realise that there may be time constraints to incorporate a detailed section to regulate access to privately held information.

Consequently, we propose a fresh approach to the incorporation of access to privately held information. This would at the minimum:

- incorporate in the bill a simple set of provisions to govern access to privately held information in the interim;
- a commitment to the enactment of further legislation to elaborate the provisions regulating access to privately held information; and
- extending horizontal application to other aspects of the bill, especially, the review and enforcement mechanism and the whistle blower provisions.

The proposed framework is not intended to serve as a final legislation elaborating the right contained in section 32(1)(b). It serves to regulate access to privately held information. The manner of access, the obligation to disclose, and review and enforcement mechanisms would be elaborated more fully in subsequent legislation. Further, legislation should be enacted possibly in the form of an Open Democracy Amendment Bill or a new bill governing access to privately held information. Sectoral legislation (such as the Environmental Management Act) will also assist in regulating access to privately held information. However, it is important that the ODB as the overarching information disclosure law take precedence over sectoral legislation.[5]

The proposed legal language is contained in Annexure A and is in part derived from the model developed by for the Open Democracy Campaign Group, by the law firm Cheadle, Thompson and Haysom, albeit with modifications. The amendment seeks to:

[5] The bill is an overarching freedom of information statute, which must set standards for information disclosure. It is further important to emphasise that access to privately held information in terms of the Constitution is contingent upon the exercise or protection of rights. Some of these rights may be sufficient to override the need to protect commercial information and personal privacy.

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- codify the right of access to privately held information;
- define the grounds for refusing information subject to the public interest override. COSATU proposes an additional element be included in the public interest override; namely where the exercise or protection of a right outweighs non-disclosure information should be provided;
- require further legislation to be passed by December 2000. In addition, the Minister shall issue regulations in consultation with the Human Rights Commission and the Minister of Trade and Industry.

3. The Right to Know: Expanding Proactive Disclosure

In our view, a requester-driven approach has its inherent limitations, for instance it will be favourable to those who have the resources and the time to lodge requests for information and also have the resources to explore remedies in cases where disclosure is denied. The bill's attempt to ameliorate this situation by requiring information officers to assist requestors, notwithstanding, a requester-driven approach will still place the bill out of reach of a significant proportion of the population.

It is against this background that we argue for maximum proactive disclosure of information independent of request. Proactive disclosure or the right to know contains two aspects; (i) proactive and accessible disclosure in the public interest by government of information in its possession; and (ii) the active collection by government of information from the private sector and its proactive dissemination to the public. Active collection and dissemination of information from private bodies by governmental bodies will reinforce the right of access to privately held information. The bill contains proactive disclosure provisions albeit in a limited form.[6]

There are important lessons to be drawn from international jurisprudence on this question. For instance, in the United States the Emergency Planning and Community Right to Know Act requires manufacturing facilities to submit annual estimates of toxic chemical releases to the air, water, and land. That data, the Toxic Releases Inventory, is then posted to the Internet for the Public to use.

To realise the objective of incorporating the right to know paradigm in the bill, COSATU proposed the following:

- mandating governmental bodies to proactively disseminate information in their possession. Governmental bodies, with the assistance of the GCIS should consider existing records that should be proactively disclosed. In addition, to mandate

[6] Section 8 provides mandatory disclosure of government records indicating public safety or environmental threats. Section 6 directs departments to proactively disseminate certain basic information about their functions. The right to know should go beyond these provisions, however, by requiring the government to actively disseminate a broad range of important information in a way that is easily accessible, understandable, and usable by the public

governmental bodies to collect information, other than environmental information, from private bodies, which they should actively disseminate.

- placing a duty on private bodies, particularly corporations to actively disseminate information in the public interest (e.g. consumer information such as labeling of goods and services),
- mandating the Government Communication and Information Systems (GCIS) after consulting the relevant civil society bodies, to assist governmental bodies to identify records that should be proactively disseminated in line with the prescriptions by the Minister of Justice;
- to empower the Minister to prescribe locations where information should be disseminated. This should meet the broad criteria of accessibility, and consideration should be given to utilising the infrastructure of the Post Office and the Tele-centers or Community Multipurpose Centers. Popular forms of media such as pamphlets, etc. should be utilised as a means to disclose information as they are easily accessible; and
- an amendment to section 8 to mandate governmental bodies to actively collect and disseminate environmental information. It must be noted that the provisions of the National Environment Management Act regarding the disclosure of information are interim pending the passing of this legislation.

In addition to these points raised in our previous submission we propose the inclusion of general principles that will guide the proactive disclosure of information. The over-arching principle should be the proactive disclosure of information that is in the public interest to know. This should be defined to include information that assists people to identify violations of their human rights as recognised in the Bill of Rights and relevant human rights treaties, and to defend these rights. In the South African context, it is particularly important that there is proactive disclosure of information that assists disadvantaged groups to gain access to socio-economic rights, and to identify the impact of private-sector activity on these rights.

As a minimum requirement, the ODB should incorporate an enabling framework to a Right To Know paradigm, as proposed by COSATU. In the long run, it is important to consider a separate Right To Know Act, which will be broader than the enabling framework entailed in the OBD. There are many aspects that can be covered in such legislation, which may not be possible to incorporate in the bill in the current stage. For instance, when does a provide party become liable to comply with the Right To Know Paradigm. For instance the US's Emergency Planning and Community Right to Know Act specifies when a private facility become liable to comply with the provisions of the Act if they have reached the threshold or exceed the threshold regarding hazardous substances which they plan to release in the air, water, etc.[7]

[7] Any facility that has present any of the listed chemicals in quantity equal to or greater than its threshold planning quantity is subject to the emergency planning requirements. In addition the State Emergency Response Commission (SERC) or the Governor can designate additional facilities, after public comment, to be subject to these requirements. Covered facilities must notify the SERC that they are subject to these requirements within 60 days after they begin to have present any of the extremely hazardous substances in an amount equal to or in excess of the threshold planning quantities.

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6. Conclusion

COSATU fully supports the objective of the Open Democracy Bill to inculcate a spirit of openness by facilitating disclosure of information. However, the bill in its current form is flawed since it fails to grant access to privately held information as required by section 32(1)(b) of the Constitution. In addition, whistle-blower provisions of the bill have to be recast to *inter alia* extend them to the private sector and reformulate criminal sanction in way that it does not undermine whistle blowing. The enforcement mechanisms also need to be rethought since the High Court is an inappropriate institution to refer information disclosure disputes. Maximum proactive disclosure of information should also be encouraged and the ODB should incorporate an enabling framework to realise this objective.

It is hoped that the weaknesses of the bill will be addressed by appropriate legal drafting to meet our concerns. In this regard, we hope that our proposed legal amendments will assist in the process. Notwithstanding its limitations, the ODB is a bold attempt to encourage information disclosure. In some instances the bill tends to veer towards non-disclosure especially due to the vagueness of some of the grounds for refusing information such as lack of a precise definition of commercial information.

In our view, there is a need to adopt a balanced approach to avoid placing too onerous burden on the state's resources and to balance the non-disclosure provisions with the objective to disclose information. On these two counts the bill has attempted to achieve the balance, albeit in an uneven fashion. It is not expected that the bill should lead to disproportionate cost effects for the fiscus.

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7. Annexures

[ ] = omit

___ = insert

7.1 Summary of Proposals Contained in the Previous Submission

1. The bill should incorporate the **right to know principle**, which will facilitate greater proactive disclosure of information. There is a need for a multi-stakeholder process to analyse which records in the possession of the departments should be routinely made available. As part of this exercise the GCIS, in collaboration with the Human Rights Commission, should provide guidelines to departments, which records should be proactively disclosed, based on an evaluation of public information needs. The infrastructure of the Post Office and the Tele-Centers/Multi-purpose Community Centers should be utilised to disseminate information to the public. Proactive disclosure of information should be extended to the private sector and the minister should be empowered to prescribe accordingly.

2. **Horizontal application:** The bill should be substantially amended to comply with section 32(1)(b) of the Constitution, i.e. access to information held by private bodies required for the exercise or protection of rights.

3. The Bill needs to clearly define use of the term (information required for) **protection of rights**

4. The **whistle-blower provisions** should be extended to the private sector to protect whistle-blowers in the sector. Further, the body charged with enforcing this bill should be empowered to assist whistle blowers.

5. The **relationship between the bill and other information disclosure statutes** should be such that there is no unintended restriction of disclosure. The law that favours disclosure should prevail in the event of a conflict between these laws.

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4. Whistle Blowers

The concerns with the Whistle-blower section are twofold. First we believe that the section needs to be extended to the private sector. Second, some of the provisions of the bill are problematic and require adjustment. Consideration should be given to expanding the list of bodies that a person could disclose information to.[8] The limited number of bodies to which an individual can reveal corruption in terms of the bill will not protect disclosures to the police or anybody not listed in clause 63(3). In some instances it may be desirable for an employee to disclose wrong doing to his/her trade union which can act on his/her behalf.

Second, section 85(b) undermines most of the whistle-blower provisions because it appears to say that is it a criminal offense "if the whistle-blower did not know if the information was true". The underlying intention to prevent malicious allegations being made against people or organisations is legitimate, but the formulation has the effect of weakening the other provisions on whistle-blowing. At the very least the words "not knowing" must be deleted in this clause, or it must be omitted.

While COSATU has not formulate legal drafting on this section, however, the following needs to happen:

- The provision of the bill should be extended to the private and voluntary sectors;
- Ensure it fully protects internal whistle-blowing;
- Remove the criminal sanction in clause 85.
- Scrutinise the circumstances where media disclosures should be protected, and if necessary, consider amendments;
- The range of designated bodies should be reconsidered possibly increasing them in the ODB

5. Enforcement Mechanism

We reiterate our position that the High Court is an inappropriate mechanism for external review. It is very slow, costly and highly adversarial, which can serve to intimidate people from seeking to lodge appeals against refusals to disclose information. The High Court mechanism is made more inappropriate if private bodies are to be included in the ambit of the bill. Therefore, an intermediate structure(s) such as the Open Democracy Tribunal proposed in our submission should be considered.

[8] Current subsection 63(3) limits disclosure to *inter alia* a committee of parliament, the public protector, the Human Rights Commission and so forth.

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6. **Ground for refusing access to records:** The bill should define trade secrets/commercially confidential information. In addition, the overly broad language of the third party commercial information needs to be narrowed. The necessity of harm exemptions override should be reintroduced in the Bill. The exercise and protection of rights must be a component of the mandatory disclosure in the public interest.

7. **External Review:** An intermediate body/mechanism should be established to adjudicate information disclosure disputes. COSATU proposes the establishment of the Open Democracy Appeals Board to settle disputes regarding information disclosure as such an intermediate body. More investigation is required regarding the mediation of information disclosure disputes. The High court will hear appeals regarding the interpretation of the law while the Appeals Board will hear appeals on decisions regarding denial of access to records by both the public and private sector.

8 A **phased/staggered implementation process** should be considered: first to appoint information officers and secondly to educate the public on how to use the legislation. The Human Rights Commission should receive sufficient resources to enable it to perform the duties imposed by this law. In addition, the Commission should establish a specialised body to deal with the bill.

9. To facilitate greater access, the information officer should be **empowered to waive fees,** where such waivers will allow for access to disadvantaged people.

10. The bill should be redrafted in **plain language** to make it accessible and readable.

The full COSATU Submission can be found on COSATU's homepage: http//www.cosatu.org.za

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7.2 Horizontal Application of the Bill

Item	Section	Proposed Amendment	Comment
1.		In the initial description of the bill, prior to the table of contents, insert the following language: To give effect to the constitutional right of access to any information held by the state and any information held by another person and which is required for exercising or protecting any rights; to make available…	This makes it clear that the object of the bill is to grant access to privately held information as required by section 32(1)(b) of the Constitution.
2	1.	Amend the definition of "private body as follows: (xxi) "private body" means a person other than a governmental body [in possession of or controlling a personal information bank]	The redefinition of private body is pursuant to the objective of giving effect to section 32(1)(b) of the constitution.
3.	3.	Insert new 3(1)© after current (1)(b) as follows: (c) to give effect to the constitutional right of access to information held by another person which is required for the exercise or protection of any rights;	
4.	4.	Insert new section after current section 4 and before current part 2: **Delegation of powers by head of a private body** 5(1)(a) The head of a private body may, subject to the conditions determined by the head, delegate a power conferred or a duty imposed on the head by this Act to any employee of the private body; (b) Any delegation in terms of subsection (a) above (i) does not prohibit the person who made the delegation from exercising the power concerned or performing the duty concerned himself or	This amendment empowers head of private body to delegate authority and specify the conditions for such a delegation.

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		herself; (ii) may at any time be withdrawn or amended by that person. (2) Any right or privilege acquired, or any obligation or liability incurred, as a result of a decision in terms of a delegation in terms of subsection (1) is not affected by any subsequent withdrawal or amendment of that decision	
5.	5.	Amend section 5(2)©(ii) as follows: (ii) access to a record of a private body [containing personal information]; and	
6.		Insert new Part 4 (page f8) and renumber current Part 4: Part 4: Access to Privately Held Information 48. Everyone has the right of access to any information that is held by another person and that is required for the exercise or protection of any right.[9] 49. Legislation further regulating this right must be enacted by 31st December 2000. 50. Pending the promulgation of legislation envisaged by section 49, the following provisions shall apply – (1) A request for information inter of section 48 must – (a) be addressed in writing to the person from whom information is required; (b) specify sufficient particulars to enable the receiver of the request to identify the information requested; (c) identify the right the requester is seeking to exercise or protect and provide a reasonable explanation of why the requested information is required for the exercise or protection of that right; (d) comply with any regulations promulgated in term of section 51 below. (2) A request for information in terms of section 48 can be refused only – (a) For the reasonable protection of personal privacy;	

[9] In our view "any right" should be interpreted to include constitutional rights, statutory rights and common law rights (e.g. contractual and delictual rights).

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		(b) For the protection of trade secrets or other commercial information the disclosure of which could reasonably be expected to cause unreasonable harm to the person from whom the information is requested; (c) if the information relates to a third party and the third party has not consented to the disclosure of the information; (d) if the granting of the information would be likely to endanger the life or physical safety of any individual; (e) if the granting of information would endanger the life or physical safety of a particular building, installation or information storage, computer or communication system; (f) if the information is already publicly available; (g) if the request is manifestly unreasonable, frivolous, vexatious, or formulated in too general a manner. (3) (1) Despite subsection (2) a request for access to privately held information must be granted if the public interest in the disclosure clearly outweighs the need for non-disclosure or if the disclosure of information would reveal evidence of substantial – (a) Abuse of authority, illegality or neglect in the exercise of a power or performance of a duty; or (b) Injustice to a person, including a deceased person; or (c) Danger to the environment or the health and safety of an individual or public. (2) The applicant's interest in having access to the information for the purposes of the exercise or protection of any rights outweighs the need for non-disclosure. 51. (1) The Minister, after consulting the Minister of Trade and Industry and the Human Rights Commission, may make regulations to give effect to the provisions of section 50; provided that such regulations are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom	

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		(2) The Minister must, before making regulations in terms of subsection (1)publish a notice in the *Gazette* – (a) setting out the draft regulations; and (b) inviting written comments to be submitted on the proposed regulations, specifying an address to which and date before which the comments must be submitted, which date may not be earlier than 30 days after publication of the notice.	
7.		The enforcement mechanisms are deliberately left out subject to parliament's decision on this matter. We believe that the proposal made in our initial submission is still valid.	

7.3 The Right to Know

Item	Section	Proposed Amendment	Comment
1.	7	Insert new section 7 to read as follows and renumber current section 7 "7.(1)(a) Governmental bodies shall take steps to actively disseminate information without request to the public; and (b) Each governmental body shall, in terms of this section, prepare an index of records to be proactively disclosed and make it available to the public. (2) The Government Communication and Information System (GCIS) shall, after soliciting from civil society bodies, assist governmental bodies to – (a) identify records of a body that should be actively disseminated to the public either because – (i) it will assist people to participate in the processes of government policy-making and administration; (ii) the records have been frequently requested in terms of this Act, or (iii) it will facilitate access to and protection of any rights. (b) Design and implement effective methods for actively disseminating this information.	This proposed amendment replaces the proposed amend in page 35 of our initial submission. The new insertion is highlighted and provides that the Minister issue regulations on the Right To Know Approach guided by the principle of proactive disclosure of governmental records and active collection and dissemination of privately held information by governmental bodies.

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		(3) In exercising the authority under subsection (2) ,the Governmental Communication and Information System must give priority to information that will promote the rights in the Bill of Rights and to assist the public to gain access to and exercise these rights; (4) The Government Communication and Information System shall develop tools for use by government bodies in all spheres of government to identify records that should be actively disseminated to the public and for effectively disseminating such information to the public; (5) The Government Communication and Information System shall investigate the feasibility of establishing government information centers throughout the Republic to serve as central repositories of the manuals developed in terms of section 6 of the Act and other records for active dissemination to the public by governmental bodies. **(6) The Minister shall issue regulations, by notice in the *Government Gazette*, guided by the following principles;** **(a) the proactive collection and dissemination of public interest information held by government;** **(b) the proactive collection and dissemination of public interest information held by the private sector;** **(c) ensuring accessibility of public interest information to disadvantaged groups** **(d) public interest information includes but is not limited to, information that is required by the public to gain access to, exercise or protect any rights in the Bill of Rights.** **(e) The regulations must make particular provision for the proactive dissemination of information to disadvantaged groups that will assist them to gain access to, exercise or protect the rights in the Bill of Rights** (7)(a) The Minister shall, in the public interest, prescribe that certain categories of private bodies actively disseminate information without formal request; (b) the bodies contemplated in paragraph (a) shall take necessary steps to disseminate information that will promote the rights in the Bill of Rights and	

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	assist the public to gain access to, exercise or protect these rights.	

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APPENDIX ELEVEN

BLACK SASH TRUST

(BLACK SASH)

University of Cape Town

BLACK SASH TRUST
National Office

4th Floor 12 Plein Street Cape Town 8001 PH: (021) 461-7804 FAX: (021) 461-8004 email: sashct@iafrica.com

Submission with regard to the Open Democracy Bill [No 67-98]

The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

These words, taken from the preamble of the Open Public Meetings Act of the State of Washington, give one perspective on why the right to access to information is so important.

Another perspective is that of the advice seekers that we see in the Black Sash offices for whom this right, along with the right to administrative justice, is key to unlocking another right, the right to social security. The right to know - why a decision has been made , how it is made and the right even to witness the deliberations leading to the decision: this right is a critical part of an open and democratic society.

It is for these reasons that the Black Sash welcomes the tabling of this Bill. We have a number of reservations about the drafting of this Bill and certain of its parameters - these should not detract from our general applause of the objects of the Bill.

1.The first reservation we wish to raise regards the omission from this Bill of the section on open meetings which was contained in previous drafts of the Bill.

In comparative jurisdictions this question is dealt with differently. According to the research available to us Canada and England do not have national legislation which deals with this

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issue. Instead it is dealt with at provincial level. It is particularly appropriate, therefor, that this legislation is being dealt with first by the chamber dealing with provincial concerns most closely, and we believe that the National Assembly Portfolio Committee should pay close attention to the reasoning and argument of this committee on this Bill.

In England the legislation regarding open meetings relates specifically to meetings of local government councils. Our Constitution also refers to the meetings of local councils, stating that

> **160 (7) A Municipal Council must conduct its business in an open manner, and may close its sittings, or those of its committees, only when it is reasonable to do so having regard to the nature of the business being transacted.**

This Bill should therefore AT VERY LEAST address the regulation of such access, with regard to notice periods for meetings, etc. In Canada open meetings are also dealt with at provincial level.

In the United States there are laws to this effect at both state and federal level. These laws serve to clarify for the people and the state their responsibilities and rights with regard to how open meetings should be conducted.

For example, the state of Idaho, has an open meetings law which regulates what is and is not a governing body, requiring that it be a public agency which consists of two or more people, with the authority to make decisions for or recommendations to a public agency regarding any matter. It regulates what meetings may take place in closed session, and deals with what it calls "executive sessions" where matters such as staff decisions, labour negotiations, litigation etc. are discussed.

The sections in the Open Democracy draft Bill are more extensive, and more detailed.

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If they are not reincorporated into the Bill the parameters of these rights will have to be established through costly and time consuming litigation. We would strongly urge this committee to reincorporate the open meetings sections, although it may be more practical to make the legislation more flexible, allowing for special meetings and emergencies.

"Emergencies" should however be closely defined, and there should be a requirement that at least an effort be made in good faith to provide advance notification, even in an emergency.

2. We are very concerned about another issue. This is the question around whether or not the right to access to information as contained in section 32(1) is actually fully enacted in this legislation. This legislation does not deal adequately with the second part of that clause.

The legislation does make provision for

- access to personal information held by private bodies.
- correction of inaccurate information about personal information held by private or governmental bodies
- the use of and disclosure of personal information held by private or governmental bodies
- collection, retention accuracy and disposal of personal information.

It does not deal with *any* information that is required for the exercise or protection of *any* rights in the context of private bodies or natural persons.

The Constitution requires that national legislation must be enacted to give effect to sections 32(1) (a) and (b). If it does not fully give effect to this right, what are the consequences? It may be that the requirement to pass legislation in section (2) simply falls away and that section 32(1) then comes into operation, and the caveat of section 31(2), that the legislation may provide for reasonable measures to alleviate the administrative and financial burden on the state, also falls away, and only the general limitations clause applies. It is not clear what effect this will have.

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Alternatively, the Constitutional Court may be approached to order Parliament to amend the legislation so that it complies with section 32(1). This would result in a lack of clarity around this important facet of this right. It would really assist matters if this confusion is dealt with by this Committee, and that the second part of the right be dealt with fully in legislation.

It is very often the relationship of the individual and private bodies which is most important to the average person, and often that relationship is one of a great imbalance of power. The divide between the public and the private has become increasingly blurred, and through GEAR and the current policy of privatisation, will become more so. What used to be public functions will become private - but the relationship of the individual to the private body may be one in which the private body holds comparative power to the state.

3. Information officers, in terms of section 4 of the Bill, must be appointed to all governmental bodies. There is no indication in the legislation as to the status of information officers. It is apparently the experience in America that where information officers are not sufficiently senior, they just are not able to access information held by more senior officials. The very hierarchical nature of South African government in the past has only begun its transformation and the problem is likely to be an even greater one in South Africa. If this law is to work for people, then the people who are there to facilitate its functioning should be properly empowered to do so.

4. The Human Rights Commission is tasked with a number of functions in terms of this Bill. Sections 82 and 83 place a heavy burden on the Commission. It may be more appropriate to place these functions elsewhere. This matter is one which should be thoroughly canvassed with the Commission.

5. The bill should provide a framework for moving beyond "freedom of information" to the implementation of a more accessible "right to know" model. The bill currently provides mainly for access to information upon request, with provision made for complex exceptions and appeals. This approach is not accessible to the vast majority of South Africans who lack the resources and capacity to engage in an adversarial process.

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The bill should therefore provide for pro-active dissemination of certain categories of government information and important privately held information. This will increase the flow of information to the public, while also easing the administrative burden on the government of replying to individual requests for public records.

6. If the right of access to information is to be meaningful the enforcement procedure must be cheap, speedy and accessible, otherwise the Act will be used by the rich and powerful to defend their interests. External review by the High Court, as currently envisaged by the Bill, does not provide a remedy that is cheap, speedy and accessible - in fact, the reverse. Hence, a creative, innovative - and cost effective - alternative, such as a tribunal, must be considered.

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APPENDIX TWELVE

ELECTRICITY SUPPLY COMMISSION

(ESCOM / ESKOM)

University of Cape Town

OPD 25

SUBMISSION TO THE PORTFOLIO COMMITTEE ON JUSTICE

University of Cape Town

SUBMISSION ON : COMMENTS ON THE OPEN DEMOCRACY BILL [B67-98]

SUBMISSION BY : ESKOM

DATE : 23/24 MARCH 1999

ESKOM'S COMMENTS ON THE OPEN DEMOCRACY BILL [B 67 – 98]

INTRODUCTION

The need to give effect to the constitutional right of access to information held by the state, and indeed, measures designed to achieve and ensure transparency and accountability can only be encouraged. The intention and spirit of the Open Democracy Bill (the Bill) is accordingly supported by Eskom. The Bill is also regarded as part of an evolving process, which will ultimately entrench true democracy in our society.

It is therefore imperative that the Bill in fact achieves its stated objectives in an efficient and effective manner. Eskom, however, has certain concerns regarding the Bill and its impact on an organisation such as Eskom.

It should be pointed out that Eskom has previously provided a detailed submission on the draft Bill, and a number of suggestions have already been accommodated in the revised Bill. This submission will highlight certain key issues, which are dealt with in two parts. The first deals with general comments and the second sets out specific comments in relation to particular sections of the Bill.

It is important to point out that this submission is made in the spirit of contributing constructively to the development of appropriate legislation.

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GENERAL COMMENT

THE STATUS OF PUBLIC ENTERPRISES OPERATING ON A COMMERCIAL BASIS

There has been a marked paradigm shift globally regarding the role of the state. In particular, the introduction of competition in sectors of the economy previously closed to private participation – like the electricity supply industry (ESI) and telecommunications, for example, is an evolving global trend. To the extent that public enterprises continue to exist in this changing environment, they need to operate on a commercial basis and be competitive.

Even in South Africa, we now see different approaches in the telecommunications and electricity supply industries. Government has recognised the need to encourage public enterprises to become internationally competitive. This is one of the objectives of the Protocol on

Corporate Governance in the Public Sector. With particular reference to the energy sector, we find that in terms of the Draft White Paper on Energy Policy, government has a long-term vision, which contemplates a competitive market within the energy sector.

It is therefore necessary for public enterprises, which are required to operate on a commercial basis in this new environment, to be treated in a manner which does not prejudicially affect their competitive position in relation to other players in that particular market. It is necessary to recognise that public enterprise such Eskom and Telkom cannot be treated like a governmental body, if this results in additional obligations (and costs) that the private sector competitors are not subjected to. There should be a level playing field between public enterprises operating on a commercial basis and private sector participants in a particular market. It is respectfully submitted that the failure to recognise this contradicts the government's vision of making public enterprises internationally competitive.

The question that arises is whether this is permissible in terms of the Constitution. In terms of Section 32(1) of the Constitution the right to access to information held by the state is wide and is not qualified. On the other hand, the right to access to information held by another person is qualified by the proviso that the information be required for the exercise or protection of any rights.

The question to be considered is whether the reference to state includes public enterprises. On the basis of the commercial role of public enterprises as explained above, a compelling argument can be made in support of the view that the Constitution does not envisage, in the definition of state, a public enterprise that operates as a commercial entity. In addition, we find that the Constitution (section 195) refers expressly to an organ of state and a public enterprise separately.

The definition of governmental body in section 1(1)(v) of the Bill appears to include a public enterprise within the ambit of that definition. This approach is, with respect, based on the "traditional" role of public enterprises, which is outdated.

RECOMMENDATION

In the light of the above it is recommended that the definition of governmental body in the Bill should be amended to exclude public enterprises, such as Telkom and Eskom, which are required to be internationally competitive and to operate in a competitive environment.

It is submitted that treating public enterprises operating in a commercial environment differently from organs of state will not detract from the objective of the Bill to allow for access to information. The right to access to information relating to policies in, for example, the energy sector can be exercised in

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respect of the relevant government department responsible for the development of energy policy.

SPECIFIC COMMENTS

1 Section 4 – Designation of information officer

Compliance with this section by an organisation such as Eskom would require the appointment of a number of employees to fulfil this role and will also require sufficient infrastructure and systems.

It is important that the spirit and objective of the Bill is complied with rather than the detailed processes to be put in place. The requirements in the Bill need to take into account the costs of complying and the benefit that results.

The Human Rights Commission should review existing procedures within organisations, and if acceptable, should not require a change which does not add value to the process of access to information.

The costs of compliance should therefore be taken into account in determining to what extent existing practices are in substantial compliance with the Bill to avoid unnecessary wastage of costs.

2 Section 6(1) – Manual on functions

The ***exclusion of the application of this section to public enterprises*** that operate a system of financial administration, which is separate from government, ***is helpful and is strongly supported***. However, public enterprises operating on a commercial basis should be exempt from all the provisions of the Bill that do not apply to private sector organisations, as is suggested above.

2.1 Section 6(2)(h)

The public should not necessarily have direct input into the policy of an organisation. They should have an input into government policy through regulatory authorities or any other government structures, and it would be for government to then give effect to its policy, either through its capacity as shareholder of a public enterprise, or by virtue of legislation or a regulatory authority insofar as the economic environment is to be influenced by these policies.

3 Section 8(1) – Announcement of public safety or environmental risk

The provisions of this section may result in certain difficulties in implementation. At what stage should disclosure be made and how much

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investigation should at first be carried out. It is not clear from this provision whether the obligation is to disclose the record or additional information relating to the record as well.

It may be more appropriate to require disclosure to the responsible Minister who should then decide on the timing and need for further disclosure.

4 Ad Section 9 – Right of access

This section provides that access be given to any record of a governmental body.[1] Record is defined as including a record in the possession or under the control of that governmental body or of an official of that body and whether or not the record was created by the body and whether it was created before or after the commencement of this section. This raises two problems.

Firstly a governmental body may be in a possession of a record created by a third party, and that third party may not wish that the record be freely available. In instances where that third party cannot or does not intend to rely on the grounds for refusal of access to records as set out in chapter 2, it would appear that there would be no protection for that third party. The fact that a record must be disclosed by a governmental body even if it is not the owner of that record is problematic. Such a requirement could prejudice the governmental body in its dealing with the private sector and the existing safeguards are believed to be inadequate.

It is recommended that the definition of record exclude a record not owned by a governmental body.

Secondly, the retrospective application of this provision means that a document prepared prior to the operation of this Bill would be subject to its application. A third party could argue that a document was created on the understanding that it should not be freely available for distribution and that the provisions of the Bill are therefore unfair insofar as its rights are concern.

The qualification requiring a purpose for the information (exercise of a right or protection of an interest) should be retained insofar as is possible, as this would limit the potential for abuse of this right. This is of particular relevance in relation to public enterprises, but is generally applicable. Without such a qualification, an organisation can be inundated with requests for information that utilise resources and man-hours, and the benefit of such information may not be commensurate with the cost incurred. This is ultimately paid for by the taxpayer .It is recognised that the legislature is, with regard to this issue, subject to the interpretation that is given to section 32 of the Constitution.

5 Ad Section 11 – Right of disclosure

The right to publish information by the recipient of such information should be subject to certain guidelines to avoid prejudice to the public. There should also be a provision to allow for the information to be furnished subject to certain conditions regarding publication of the information. A possible guideline is to treat commercial, non-commercial and personal requesters differently with regard to such a limitation on publication.

6 Section 14 – Duty to assist requesters

The purpose of this section is understandable. However, the obligations on the information officer to assist may be burdensome, especially in the context of a commercial public enterprise.

The section should provide that the information officer should assist by referring the request for access to the correct governmental body, and to assist the requester to locate the appropriate governmental body. The information officer should not be obliged to comply with the provisions of Section 13 in this instance.

7 Section 20(5) – Urgent requests

The requester is to be informed by fax or telephone of the decision relating to an urgent request for access to information. Further options needs to be provided in instances where there is no fax or phone.

8 Section 23 – Severability

Although a record can be severable from the part of a document in respect of which refusal is justified, disclosure of the remaining part of the record could in certain circumstances indirectly divulge information that should be refused.

The Bill should be explicit that this situation allows for refusal of the entire record on the basis that the information can not be reasonably severed.

9 Section 24 - Access fees

A safeguard should be introduced to ensure that the resources of governmental bodies are not used as a cheap source of labour to locate and furnish information. The additional fee that could be charged for commercial requesters may not justify the costs incurred by an organisation to obtain the

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information requested. The Bill is also not clear in defining adequately what/ who is a commercial requester.

The fee for time spent on preparing information to be furnished to a commercial requester should not be limited and should be allowed to be market related.

10 Section 25(4) – Access and forms of access

The fee to be charged is to be that which would have been charged if the requester had been given access in the form requested. What would be the case if the information could not have been furnished in the form requested (as a technical impossibility) , and the information is only available in a more expensive format.

Where the record is been made available in an audio or visual form, ***the provision should allow the information officer or a representative on his behalf to be present during the hearing of a recording or viewing of a video.***

In certain instances a requester may wish to reproduce or transcribe an audio record himself/ herself. This is one of the instances where ***publication of such a transcription should be limited unless certified as a correct transcription.***

11 Section 29 – Mandatory protection of privacy

The provisions of sub section (e)(iii) are acceptable if it envisages the disclosure of broad salary scales, in which event it should clarify that this is the case. Eskom does not object to such disclosure in general terms, which attach to particular classes of positions.

This sub section as it is presently worded could be argued to refer to remuneration of individuals being excluded from protection on grounds of privacy. ***This may be unconstitutional insofar as the rights of those employees are concerned.*** On a more practical note, the disclosure of actual salaries of individual employees makes it easier for these employees to be recruited by other companies and the governmental body would be prejudiced. The problem is compounded in the case of a public enterprise operating in a commercial environment. Eskom has always treated the actual remuneration of its employees in confidence. This confidentiality is fundamental to its human resources policy.

It is submitted that the failure to protect the details of the remuneration of individuals may be unconstitutional and it is recommended that the remuneration of individuals be specifically included as being protected in terms of this section.

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12 Section 35 – Privilege

Legal professional privilege is not necessary merely for the proper conduct of litigation, it aims to ensure the confidentiality which is necessary for the proper functioning of the legal system, and it is therefore necessary even after legal proceedings have been finalised.

The loss of permanent immunity from disclosure of information that is subject to legal privilege will undermine the proper functioning of the legal system and section 35(b) should accordingly be deleted.

13 Section 63 – Protection of whistle-blowers

While the need for some form of protection may be necessary, in appropriate circumstances, to encourage full disclosure, it is necessary that this need be balanced with the need to ensure that such protection is not relied upon to undermine legitimate internal processes. One way of achieving this balance is to allow the disregard of internal processes only in circumstances where this can be justified. This will limit the potential for abuse of this section to the detriment of the governmental body.

It is therefore suggested that the following be inserted in sub section 3 as the first point under (a) :

"(i) in the first instance, the head of the governmental body, unless that person in good faith believes that such disclosure would defeat the object of the intended disclosure, or in any way prejudice the rights of such person; "

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CONCLUSION

As is recognised in section 3 of the Bill, one of the significant challenges is to give effect to the constitutional right of access without jeopardising good governance, privacy and commercial confidentiality. The success of this legislation will, to a large extent, be determined by the manner in which these objectives are reconciled. We trust that this submission is of assistance in finding the right balance.

APPENDIX THIRTEEN

LAWYERS FOR HUMAN RIGHTS

(LHR)

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LAWYERS FOR HUMAN RIGHTS

Dial 0861 100035 for the office nearest you.

Colesberg
- *Law Clinic*

East London
- *Law Clinic*

Mafikeng
- *Law Clinic*

Pietermaritzburg
- *Child Rights*
- *AIDS/HIV*

Pietersburg
- *Law Clinic*

Pretoria
- *Human Rights Education*
- *Paralegal Training*
- *Penal Reform*
- *Refugee Rights*
- *Women's Empowerment*
- *Gender*
- *Public Protector Awareness*

Stellenbosch
- *Law Clinic*
- *Constitution & Bill of Rights*
- *Security of Farmworkers*
- *Overberg Pilot*
- *Rural Litigation*

Umtata
- *Law Clinic*

Ad Hoc Committee on Open Democracy Bill
The Secretary to Parliament of the Republic of South Africa
Attention: Ms. Teboho Sepanya
Fax (021) 462 - 2153

October 1, 1999

The Open Democracy Bill can only promote a transparent, accountable, and open[1] democratic regime if ***all*** South Africans are equally empowered to proactively participate in governance. Thus, this Bill must afford the poor, the illiterate, the weak, the young, the distant and all other disempowered peoples the ability to access information, in order to be effective. At this juncture, Lawyers for Human Rights feels that two critical changes are required to achieve this end:
(although submissions are requested only for the Open Democracy Bill, it is not possible to comment here without also discussing the Administrative Justice Bill as both pieces of legislation have considerable synergy)

1. If the masses are to be able to exercise their right to know, some *legal* remedy other than application to Magistrate Courts[2] or the High Court[3] must be provided to appeal decisions on information requests. Otherwise the constitutional guarantee in sections 32 of the Bill of Rights will be infringed upon. Prior to resorting to court action, members of civil society must have the option of resolving their disputes or inquiries by a more accessible means. For example, in rural areas where a large portion of the South African population resides, there are no lawyers available for legal advising. How can a rural dweller be expected to approach a Magistrate Court much less the High Court for judicial review without access to legal counsel? Moreover, the high costs involved in litigation and the distant location of the High Court from rural villages prohibit disempowered peoples from petitioning the High Court for judicial relief. Similarly, Magistrate Courts already suffer from overburdened court dockets; thus they won't be effective in adjudicating information requests.

   One resolution to this 'accessibility' problem is to provide legal advice in rural areas by way of paralegals. Paralegals serve as cost-effective and

[1] Section 3 of the Open Democracy Bill B 67-98.
[2] Draft Administrative Justice Bill 21/6/99 Section 1(g) definition of court.
[3] This is the only judicial remedy provided for in Sections 72-81 of the Open Democracy Bill B 67-98.

trustworthy sources of legal information to rural communities. According to this scheme, rural dwellers could obtain legal advice regarding their information requests and perhaps resolve disputes they may have with the government body through the intervention and advise of paralegals. The nature of information requests (and responses thereof) is such that courtroom remedies are not the most effective and efficient means to provide resolve. For example according to The Refugees Act of 1998 Act # 130, asylum seekers that are denied asylum must be given reasons for the denial. At Lawyers For Human Rights we have found that reasons are never provided to the asylum seekers unless a lawyer intervenes and requests information on the behalf of the asylum seeker. In this scenario, merely because the lawyer is aware of the refugee's rights, he or she is able to demand that the government body comply with the information request. This is only one example of an information request related dispute, however it depicts that neither judges nor lawyers are required to police government bodies to ensure that they comply with their responsibility to provide information. In essence, a paralegal or even a civilian who 1). is aware of his or her rights and 2). has the persistence to 'follow-up' with government bodies can perform this function.

A second option is to include the Public Protector as a venue for recourse. Many in the legal community feel that far too many of these tribunals have already been created, thus to avoid wasting resources it is best to utilize an existing body. There are many advantages to using the Public Protector. For example, it is more accessible, lower costs are involved and a remedy can be provided faster. Also the Public Protector can serve as a neutral entity to review a dispute or inquiry after the internal appeal has taken place.

In conclusion, after an individual has exercised the internal review option, he or she must be afforded the ability of legal recourse by means other than a courtroom.

2. If members of civil society are expected to participate in government, they must be able to understand government functions, laws, standards, etc. This Bill violates the very spirit of open and accountable government because it is too lengthy and intricate for a non-legal party to understand. As many members of the legal community have had quite a bit of difficulty following the Bill, civilians can not be expected to comprehend as it currently exists. Readability can be enhanced if schedules, diagrams, footnotes, or flow charts are included to eliminate some of the cross-referencing. Open and transparent government inherently assumes that members of civil society do not require law degrees to understand the workings of a bill.

Sincerely,

Saloni Mavani

Legislative Monitoring
LAWYERS FOR HUMAN RIGHTS

University of Cape Town

APPENDIX FOURTEEN

NEDCOR INVESTMENT BANK

(NEDCOR)

University of Cape Town

OPD5



NEDCOR
INVESTMENT BANK

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Tel (021) 466-2911 Fax (021) 24-4432 | Tel (021) 488-2911 Faks (021) 24-4432

Dear Sir

Our company has been pleased with the manner in which the Open Democracy Bill has been drafted in consultation with all interested parties, and believe that – in its current form – it balances the interests of business and society at large.

We are also very encouraged by the precedent set regarding individuals' right to object to the use or disclosure of personal information via an opt-out clause. This precedent is aligned with international best practice and respects the rights of individuals and business.

We support self-regulation as a cost-efficient means of ensuring discipline in an industry, and would encourage you to consider self-regulation as an option before introducing legislation relating to this Bill that endorses governmental transparency.

We would prefer the Human Rights Commission to manage the Act, as proposed, as opposed to creating another Commission or Authority, which may be very costly.

Thank you considering our opinion and submissions via the Direct Marketing Association.

Yours sincerely

LIZETTE LABUSCHAGNE
General Manager Marketing

University of Cape Town

Directors/Direkteure: R C M Lauscher (Executive Chairperson/Uitvoerende Voorsitter) •
C P Beatty (Managing Director/Bestuurende Direkteur) • Dr I J Botha (Managing Director/Bestuurende Direkteur) • C J Pearce (Managing Director/Bestuurende Direkteur) •
G H Botterman • M L Davis • B E Davison • P G Jacobs • M M Katz • C P Lesemore • Dr L A Porter • G F Richardson • A A Routledge • I J Sims (*Executive Directors)
30.3.95

APPENDIX FIFTEEN

DIRECT MARKETING ASSOCIATION

(DMA)

University of Cape Town

OPD 24

SUBMISSION

ON THE OPEN DEMOCRACY BILL (B67-98)

THE DIRECT MARKETING ASSOCIATION

The Direct Marketing Association is a non-profit trade association representing all stakeholders in the South African direct marketing industry. Members include the widest range of private and governmental bodies involved in making sales and developing relationships directly by mail, telephone, television and radio, magazines and newspapers, fax, electronic mail and the internet - all brought together by a common interest in responsible business practice.

The Association represents some 300 companies and 1000 individuals, both local and international. Membership includes organisations ranging from entrepreneurial start-ups to the largest multi-national corporations, and is fully representative of both marketers in, and suppliers to, the financial, retail, advertising, mail order, call centre, and electronic commerce industry amongst others.

All members are bound by a stringent Code of Practice based on international norms, and which has the endorsement of the Business Practices Committee of the Department of Trade and Industry.

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GENERAL PRINCIPLES

THE BALANCE OF INTERESTS

The Direct Marketing Association welcomes the Open Democracy Bill and supports its aim of implementing the provisions of the Bill of Rights relating to privacy, access to information and transparency in all transactions.

The emphasis of this submission is to ensure that the Bill offers an equitable balance between the legitimate interests of the State, the Individual and Society, of which business is an important element.

The balance of interest principle applies equally to the drafting of Regulations to give effect to the Act.

PRIVATE vs. PUBLIC BODIES

Whilst this submission will not comment extensively on the provisions relating to the public sector, cognisance has been taken of these as they relate to and may influence the drafting or application of Regulations to private bodies.

TERMINOLOGY

We note that the terminology used in the Bill is not technically compatible with current computer technology with regard to the way that records are stored, accessed or altered.

The wording of the Bill is more applicable to manual rather than computerised databases, and does not provide for future changes in technology. Care needs to be exercised to ensure the Bill does not limit either the accessibility of information, or the feasibility of correcting, producing or holding the information. For example, Section 51 requires that if a private body declines the correction of data then it is obliged to "attach" a note "as near as possible" to where the information appears. The body is likewise required to attach the request to the record.

DIRECT MARKETING ASSOCIATION, PO BOX 977, AUCKLAND PARK, 2006. TEL: (011) 482 6440 FAX: (011) 482 1200

With regard to the first point it is often impossible to amend computer database structures to provide for this, and in most cases such notes will be recorded in a different database, linked electronically to the record. This process is seamless and transparent to the user, ensuring that the record may not be accessed without the note being evident.

With regard to the latter point, in the large majority of cases requests for correction will be in paper form, thus necessitating the electronic capture of the request. This is impractical, and may prove prohibitively expensive and inefficient.

SUPPORT OF HUMAN RIGHTS COMMISSION

Section 82 of the Bill empowers and encourages the Human Rights Commission to consult with, and seek advice and support from private bodies. The Direct Marketing Association has access to extensive local and international resources and makes itself available to the Human Rights Commission on all matters relating to the implementation and regulation of the Act as it relates to this industry.

WORLD STANDARDS

The issue of personal data privacy is well developed across the world, and carefully researched and debated principles of personal data protection have been accepted and implemented. These principles are, for example, included in The OECD Guidelines and The Council of Europe's Convention 108, as well as in numerous self-regulatory codes of practice such as that of the Direct Marketing Association.

Only some of these principles are included in this Bill.

Those principles that are not explicitly addressed in the Bill should be entrenched in the Regulations to the Open Democracy Act, as well as in self-regulatory codes of specific industries.

The following are the internationally accepted general principles applicable to the collection and use of personal data. All reasonable steps should be taken to ensure compliance with the principles:

- Personal data should be collected and processed in a fair and lawful manner;
- The purpose of data collection should be explicit and legitimate, and data may not be used for other incompatible purposes;
- Data used by bodies should be accurate and up to date. It should be adequate and relevant for the purpose for which it was collected and is used;
- There should be a right of access to information, and a right to object on compelling and legitimate grounds.
- Bodies should consider the sensitivity of information. Security measures proportional to the sensitivity should be implemented and unauthorised access prevented.

CROSS BORDER DATA FLOW

The European Union and *all* its trading partners are required to have adequate data protection regimes, conforming to the European Data Protection Directives, with effect from 24 October 1998.

This means that transfer of data from the EU to both private and governmental bodies will normally only be permissible with countries which have acceptable *data protection legislation or self-regulations* covering the principles outlined in the preceding Section of this document.

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SPECIFIC LEGAL COMMENTS

1. **Inconsistencies between different Clauses of the Bill**

We recommend that the following inconsistencies between various clauses be addressed:

a. Whereas Section 50(2)(c) requires any request for access to information to provide a *"postal address or phone number"*, Section 51(5)(d) requires any request for correction to provide a *"postal address or fax number"*. We recommend that the Bill be amended to provide for postal address, fax or phone number, and/or email address.

b. Whereas Sections 55(h) and 56(p) - Disclosure of personal information by private and government bodies - demonstrate a balance of interest between the requester and the private or governmental body with regard to the disclosure of information, this is not reflected in Section 53 with deals with the use of information. We recommend that the wording of Section 55(h) be included as Section 53(d).

2. **Recommendations regarding Amendments or Insertions**

a. Section 51(6) - Correction of personal information: Requests for correction to information are required in terms of 51(5)(b) to provide sufficient particulars to identify the appropriate record. To facilitate situations where these particulars may be provided subsequent to the date the initial request is made, and so as not to unfairly prejudice the information holder, we propose the following insertion in Section 51(6): After "*...within 30 days*" insert *"of receiving sufficient information to identify the record"*

b. Section 51(8) - Correction of personal information: Section 51 provides for the correction of information held by private bodies and requires that copies of deleted records be retained. There appears no good reason why copies should be kept of records that are deleted in compliance with a person's request to do so. The act of making and retaining copies of deleted material defeats the purpose of the deletion, creates an unnecessary administrative burden, and requires the costly creation of both procedures and storage facilities (either physical or on computer). We recommend that this section be deleted.

In the event that compelling reasons exist to apply this requirement in certain sectors or industries we recommend that the requirement be limited to those sectors.

In the unlikely event that compelling reasons exist to apply this requirement for all private bodies, the retention of such information should be restricted for as short a period as possible, for example no longer than one year, whereafter it may be destroyed or removed from databases.

c. Section 56(n) - Disclosure of personal information: This section provides for the disclosure of information by government bodies for the purpose of locating another person in order to make a payment owing to that person. This is unnecessarily restrictive in cases where non-financial benefits such as goods or services are due to persons, and we therefore recommend the following insertion: After "*... in order to make a payment*" insert *"or deliver a benefit owing to that other person"*

d. Section 58(1): Consent to use or disclose personal information: this section appears incompatible with consent obtained by giving individuals the right to object to the use or disclosure of their personal information, even where harm to the individual is wholly

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improbable. We therefore propose that section 58 be amended as follows:

"58(1) A private or governmental body may not use or disclose personal information as contemplated in sections 53(a), 54(a), 55(b) and 56(b) unless the prescribed procedures in respect of form and manner have been complied with.

(2) The consent of a person for the use and disclosure of personal information as contemplated in sections 53(a), 54(a), 55(b) and 56(b) may be withdrawn by the person giving that consent as prescribed

(3) *Regulations made for the purpose of subsections (1) and (2) may ..."*

e. Section 86 - Regulations: In terms of section 82 the Human Rights Commission is empowered and encouraged to liaise with the private sector on issues relating to this Bill. In order to give further effect to this requirement we recommend that the following underlined words be inserted in Section 86 as follows *"The Minister of Justice may, after consultation with the Human Rights Commission and any other representative body affected by the regulations, and with the approval of Parliament..."*

RECOMMENDATIONS

1. Significant parts of the Open Democracy Bill relating to the application of the Act to private bodies are subject to the making of regulations. We note that, although the Act has bearing on Government, Private Citizens, and Private Bodies, Section 86 of the Bill (which provides for the making of Regulations) requires only that Parliament (Government) and the Human Rights Commission (private citizens) are involved in this process.

   This approach is discriminatory and we submit that private bodies should be part of the process of regulation making and subsequent monitoring of the progress of the Act, in order to ensure that a fair and equitable balance of interest is maintained.

   In this regard the Direct Marketing Association places on record its willingness to be involved in this process insofar as regulations and changes to the Act relate to the direct marketing industry.

2. We refer you to the points raised in the Section headed "Specific Legal Comments" above, and recommend the adoption of those recommendations.

3. We again draw attention to the fact that the Open Democracy Bill includes language inappropriate to the burgeoning use of computer databases for storage, and use of personal information. We are of the opinion that this may lead to practical problems in the implementation and interpretation of the Act, and recommend that attention be given to redrafting as appropriate.

4. The Open Democracy Bill already demonstrates significant adherence to the generally accepted principles of data privacy as practiced throughout the world. We urge that these principles are not diluted in the process of law making, but are reinforced and further entrenched. In this regard we also draw attention to the existence of a significant body of obligatory and enforced self regulation in South Africa, and recommend that these be taken into account in any redrafting of the Bill, or subsequent making of Regulations.

ENDS

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APPENDIX SIXTEEN

COMMISSION ON GENDER EQUALITY

(CGE)

University of Cape Town

Commission on Gender Equality

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OPD 75

18 October 1999

The Chairperson
Ad-Hoc Committee on the Open Democracy Billy
National Parliament of South Africa

Dear Advocate de Lange

Submission on the Open Democracy Bill

The Commission on Gender Equality presents the following submission for your consideration in deliberation on the Open Democracy Bill.

Should you require any further information pertaining to our submission please do not hesitate to contact us.

University of Cape Town

Commissioner Phumelele Ntombela-Nzimande
Deputy Chairperson

Joyce Piliso-Seroke (Chairperson),Phumelele Ntombela-Nzimande (Deputy Chairperson), Cathi Albertyn, Zubeida Barmania, Elize Delport, Farid Esack, Pinkie Mbowane , Rajuili, Beatrice Ngcobo, Viviana Taylor

Written Submission
of the

Commission on Gender Equality
to the

Ad-hoc Joint Committee

on the
Open Democracy Bill

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1. Introduction

The Commission on Gender Equality (CGE) is an independent, statutory body established in terms of Section 187 of the Constitution of South Africa, Act 108 of 1996.

The role of the CGE is to promote respect for gender equality and the protection, development and attainment of gender equality. The powers and functions of the CGE are detailed in the Commission on Gender Equality ACT 39 of 1996. In terms of Section 11(1), the CGE must inter-alia evaluate any law proposed by Parliament, affecting or likely to affect gender equality or the status of women, and make recommendations to Parliament with regards thereto.

The Commission welcomes this opportunity to engage with the Committee on this crucial piece of legislation. In particular, we welcome the commitment to gender equality that this meeting is indicative of.

We find it crucial that the Committee engage ~~its self~~ itself on the gendered implications of the Bill and submit the following for your attention.

2. Overview

The Open Democracy Bill is intent on giving form to section 32 of the Constitution which confirms the right to "access to any information held by the state and any information held by another person and that is required for the exercise or protection of any rights." This right is further developed by the necessity for legislation giving effect to this right together with

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provisions for "reasonable measures to alleviate the administrative and financial burden on the state". The right itself is positive in its framing. It confirms a right that is fundamental to our being a democratic state.

It is true that the development of legislation to give effect to the right to information may be either prescriptive or responsive.

As regards the availability of information, the prescriptive approach begins from the premise that government or persons hold particular information, that this information is privileged and that it must be protected. From this it follows that disclosure of this information is strictly regulated.

A responsive approach to the right to information is one that percieves the necessity of information for enabling human development and responds accordingly. Moreover, this approach begins with an analysis of the information needs gathered in respect of communities, the substance of which forms policy and which is subsequently formulated into legislation aimed at fulfilling these needs .

The Constitutional provisions which have determined the characteristics of the Open Democracy Bill reveal a gender bias entrenching the prevailing status quo.

Hence, Section 32 (2), confirming a mechanism for the realization of the right to information is simultaneously prescriptive and deterministic. It approaches access to information from the perspective of disclosure rather than that of dissemination. Subsequently, the approach taken in the drafting of the Open Democracy Bill, has been a prescriptive one.

The legislation begins from the premise that government holds information which must be protected and which it will disclose under certainly particular circumstances. This caveat in principle then appears to maintain the status quo in that it privileges and protects those who have a monopoly on information and power.

This is borne out in the fact that the Bill ensures that information will primarily be made available upon request implying that it will not be made available voluntarily. This information will be made available only to the requester, and certain types of information and certain bodies will be exempted from the Bill.

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This point is carried through in the fact that the Bill does not give full expression to the horizontal application of the rights in Section 32(1) of the Constitution.

An alternative

Ideally we believe the ODB should attempt to strike the necessary balance between privacy, access and good governance.

The Commission sees the right to access to information intrinsically linked to the right to development. As development is essentially a process that seeks to improve the lives of individuals and communities, it is clearly connected to the availability of information that indicates options and possibilities for improvement.

The theme of development and its relation to information is further expanded when we consider the role of information in empowerment and capacity building. Individuals and communities are capacitated and empowered by means of increasing the knowledge base from which they function and with which they are able to determine the quality of their lives. Hence, the Commission confirms the right to access to information, as a requirement for the successful realization of the right to development.

The Commission would have welcomed legislation which developed out of an analyses of the information needs of South Africa's peoples and which sought to fulfil those needs, by voluntarily responding to them. We would consider this a gendered approach to information, its availability and its usage.

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Simultaneously, we are acutely aware of the need to promulgate legislation to give effect to S32 of the Constitution by 4 February 2000. Therefore the Commission has two sets of recommendations for the Committee.

a) To adopt the Bill with the amendments suggested below
b) To ensure that this Bill is followed by a second development phase aimed at assessing the development information needs of South Africans and ensuring that policy and subsequently, legislation is developed to ensure these needs are fulfilled.

-

3. Suggested Amendments to the Open Democracy Bill

3.1 Appeal

Section 74 allows application for appeal at the High Court. The High Court appeal process is exclusive, expensive and limits those who will eventually have full access to the system. It assumes particular financial and literacy capabilities which excludes the majority of South Africans. *Section 74* also does not allow for interest groups to bring an appeal against a decision.

Section 77 allows the SAHRC to assist where needed in making applications to the High Court. The SAHRC however, has X number of offices and is itself only accessible to individuals in these areas.

Both these options limit access of the most disadvantaged.

Recommendations:

The Commission supports the submissions of the Open Democracy Campaign in favour of the above and therefore recommends the following:

- *Extension of those who may lodge an appeal to includeChapter 9 Institutions*
- *Extension of the Provisions of Section 77 to the Commission on Gender Equality as well as the Public Protector in providing assistance for those who wish to lodge an application for appeal*
- *The option of review by designated magistrates trained in reviewing such cases. The system would be further improved if these designated magistrates were mobile and could move to areas where they'd be needed*

3.2Horizontality

The Commission is of the view that the right to access to information from private bodies, natural or juristic is a further concomitant to the right to development. We encourage that in developing this section the rights of the public to information which effects them as consumers of both products and services, and as beneficiaries or victims of corporate activity receive particular attention.

Recommendations: To facilitate the passage of the Bill we support the Open Democracy Campaign proposal for an interim measure and further legislation before December 2000. However, we caution that when legislation is developed to ensure a more comprehensive horizontal application of Section 32 of the Constitution, that this be done in the responsive manner indicated above and further outlined in 4.1

3.3 Beneficiaries of the Bill

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Accessing information and the opportunities it indicates has historically been the privilege of the wealthy and the educated. In order for the impact of the Bill to be truly developmental, the effects of this legislation, must be felt as widely and as deep into the rural areas of South Africa's undeveloped regions as possible. The Commission is careful to ensure that this Bill does not further the existing status quo, rather that it ensure that those who normally do not have access to information, begin to have such access. To ensure that this does happen we need to ensure that the mechanisms for accessing information are accessible to rural communities.

Recommendations:

- *The annual report on the Act should reflect information that is dis-aggregated both by gender and geographic location in order to assess the utility of the Bill for these segments of the community. This information to be used in making the necessary amendments to facilitate improved access for women, rural communities and other groupings with particular needs.*

3.4 Access

Assessing access requires a review of the nature, characteristics, and location of access points. It would further benefit from an understanding of the restrictions faced by marginalised sectors in accessing information. Of particular concern are restrictions to rural communities, removed from government offices which the Bill proposes as access points, the financial sacrifices involved in accessing information and the manner in which rural communities interact with the beaurocracy.

Failing to understand and accommodate the different experiences of rural communities in the access and use of information will only further the existing status quo which discriminates against those with fewer resources, those who are to travel further distances and those without access to formal education. In this regard the Commission welcomes Section 4(a) which allows an oral request and makes provisions for those that are not literate.

Of concern, however is the location of government offices and their access for rural peoples. The system proposed by the Bill will in effect require three separate visits to the relevant office for an individual to access information. The first for the request, the next to receive the

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information and the third for the appeal. Considering the costs of transport and that many South Africans live in areas far removed ~~form~~ from government offices we recommend the following:

Recommendation:

- *That Section 13 include a provision for applications for information to be made at social assistance pay-out points. In areas where the most frequently encountered government officials are those responsible for distributing social assistance payments, we recommend that these also be points at which rural communities can make requests in terms of the Bill. Staff at these pay-points must be trained in processing these requests and ensuring they are directed to the appropriate departments.*
- *That the location of access points for making requests be linked to the GCIS initiatives to develop information centres in both rural and urban areas. This would allow for applications for information to be made at GCIS information centres and require appropriately trained staff in these areas.*
- *Section 19 be amended to include the possibility of requested information which is immediately at hand to be made available immediately, or within a reasonable time that would prevent an additional visit to the office by the requester.*

3.5Duty to Assist

While the Bill places a duty on Information Officers and other officials to assist in completing requests, it suggests no penalty for those who do not assist.

Recommendations:

Section 14 and Section 44 be amended to include a penalty for not assisting a requester.

3.6Penalty for not-informing

Section 8 focuses on issues of serious public safety and environmental risk and which is in the public interest to disclose, however, makes no provision for penalising those who do not disclose such information.

Recommendation:

That Section 8 be amended to include a penalty for non-disclosure.

3.7Exemptions

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Section 6 allows the SAHRC to exempt departments from publishing manuals.

Recommendation:

We recommend that this exemption be provided only following a motivation for the exemption.

3.8Records already available to the Public

Section 43 allows an information officer to refuse a request for access to a record if the record is open to public access. However, it does not include a provision requiring the information officer to indicate where the information is and how it may be accessed.

Recommendation:

That Section 43 be amended to require information officers to inform requesters as to where this information is available and how it may be accessed.

3.9Forms

Section 58 requires consent for use and disclosure of personal information by means of a prescribed form. It is important that these forms also include the purpose for which the information is to be disclosed or used.

Recommendation:

We recommend that the reason for the disclosure of personal information and the purpose for which it will be used be included in the form. Further we recommend that these forms also be clear and easily readable.

3.10 Offences

Section 85 makes allowances for penalties for inappropriate disclosure of personal information by government but makes no similar provision for such disclosure by private bodies.

Recommendation:

To ensure consistency in the application of the Bill we recommend that similar penalties apply to inappropriate disclosure of information by private bodies.

3.11 Protection of Whistle Blowers

- Section 63 (3) provides protection for whistle blowers when they make disclosures to a parliamentary committee, the Public Protector, the Human Rights Commission and/or the Auditor General and/or any

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Attorney General. The Commission on Gender Equality has not been included amongst these organisations. As a statutory body and in light of our mandate to 'protect and promote gender equality" we believe that the public would benefit significantly by having access to the Commission on Gender Equality in this regard.

Recommendation:

We recommend that Section 63(3)(a) be amended to include the Commission on Gender Equality amongst the bodies to which disclosure of contravention of law, corruption or mal-administration can be made.

3.12 Access Fees

Section 24 - 24(2) Makes allowances for a 'reasonable access fee'. This makes room for subjective and arbitrary determinations of access fees. We suggest that reasonable' be replaced by 'just and equitable'. Further we suggest that the Commission and other Chapter 9 institutions be exempted from paying an access fee.

Recommendation:

- *24(2) should read as follows:*
  Access fees prescribed for the purposes of subsection (1) must provide for a just and equitable access fee for...
- *24(6) should read as follows:*
  A member of Parliament, a provincial legislature, statutory body or municipal council who makes a request for access in connection with his or her work as such member does not have to pay any access fee in respect of the request.

4. A responsive approach to the right to information

4.1 Feminising the availability of information

The historical privilege assigned to those that hold information in their power to prevent its dissemination and availability is an issue, which requires fundamental redress. Old notions of the right to own information pertaining to individuals, and to limit its availability are not compatible with the transformation of social power relations.

The current formulation of the legislation entrenches these concepts by making it the responsibility of the requester to seek information, with little or duty on those who hold information to make it public and available without a request. Such a change in formulation would transform the prevailing unequal power relations most significantly.

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The proposed mode of requesting information follows a traditional and potentially adversarial method.

According to the Open Democracy Bill, information released in the traditional request-response manner would be made available exclusively to the requester. As there is no mechanism for disseminating this information further, with the result that the onus for further dissemination of the information ~~in~~ transferred to the requester. Thus limiting the accountability of the state for disseminating information.

Termed the feminising of access to information, the alternative approach to disclosure of information outlined above would serve to truly facilitate the open democracy that we seek. We believe that Bill ought to aim at transforming the power structures inherent in the relationship between those who have and those who seek information. To do this, would require legislation that makes the disclosure of information a pro-active duty of government and individuals. It would also facilitate transparency and the information made so available would be available and accessible to everyone.

This raises the question as to what types of information should be made freely available to the public. To this end the Commission suggests an assessment of community development information needs.

4.2 Assessing and responding to community development information needs

The Commission is of the view that this legislation must be accompanied by further efforts to ensure that the information needs of South Africa's men and women are satisfied. The Commission is committed to development that improves the lives of South Africa most under-privileged men and women. To this end we advocate for mechanisms by which the gender disparities which result from the unequal distribution of power may be addressed. The lives people construct for themselves derive from the circumstances in which they find themselves. In the absence of alternatives, these circumstances perpetuate themselves. Alternatives are presented when people have information on these alternatives. Only once people become aware of the alternatives available to them for improving the quality of their lives, can they begin to work toward changing their lives.

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It is for this reason that the Commission sees a very clear linkage between information and development. The right to information flows from the right to development.

The information needs of the various segments of society are differentiated by their unique experience of the systems surrounding them. In particular we need to be informed of the development information needs of rural and urban women. To this end we are bound by our international obligations.

Article 3 of CEDAW reads as follows:

> State Parties shall take in all fields, in particular in the political, social economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purposes of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on the basis of equality with men

Article 14 (2) of CEDAW states:

> State parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and in, particular, shall ensure to such women the right:
> a) to participate in the elaboration and implementation of development planning at all levels;
> b) to have access to adequate health care facilities, including information, counselling and services in family planning;
> c) to benefit directly from social services programmes;
> d) to obtain all kinds of training and education, formal and non-formal, including that relating to functional literacy, as well as, *inter alia*, the benefit of all community and extension services, in order to increase their technical proficiency;
> e) to organise self-help groups and co-operatives in order to obtain equal access to economic opportunities through employment or self-employment
> f) to participate in all community activities
> g) to have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as land in resettlement schemes
> h) to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.

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In light of our commitment to eliminating the barriers to accessing the right to information, we find it most appropriate to advocate for a developmental and responsive approach. To ensure that this Parliament is most effective in satisfying the information needs of women and men alike and particularly of women in rural areas the Commission is of the opinion that it must be guided by an assessment of their unique information needs.

This would result in pro-active disclosure as regards the broader rights to information.

Therefore we recommend the following:

- *The relevant Ministries should be tasked with carrying out research to determine the information needs of men and women in South Africa. This research is to be used toward developing National Policy aimed at satisfying the information needs of South African communities.*
- *This research is to have an additional focus on the information needs of women and be dis-aggregated by geographic location. Current research does not specifically identify the information needs of rural women.*
- *That the findings and recommendations of such research be considered in the first review of the Act.*
- *That this research results in further legislation designed to facilitate the pro-active dissemination of information and the further realisation of these needs.*

5. Conclusion

In conclusion the Commission has suggested
a)the passage of the Bill with amendments that will address fundamental issues of access to the right to information and
b) further development of the process that this Bill has started in the form of research designed to assess the development information needs of South African men and women and subsequent mechanisms for fulfilling these needs.
We believe the adoption of both of these suggestions will facilitate the redistribution of resources and powers, the ultimate aim of the gender struggle.

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Commission on Gender Equality

APPENDIX SEVENTEEN

THE LAW SOCIETY OF SOUTH AFRICA

(LSSA)

University of Cape Town

OPD 44

Submission to the Ad Hoc Joint Committee on the Open Democracy Bill by the Law Society of South Africa

1. Introduction

1.1. The Law Society of South Africa ('the LSSA') is an association consisting of the four statutory Law Societies (the Law Societies of the Cape, Transvaal, Free State, Natal), the Black Lawyers' Association (BLA) and the National Association of Democratic Lawyers (NADEL). The Society represents the interests of approximately 14 000 practicing attorneys in South Africa.

1.2. The point of departure of these submissions is threefold.

1.2.1. As the representative of the attorneys' profession, the LSSA believes that it is well placed to play a role in defending and upholding the Constitution and that it has a special duty to be of assistance in doing whatever is necessary to prevent a devaluation of constitutional values where, for example, legislation passed by Parliament fails certification by the Constitutional Court or, perhaps worse, is subjected to scathing comments by the Judiciary, as has happened recently.

1.2.2. The LSSA falls within the definition of 'governmental body' in clause 1(v) of the Bill, insofar as it is an 'institution . . . exercising a public power or performing a public duty in terms of . . . legislation'. In respect of the exercise of its public powers and duties, the LSSA is bound by the primary duty imposed by the Bill to provide access to its records to any person on request, in addition to the other duties that the Bill imposes on governmental bodies.

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1.2.3. The LSSA falls within the definition of 'administrator' in the draft Administrative Justice Bill submitted to the Minister of Justice by the South African Law Commission, and will therefore be bound by the Bill when exercising 'administrative action'. Many of the rights and duties imposed by the Open Democracy Bill will interact and overlap with those imposed by the Administrative Justice Bill. It is therefore not possible to comment exhaustively on the Open Democracy Bill at a time when a final draft of the Administrative Justice Bill is not yet available and when Parliament has not yet called for comments on the latter Bill. Once a final draft of the Administrative Justice Bill is available, the LSSA may wish, in its comments on that Bill, to return to and revise some of the positions it has adopted here, in the light of the overlap between the two Bills.

It is in this spirit and against this background that the LSSA makes these submissions. The LSSA will hold itself available to present oral submissions to amplify or clarify any of the comments made here at the hearings before the Ad Hoc Committee.

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2. Exemption of cabinet and judiciary from operation of Bill

2.1. Section 32(1)(a) of the Constitution grants a right of access to information 'held by the state'. The Bill is intended to 'give effect to' this right. However, the LSSA notes with concern the exclusion of two state bodies from the operation of the Bill. The definition of 'governmental body' in clause 1(v) excludes the cabinet, the courts and judicial officers.

2.2. As regards the blanket exclusion of the judicial branch of the state from the operation of the Bill, the LSSA notes that the approach taken by the Open Democracy Bill is inconsistent with that taken by the draft

Administrative Justice Bill. The latter Bill includes the functions of the administrative or non-judicial functions of the judiciary within the definition of 'administrative action' in clause 1(a)(ii) read with clause 1(dd) of the Bill as drafted by the South African Law Commission. This inconsistency will lead to the anomalous situation that the judiciary will be bound to proceed fairly and to provide reasons for its administrative actions, but will not be bound to provide access to information.

2.3. The LSSA welcomes the approach of the draft Administrative Justice Bill in that the Bill recognises the judiciary's duty to comply with the duties imposed by the administrative justice right when it conducts itself as an administrator. Similarly, as a branch of the state, the judiciary is bound by the duty in s 32(1)(a) to provide access to information, but this duty must be balanced with the Constitution's requirement in s 165(2) and (3) that the courts must be independent and that no one may interfere with the functioning of the courts. The LSSA believes that the best way to achieve this balance in the Open Democracy Bill is to include the judiciary within the definition of 'governmental body' insofar as it exercises public powers *other than the judicial authority granted to it by s 165(1) of the Constitution*. This could be achieved by the following insertion in clause 1(v) of the Bill:

> **'governmental body'** . . . does not include . . . a court or judicial officer <u>when exercising judicial authority</u> . . . .

2.4. The LSSA notes with concern the blanket exclusion of the cabinet from the operation of the Bill. It endorses the many submissions to Parliament that have already been made on this point. (See, for example, the submissions made by the Centre for Conflict Resolution and the Freedom of Expression Institute). The right in s 32(1)(a) of the Constitution binds 'the state'. The Cabinet is part of the state.

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Section 32(1)(a) was drafted by the Constitutional Assembly in compliance with Constitutional Principle IX which required provision to be made 'for freedom of information so that there can be open and accountable administration *at all levels of government*' (our emphasis). The blanket exclusion of all its operations and functions from the Bill (rather than the exclusion of specific sensitive functions and operations from the duty to provide information – the approach taken by most foreign jurisdictions) is therefore a failure to give effect to the Constitution.

3. Civil or criminal discovery

3.1. Clause 10 of the Bill provides that no request for access to information in the hands of a governmental body may be made for purposes of criminal or civil discovery. The provision is repeated in respect of information in private hands in clause 49. In the view of the LSSA, clause 10 is problematic in that it is a substantial limitation of the right of access to information in state hands in s 32(1)(a).

3.2. The constitutional right of access in s 32(1)(a) is unqualified by any requirement that a requester of information show the purpose behind the request. To put it another way, there is a duty on the state to provide information on a 'right to know' rather than a 'need to know' basis. Clause 10 imposes a purpose-based restriction on access. It will permit a governmental body to refuse access to information whenever it considers that the request for information is made for purposes of discovery. This will usually occur whenever the requester is involved in litigation against the governmental body. The requester wishing to pursue the right of access to information will then be required to challenge the refusal through an internal appeal procedure or in High Court proceedings, adding considerably to the costs and complexity of litigation by governmental bodies. The LSSA is of the

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view that the exclusion is an unjustifiable limitation of the right in s 32(1)(a) and advocates the deletion of clause 10.

4. Legal professional privilege

4.1. Clause 35 provides that a governmental body may refuse to reveal information on grounds that the information is 'privileged from production in legal proceedings'. The clause then provides two exceptions to this exemption: a record may be revealed where there has been a waiver of the privilege by the person entitled to it, and where the 'legal proceedings to which the [privileged] record relates have been finally determined'. In addition, clause 44 provides that privileged information in the possession of a governmental body must be disclosed in the public interest where it reveals substantial evidence of governmental illegality, maladministration or corruption, health and safety risks or 'injustice to a person'.

4.2. The LSSA considers the 'final determination' exception in clause 35 and the duty to reveal privileged information in the public interest in clause 44 as effecting far-reaching changes to the law of legal professional privilege that will seriously inhibit the work of legal professionals. The common law of privilege is a body of law developed over centuries that balances the need for absolute confidentiality of communication between a legal advisor and his or her client and the requirements of the law of evidence and the obligation to make discovery in civil and criminal litigation. In terms of the common law, a communication between client and legal advisor that is made in confidence for purposes of obtaining legal advice is, *and remains* privileged. This is to ensure the candour between legal advisor and client essential to the operation of the legal system. A privileged document may only be produced in evidence or revealed by a legal advisor to a third party where the client has waived the

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privilege. There is no possibility of revealing privileged information after determination of the legal proceedings (if any) to which it relates.

4.3. In terms of the Bill, if a client is a governmental body, it can expect that a privileged communication might have to be revealed in the public interest (if, for example, it reveals evidence of an 'injustice to a person, including a deceased person) or after final determination of the proceedings to which it relates. Moreover, as a governmental body, the LSSA and the statutory provincial Law Societies will be bound on occasion to reveal privileged information that they obtain in the course of their disciplinary and oversight functions over the work of attorneys. The duty to reveal privileged information in terms of clauses 35 and 44 will also apply to governmental bodies that operate as legal advisors, such as the State Attorney, the State Advocate and the Legal Aid Board, creating an irresolvable tension between the ethical duty of a legal professional not to reveal information supplied in confidence by a client for purposes of obtaining legal advice and the duties of these institutions as governmental bodies.

4.4. The LSSA is of the view that the privilege exemption must be absolute. It will apply to an extremely narrow class of information and represents a justifiable limitation of the right to information in the interests of the administration of justice. In comparable foreign jurisdictions, freedom of information legislation provides an absolute exemption for records and information considered privileged. For this reason, the LSSA recommends the deletion of clause 35(b) and of the reference to clause 35 in clause 44. Additionally, the formulation of the privilege exemption in clause 35 (applying to records that are 'privileged from production in legal proceedings') is potentially too narrow, and could be interpreted to refer to information supplied by a client to a legal professional only in contemplation of or in response to litigation. The exemption should be rephrased to ensure that it

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applies to the whole body of information recognised at common law as being subject to legal professional privilege.

4.5. For these reasons the LSSA recommends the following amendments to clauses 35 and 44 of the Bill:

~~**Privileged from production in legal proceedings**~~

Legal professional privilege

35. The information officer of a governmental body may refuse a request for access to a record of the body if the record is ~~privileged from production in legal proceedings~~ subject to legal professional privilege unless ~~a)~~ the person entitled to the privilege has waived the privilege. ~~; or~~

~~the legal proceedings to which the record relates have been finally determined.~~

Mandatory disclosure in the public interest

44.(1) Despite any other provision of this Act, but subject to Chapter 3 of this Part, the information officer of a governmental body must grant a request for access to a record contemplated in section 29(1), 30(2), 31(1), 33(a), 34(1)(c)(ii), (iii) or (vi) or (d) ~~or 35~~ if . . . .

5. Security for costs in High Court applications

5.1. Clause 81 which relates to the power of a High Court to make an order as to costs currently does not make express provision for an order requiring the provision of security for costs. The power of a Court to order that a litigant provide security is essential to deter and protect against vexatious litigation, and ensure that the costs of an unsuccessful application can be recovered from applicants who are

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not resident within South Africa or from juristic persons. It is essential however that there is no hard and fast requirement that a litigant is required to provide security for costs, in order not to close off access to justice to bona fide, private litigants. The LSSA therefore recommends that the High Court is given a discretionary power to require the provision of security for costs and that the circumstances in which such a requirement is imposed is left for the Court to decide along the lines of the common law rules relating to the provision of security for costs.

5.2. The LSSA therefore recommends an insertion in clause 81 along the following lines:

Costs

81. A High Court may make such order as to costs, including an order that an applicant provide security for costs, as it considers appropriate.

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6. Application of Bill to private persons

6.1. Section 32(1)(b) of the Constitution requires legislation to give effect to the right of access to information in the hands of a private person where the information is required for the exercise or protection of any of the rights of the requester. Currently, the Bill does not give full effect to this right in that it contains a right of access only to information held by 'private bodies' possessing or controlling a 'personal information bank'. In the view of the LSSA, the failure of the Bill to give complete effect to s 32(1)(b) will have the effect that when a requester seeks information from a private person that does not form part of a personal information bank, they will have to rely directly on their constitutional right, rather than on a statutory right granted by the Open Democracy Bill. This could lead to anomalies. For

example, where a requester has been denied access to information in terms of the Bill, he or she may, in terms of clause 73, approach a High Court on an urgent basis. In terms of clause 77, a requester who is illiterate, poorly literate or disabled, may call on the Human Rights Commission for assistance in making a High Court application for disclosure of information. Where a requester relies on his or her *constitutional* right of access to information in private hands for the exercise or protection of their rights in s 32(1)(b), the simplified and expeditious procedures set out in chapter 2 of the Bill will be unavailable to the requester, who must proceed in terms of the ordinary High Court rules and procedures and who will be unable to rely on the assistance of the Human Rights Commission.

6.2. The LSSA therefore associates itself with the proposals made in this regard by COSATU and urges Parliament to give full effect to the right in s 32(1)(b) of the Constitution, thereby bringing all access to information requests and associated litigation under the control of the Open Democracy Bill. This can be immediately achieved by a redefinition of the term 'private body' in the Bill so that it no longer refers only to persons controlling a personal information bank. More detailed provisions relating to the right (along the lines of the current provisions relating to private information banks) could then be phased in on the recommendation of the Human Rights Commission in terms of clause 82.

6.3. Giving full effect in the Open Democracy Bill to the right contained in s 32(1)(b) of the Constitution can be achieved by the amendment of the definition of 'private body' in clause 1(xxi) of the Bill.

> '**private body**' means a person other than a governmental body~~, in possession of or controlling a personal information bank~~.

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6.4. It may be necessary as a consequence to amend the provisions of clause 51, which allows a request for correction of information in private hands, to apply the duty to make corrections of personal information on request only to possessors of private information banks.

7. Open meetings

7.1. The LSSA regards making provision for open meetings in the Bill as an essential to give full effect to the right to information in state hands in s 32(1)(a) of the Constitution. Earlier drafts of the Bill provided that meetings of governmental bodies must be open to the public unless closed for good reason and in accordance with the procedures outlined in the Bill. The LSSA urges Parliament to consider reintroduction of an open meetings chapter in order to ensure that the Bill complies with the requirements of the Constitution.

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APPENDIX EIGHTEEN

TRANSNET

University of Cape Town

Ministry for Public Enterprises
Ministerie vir Openbare
Lefapha la Dikgwebo tsa Setshaba
Thelo ya tsa Kgwebo ya Setshaba

OPD23

1 (021)45-2381 (021)461-6376 TH BOSCH

Mr JH de Lange, MP
Chairperson
Portfolio Committee on Justice
(National Assembly)
Room V277
Old Assembly Wing (Central)
Parliament of the
Republic of South Africa
CAPE TOWN

1999 -02- 19

Dear Mr De Lange

OPEN DEMOCRACY BILL [B 67 – 98]

Mr ME Mkwanazi, Deputy Managing Director of Transnet Limited, has requested that the enclosed papers concerning the Open Democracy Bill be forwarded for your kind attention, please

Transnet's comments on the Bill emanates from an article (copy attached) that has appeared in the Business Day towards the end of last year, in which the private sector has been invited to make written representations on the Bill.

It would be highly appreciated if the Portfolio Committee on Justice could consider the representations submitted by Transnet when the Bill is deliberated

Kind regards

SENIOR MANAGER
(ADMINISTRATIVE)

.../2

Pretoria Suite 101, Infotech Building, 1090 Arcadia Street, Private Bag X15, Hatfield, 0028, South Africa
Tel (012) 319-7111, Fax (012) 319-7222

Copies to:

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Secretary to Parliament
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CAPE TOWN

2) Mr B Kali
Secretary to the
Portfolio Committee
on Justice
Room 1005
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Parliament Towers
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CAPE TOWN

University of Cape Town

TRANSNET

16 February 1999

Mr JH de Lange
Chairperson
Portfolio Committee on Justice
PO Box 15
CAPE TOWN
8000

Mr Mafika Mkwanazi
Deputy Managing Director

Ref. T/NET 042

Dear Mr. de Lange

OPEN DEMOCRACY BILL

Attached please find the submission from Transnet Ltd. regarding the Open Democracy Bill, for your further attention.

Kind regards

Signed by candidate

MAFIKA MKWANAZI

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TRANSNET'S COMMENTS ON THE OPEN DEMOCRACY BILL

INTRODUCTION

In the case of *Le Roux v Direkteur-Generaal van Handel en Nywerheid* which dealt with the right of access to State information in terms of section 23 of the interim Constitution, it was stated that, *"section 23 of the interim Constitution means that public authorities may no longer play hide and seek with members of the public when the latter exercise or protect their rights.... The object of the interim Constitution, as appears from section 23, is to subject organs of State to a new dispensation of openness and fair dealing with the public."*

The ideals underlying the Open Democracy Bill (the Bill) are aptly described in the above case. The broad principles that make up the constitutional right of access to State information have already been agreed upon widely, and have been entrenched in the final Constitution. It can therefore safely be said that there is broad consensus with regard to why the principle of access to State information is justified, and why it is regarded as one of the fundamental rights necessary in an open and democratic society.

The intention and spirit of the Open Democracy Bill is accordingly supported by Transnet.

The stage has now been reached where the principles have to be put into practice, and thus the introduction of the draft Bill. The draft Bill is aimed at the *'bread and butter'* issues:-

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- the logistics, functioning and guidelines which will direct how all parties concerned will have to operate to give effect to the Bill in a manner that is fair and reasonable.

Parliament has until 4 February 2000 to enact the appropriate legislation to give effect to the right envisaged in section 32. The foregoing is important for **practical** purposes and is relevant as well, considering that one such instance of *'appropriate'* piece of legislation to give effect to the right envisaged in section 32 of the final Constitution – namely the Open Democracy Bill.[2]

This submission aims to highlight practical issues that may be considered in the development of the Bill. Different authorities are examined which provide guidelines relating to the Bill and a few suggestions are put forward which, may be of practical use.

It is emphasised that these submissions are made in the spirit of contributing constructively to the development of the Bill.

UNFAIR ADVANTAGE TO COMMERCIAL COMPETITORS. SECTION 1(v)(a)(iii), SECTION 38(2)(a), (b) and (c), SECTION 31

section 1(v)(a)(iii) includes Transnet in the definition of a *"governmental body"* by definition. It is submitted that an organisation such as Transnet be excluded from this definition for the following reasons:

(a) It is a public enterprise which is required to operate on a commercial basis. It is a commercial competitor in the marketplace for the services that it provides. It occupies a

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strategic competitive position in relation to other companies who provide similar services.

There would be an unfair advantage which Transnet's competitors would have over it if they were allowed to have access to information which they could use to their benefit and to Transnet's detriment, and Transnet is compelled to give them this information because it is included in the definition of a governmental body in terms of section 1(v).

(b) the inclusion of Transnet as a governmental body results in additional obligations and costs for it to provide information in terms of the Bill. The Bill makes provision for a structure and process which must be put in place by Transnet to supply information. Infrastructure will have to be put in place and staff will have to be employed and trained to facilitate the process of provision of information in terms of the Bill. Transnet's private sector competitors are not compelled to incur the same costs. They will therefore have an unfair advantage over Transnet in the competitive marketplace.

(c) The Constitution (section 195) refers expressly to an organ of state and a public enterprise separately. The relationship that is envisaged by the Constitution is a *"vertical relationship"* i.e. a relationship between the state and the subject.

It is submitted that the distinction should be maintained between an organ of state and a public enterprise. Should a party require information, for example, on governments Transport policies,

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he./she should obtain the information from the Department of Transport.

A public enterprise such as Transnet should not be compelled to supply information to this party since the relationship between Transnet and the requester is a *"horizontal"* one (i.e. they are on the same *"level playing field"*), if the definition of *"governmental body"* is limited to an organ of state only and not a public enterprise.

A further note to be added to this is the relationship that should exist between Transnet and public enterprises with strategic equity partners, or public enterprises which are in the process of being privatised.

It is submitted that the above entities, due to their hybrid nature, should be regarded as private sector entities, and they should be excluded from being able to request information from Transnet.

SECTION 31 -

It is submitted that section 31 should not be limited to mandatory protection of third party commercial information only, but should extend to protection of Transnet's own information.

Although section 38(2)(a)(b) and (c) makes provision for protection of commercial information, this protection should be explicitly mentioned. It is therefore submitted that all references to *"third party commercial information"* in section 31 be extended to include protection of a

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governmental body's own information on the same terms and conditions in section 31(1).

This section should be further amended to address subsection (c) of section 31. This clause refers to *"better informed choices"*. [Section 31(2)(c)]. It is submitted that this clause is too wide and vague and should the application for information reach the High Court, Transnet could be compelled to disclose confidential information. Section 31(2)(c) should either be deleted, or the phrase *"better informed choices"* should be clearly defined and elaborated upon, to make the situation fair to both parties.

1. THE *'LE ROUX'* TESTS- PURPOSE AND REASONABLE FOUNDATION - BURDEN OF PROOF SHOULD BE ON APPLICANT (AN ALTERNATIVE TO SECTION 79)

The LE ROUX case quoted above provides guidelines for the provision of information by the State. Where a subject (natural or legal person) requires information from the State in order to exercise or protect his or her rights against another subject, the party requesting the information should, at the outset, have a legally good reason for doing so.

(a) An applicant, in order to demonstrate in legal proceedings his entitlement to information ..., should in his application, in respect of each document claimed, at least lay a foundation for why that document is reasonably *'required'* for the exercise or protection of his or her rights.[3]

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(b) In order for this purpose to be properly considered, it is important that an applicant lay a proper and complete foundation for the exercise of that right.[1] (own underlining).

It is clear that an organisation such as Transnet would require:

(a) a foundation (or purpose) which is

(b) proper and complete

before even considering whether to provide information to the public.

The above test is thus suggested as a preliminary test to be applied in considering whether to entertain an application for State information. Should the applicant's request pass this preliminary test, it may still be excluded due to further qualifications that bar the disclosure of the information. The onus should thereafter shift to the state to justify their refusal. Section 79 could be redrafted to incorporate the above.

1. ARTICLE 10 OF THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS – CRITERIA FOR APPLYING CHAPTER 2 OF PART 3 OF THE BILL

Article 10 reads as follows:-

"(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

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(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'

The restrictions mentioned in (2) above are comprehensively addressed in Chapter 2 of Part 3 of the Bill. The question that arises is how are proper guidelines to be formulated for the application of the above?

In *GOODWIN v UK*[4] it was held that in order to reveal the source of confidential information, there had to be exceptional circumstances where vital public or individual interests were at stake[5]. In applying article 10 it was necessary to carry out a balancing exercise between the need to protect sources and the *'interests of justice'*.

It is submitted that section 78(3) should be amended so that the High Court may refuse disclosure in the interests of justice and on the grounds of public policy as well. The concept of public policy implies a wider ambit than the interest of justice, and should the circumstances arise, the court should have the option to refuse disclosure on the grounds of public policy.

Section 5 of the Bill makes provision for the publication of a guide containing information regarding the Bill. It is suggested that the guide

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should specifically mention the relevant sections of the Constitution upon which the Bill is based i.e. section 32 and explain in layperson's terms the implications of a person's right to access of State information. This would help to prevent unnecessary enquiries to a large organisation such as Transnet, which cannot afford to be inundated with requests by requesters who do not properly understand the basic concept underlying the Bill.

It is suggested that Article 10 quoted above also be included in the guide since this explains the concept in a single, straightforward manner.

To go a step further, it is suggested that a person seeking guidance from the Human Rights Commission (HRC) on how to approach Transnet, (but not wishing to be represented by the HRC in its application to Transnet) should be given proper guidelines on the relevant aspects of the Bill, so that when he/she eventually makes an application for information at Transnet, he/she is well *"coached"* in the substantive and procedural aspects of the application for information. This will ensure efficiency and smooth functioning of the entire process.

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From a Transnet point of view, there is concern over two aspects of the process during legal proceedings, i.e. the availability records of the judicial proceedings and, oral evidence. It is conceded t' section 78(1) is a necessary evil - an organization would have to provide records of even the most sensitive information to the court, and it cannot refuse to do this *"on any grounds"*. It is clear that an organization such as Transnet would be loathe to provide information regarding for example a project which:

(i) it has spent time and money developing;

(ii) is strategically sensitive;

(iii) discloses methods which the organization uses to handle relations with its other clients and tenderers;

(iv) it intended never to be disclosed to anyone else except certain of its employees.

to a court, knowing that there is a probability that it may be disclosed to a 3rd party.

The concern expressed, however, is that even if the court dismisses the application and refuses to allow the information to be divulged to the applicant there is still the possibility that the applicant may obtain information regarding the project from a transcript of the court proceedings and/or the reasons for judgement. It is therefore suggested

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that since a judicial officer would have knowledge of the information in terms of section 78(1), the Bill make provision for the following:

(a) During the hearing of the application, if it has reached a stage where oral evidence is given, the judicial officer should:-

(i) allow a respondent (such as Transnet) to refuse to answer certain questions which may have the effect of disclosing sensitive/confidential information.

(ii) allow a respondent to refuse to answer questions which may have the effect tof indicating to the applicant the source of confidential information.

(iii) allow a respondent to refuse to answer question which may have the effect of prejudicing it in any manner regarding the disclosure of confidential information which it possesses.

ALTERNATIVE MEANS OF OBTAINING THE INFORMATION AND COSTS THEREOF

With the advent of the information age, there are many other avenues which exist for an individual to obtain information. It is only fair that should information be available from an alternative source, then Transnet should not be burdened with the task of providing the same. The Bill makes provision for this in section 43.

The only concern, however, is the question of costs. It is submitted that the latter part of section 43 dealing with costs should be deleted. The effect of that section should simply be that if the information is available

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elsewhere then the applicant should make use of the alternative source, e.g. the internet.

Therefore:

(a) the alternative source of information should include all alternative sources of information and not only information which is available to the public in accordance with other legislation; and

(b) there should not be a comparison of costs in determining whether Transnet should supply the information or not. The exclusion should be absolute - if the information is available elsewhere, then the applicant should avail himself/herself of the alternative source, at his/her own cost.

TENDER PROCEDURE OF TRANSNET

In the light of the decision in *Goodman Bros. (Pty) Ltd. V Transnet Ltd.* 1998 (4) SA 989 (W), it is submitted that section 32 of the Bill is not specific regarding tender procedures and the protection of information pertaining to tenderers who have not been successful. In the Goodman Bros. Case it was held that Transnet would have to disclose its tender documents and provide reasons for their decision not to accept certain tenders.

It was held that an award of a tender by an organ of state constituted an administrative act. The fact that the organ of state's conditions of tender provided that it was not obliged to furnish reasons for its decision to unsuccessful tenderers was regarded as contrary to the spirit of the Constitution.

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It is submitted that Transnet should not be obliged to disclose its tender documents and the right of a party to reasons for an unsuccessful tender should be limited to broad reasons for refusal and not disclosure of detailed information.

The Bill as it is currently drafted, does make provision for protection of 3rd party information, but does not specifically mention information supplied for the purpose of securing some advantage, grant, permit, contract or concessions from the govenrmental body concerned. Therefore it can be argued that there is insufficient protection for 3rd party information in the tender process.

It is submitted that section 32 should include information supplied to a governmental body for the purpose of securing some advantage, grant, permit, contract or concession from the governmental body concerned.

Kind regards

VIVEK RAMDASS
LEGAL ADVISOR (SPOORNET)

APPENDIX NINETEEN

STATE LAW ADVISERS

(SLA)

University of Cape Town

OPD 74a

Opinion by the State Law Advisers
on the meaning of the phrase
"[n]ational legislation must be enacted"
in section 32(2) of, read with item 23(1) of Schedule 6
to, the Constitution

University of Cape Town

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Adv S M van Schoor

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1999 -06- - 7

MEANING OF "ENACT" WITH SPECIAL REFERENCE TO SECTION 32 OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 (ACT NO. 108 OF 1996), AND THE OPEN DEMOCRACY BILL [B 67—98]: YOUR 8/6/Nie/1 (SWA)

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The State Law Advisers remark as follows:

"1. The Department requests our opinion as to the meaning of the phrase "[n]ational legislation must be enacted" in section 32(2) of, read with item 23(1) of Schedule 6 to, the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), hereinafter referred to as "the Constitution".

2. Section 32(1) of the Constitution, provides as follows:

"(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 financial burden on the state.". (Our emphasis.)

Item 23(1) of Schedule 6 to the Constitution provides, *inter alia*, that the national legislation envisaged in section 32(2) "must be enacted within three years of the date" on which the Constitution took effect, i.e. 4 February 1997. In other words, the Constitution requires that such national legislation be enacted before or on 4 February 2000.

3. The pertinent question is whether the term "enact" in the context of section 32(2) of, read with item 23(1) of Schedule 6 to, the Constitution requires that national legislation, which gives effect to the right referred to in section 32(1) of the Constitution (hereinafter referred to as "the section 32(1)-right"), **must be in force, or in other words, must take effect, before or on 4 February 2000.**

4. With reference to the Constitutional Court's judgement in *In re: Certification of the Constitution of the Republic of South Africa* 1996 (10) BCLR 1253 (CC) (hereinafter referred to as "the first certification judgement"), the dictionary meaning of "enact" and pertinent provisions of the Constitution, the Department concludes that the legislation envisaged in section 32(2) of the Constitution will have to be passed by Parliament and assented to and signed by the President on or before 4 February 2000. It is also submitted that implementation (i.e. coming into operation) of the legislation does not have to take place within the three year period. We deduce that what in fact is submitted is that the legislation does not have to be in operation on or before 4 February 2000.

5. We concur with the reasoning in the Department's submission and accordingly also with the conclusion mentioned in paragraph 4 above. Without repeating the reasoning in that submission, we will allude to certain other dictionary meanings, the relevant provisions of the Constitution and judgements, which strengthen that conclusion:

5.1 *Collins English Dictionary* (3rd ed.) defines "enact", *inter alia*, as follows:

> "**1.** to make into an act or statutes. **2.** to establish by law; ordain or decree.".

The Concise Oxford Dictionary (8th ed.) defines "enact", in the current context, as "make (a bill etc.) law". According to *Black's Law Dictionary* "enact" means "to establish by law; to perform or effect; to decree ..." and "enactment" means "[t]he method or process by which a bill in the Legislature becomes a law". Garner, *A Dictionary of Modern Legal Usage* (2nd ed.) describes "enactment" as "the action or process of making (a legislative bill) into law".

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Given the above-mentioned dictionary meanings it is, in our view, apparent that section 32(2) of the Constitution **determines that provisions which give effect to the section 32(1)-right must become national legislation or, in other words, must be established by national legislation.**

5.2 The above-mentioned interpretation of section 32(2) of the Constitution is confirmed by the judgement in *R v Conway* 1943 EDL 215 in which it was stated that "[e]*nactment* is not a term of art and means any measure ordained and promulgated by any person or body possessing legislative authority.". In the first certification judgement the Constitutional Court [par 82] interpreted item 23 of Schedule 6 to the Constitution so as to suspend the operation of section 32(1) of the Constitution "until Parliament has enacted national legislation, which must happen 'within three years of the date on which the ... Constitution took effect'". (See par 3.2 of the Department's submission.)

5.3 Given the terminology used in sections 73 to 82 of the Constitution, which deals with the national legislative process, it follows from the first certification judgement that section 32(2) at the very least requires that Parliament [the body which is competent to pass national legislation (sections 43 and 44 of the Constitution)] must pass a Bill which gives effect to the section 32(1)-right. However, in view of the wording of section 32(2) ("**National legislation** must be enacted ..." - our emphasis) and the meaning of the word "enact", we are of the opinion that such Bill must also become national legislation, i.e. an Act of Parliament. Section 81 of the Constitution provides as follows:

> "A Bill assented to and signed by the President becomes an Act of Parliament, must be published promptly, and takes effect when published or on a date determined in terms of the Act.". (See par 4 of the Department's submission.)

Thus, only immediately upon the President's assent to and signature of a Bill, which was passed by Parliament, it becomes "national legislation".

5.4 From section 81 and item 23(1) and (3) to Schedule 6 of the Constitution it is,

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In our opinion, clear that the Constitution draws a distinction between the establishment of national legislation and the date it comes into operation or takes effect, and that the enactment of a law does not include the coming into operation of such law.

5.6 Consequently, and to summarise, we are of the opinion, that what section 32(2) of, read with item 23(1) of Schedule 6 to, the Constitution, requires is—

(a) that Parliament must pass a Bill which gives effect to the section 32(1)-right; and

(b) that the President assents to and signs that Bill in terms of section 79(1) of the Constitution, whereupon it becomes an Act of Parliament, i.e. national legislation (section 81),

before or on 4 February 2000, and that that Act of Parliament does **not** have to take effect before or on that date.".

p SM Echar

CHIEF STATE LAW ADVISER

S M VAN SCHOOR/W J J NEL/M A OLWAGE//1999-06-03

University of Cape Town

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THE CHIEF STATE LAW ADVISER via AC

THE MEANING OF "ENACT" WITH SPECIAL REFERENCE TO SECTION 32 OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 (ACT 108 OF 1996), AND THE OPEN DEMOCRACY BILL, 1998

University of Cape Town

1. Purpose of memorandum

The purpose of this memorandum is to request an opinion on the meaning of the word "enact" as used in the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996)(the Constitution).

2. Background information

2.1 Section 32 of the Constitution deals with the right to access to information held by the state or another person and provides that:

> **32. (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 <u>enacted</u> to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.**

(emphasis supplied)

2.2 Item 23 of Schedule 6 of the Constitution provides for transitional arrangements with regard to sections 9 (the equality clause), 32 (access to information) and 33 (just

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administrative action) of the Constitution. Item 23(1) requires that the national legislation envisaged in sections 9(4), 32(2) and 33(3) must be enacted within three years of the date on which the Constitution took effect. Item 23(2) of Schedule 6 provides that until the legislation envisaged in section 32(2) of the Constitution is enacted, section 32(1) will be regarded to read as follows:

> **32(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.**

The National legislation envisaged in section 32(2) of the Constitution is at present embodied in the Open Democracy Bill, 1998, which was introduced into Parliament during 1998. The discussion, hereunder, will focus on the requirement of section 32(2) for legislation to be enacted, but will for all purposes also be applicable to sections 9(4) and 33(3) of the Constitution.

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3. Reasoning

3.1 Section 32(2) of the Constitution requires that legislation "must be enacted" to give effect to the right contained in section 32(1). The question which presents itself is whether the term "enacted" would include the requirement that the implementation of the legislation should also have to take place before the expiry of the three year period (in other words does the term "enacted" mean "passed by Parliament" or "passed by Parliament and implemented" ?).

3.2 In the first certification judgment of the Constitution, the Constitutional Court in

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In re: Certification of the Constitution of the Republic of South Africa 1996 (10) BCLR 1253 (CC), considered whether the access to information clause complied with Constitutional Principle IX. The court, *inter alia*, pointed to the following:

> **[82] CP IX requires the NT to make provision for "freedom of information so that there can be open and accountable administration at all levels of government" ... The objection, however, is directed at the mechanism introduced by the NT sch 6 s 23 which suspends the operation of NT 32(1) until Parliament has enacted legislation, which must happen "within three years of the date on which the new Constitution took effect.**

The court averred to the reason for the transitional arrangement and indicated that it is necessary to give Parliament time to provide a legislative framework for the implementation of the right to access to information. The court explained that freedom of information legislation is complex in the sense that it must provide for provisions defining the nature and limits of the right and the requisite conditions for its enforcement. The court was of the opinion that if the contemplated legislation is not enacted timeously, the transitional arrangement in schedule 6 and the provisions of section 32(2) fall away and the suspended section 32(1) automatically comes into operation. The court indicated that freedom of information is not a "universally accepted fundamental human right". Freedom of information is directed at promoting good government. Constitutional Principle IX is a principle dealing with government and that is the reason why freedom of information is dealt with in that Principle. The court indicated that:

> **[85] ... Had freedom of information indeed been a fundamental human right or one of the basic structural requirements for the new dispensation; its suspension would have been inconsistent with the character of the state envisaged by the drafters of the CPs.**

The court stated that Constitutional Principle IX requires that provision be made for

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freedom of information and went on to say:

> **[86] ... That has been done in NT 32(1) read with sch 6 s 23(2)(a), which clearly delineates the right and puts the legislature on terms under the sanction of unqualified implementation. ... The legislature is far better placed than the courts to lay down the practical requirements for the enforcement of the right and the definition of its limits. Although NT 32(1) is capable of being enforced by a court — and if necessary legislation is not put in place within the prescribed time it will have to be — legislative regulation is obviously preferable.**

The above remarks of the court should be seen in the light that the court was called upon to decide on the suspension mechanism introduced by Schedule 6. The court did not consider the meaning of the word "enact".

3.3 In *West's Legal Thesaurus and Dictionary* the definitions of three important words are given, to wit:

> **"Enact. To establish by law (be it enacted). Legislate, institute by law, put into effect, decree, command, codify, establish, dictate, sanction, effect, pass, prescribe, make, proclaim, effectuate, execute.";**
> **"Enacting clause. A clause at the beginning of a statute, which states the authority by which it is made ....."; and**
> **"Enactment. The method or process by which a bill in the legislature becomes a law; the law itself that is enacted (the enactment was declared unconstitutional). Legislation, codification, measure, statute, law, act, rule, bill, regulation, ordinance, fiat.".**

3.3 It is evident from the above meaning of the word "enact" that it has a technical meaning which has a bearing on the functions of the legislative authority. The provisions in the Constitution dealing with the national legislative process can be found in sections 73 to 82 of the Constitution.

4.1 Sections 79(1) and 81 of the Constitution are of special interest and provide,

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respectively, as follows:

> **79. (1) The President must either assent to and sign a Bill passed in terms of this Chapter or, if the President has reservations about the constitutionality of the Bill, refer it back to the National Assembly for reconsideration.**
>
> **81. A Bill assented to and signed by the President becomes an Act of Parliament, must be published promptly, and takes effect when published or on a date determined in terms of the Act.**

4.2 The passage of a national legislative instrument, in terms of sections 79(1) and 81, requires a Bill to be referred to the President after it has been passed by Parliament. The President has to assent to and sign the Bill, except where the President has reservations on the constitutionality of the Bill. A Bill assented to and signed by the President becomes an Act of Parliament. It is clear from the wording of section 81 that the legislature made provision for those cases where a legislative instrument may only take effect after it has become an Act.

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5.1 Turning to the Open Democracy Bill, 1998, and applying the provisions of section 81 of the Constitution to the Bill, it would mean that after Parliament has passed the Bill, it would then be referred to the President. The Open Democracy Bill, 1998, will then become an Act when the President signs it, but will, in terms of section 87, take effect on a date determined by the President.

5.2 Concern might be raised with regard to the fact that a three year period is required to enact section 32(2)-legislation but that no time frame has been provided for the implementation of this legislation. It is submitted that section 55 of the Constitution, which deals with the powers of the National Assembly, may be regarded as a sufficient control measure. Section 55 of the Constitution provides as follows:

> **55. (1) In exercising its legislative power, the National Assembly may—**
> **(a) consider, pass, amend or reject any legislation before the Assembly; and**
> **(b) initiate or prepare legislation, except money Bills.**
> **(2) The National Assembly must provide for mechanisms—**
> **(a) to ensure that all executive organs of state in the national sphere of government are accountable to it; and**
> **(b) to maintain oversight of—**
> **(i) the exercise of national executive authority, including the implementation of legislation; and**
> **(ii) any organ of state.**
>
> (emphasis supplied)

Another conclusion may be drawn from the provisions of section 55(2)(b), and that is that the drafters of the Constitution intended the implementation of legislation to form part of the functions of the executive authority. The conclusion that the implementation of legislation does not form part of the enactment thereof may be strengthened by the provisions of item 23(3) of Schedule 6 to the Constitution. Item 23(3) provides as follows:

> **23(3) Sections 32(2) and 33(3) of the new Constitution lapse if the legislation envisaged in those sections, respectively, is not enacted within 3 years of the date the new Constitution took effect.**
>
> (emphasis supplied)

Item 23(3) draws an indirect distinction between "enact" and the implementation of legislation. If the drafters of the Constitution intended to regard the implementation of legislation as being part of the meaning of the word "enact", then "enact" would have been used instead of the reference to "the date the new Constitution took effect.".

5.3 In view of the above, it is consequently argued that the term "enacted" entails Parliament passing a Bill, the President assenting to it and signing it, whereupon the

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Bill becomes an Act. The publishing thereof and its implementation are separate acts which do not form part of the meaning of the word "enact".

6. Conclusion

6.1 Section 32(2) of the Constitution requires that national legislation must be enacted to give effect to the right contained in section 32(1). Item 23(3) of Schedule 6 requires that the legislation be enacted within three years of the date the new Constitution took effect.

6.2 The Constitution took effect on 4 February 1997 and the legislation envisaged in sections 9(4), 32(2) and 33(3) of the Constitution will, in our opinion, have to be passed by Parliament and assented to and signed by the President on or before 4 February 2000. It is submitted that the implementation of the relevant legislation does not have to take place within the three year period. Your opinion in this regard would be appreciated.

HW 10.5.99

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APPENDIX TWENTY

GAUTENG PREMIER: CHEADDLE THOMPSON & HAYSOM ATTORNEYS

University of Cape Town

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Argument cf receipt see Page 1.

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OPD 77

20 October 1999

Advocate Johny De Lange
Member of Parliament
National Assembly
House of Parliament
CAPE TOWN
8001

Facsimile: (021) 461-6551

Dear Sir

GAUTENG PROVINCE : SUBMISSIONS ON THE OPEN DEMOCRACY BILL

I refer to the above matter and to your telephone conversations with MEC Fowler.

Kindly find herewith Gauteng Province's submissions on the Bill.

Yours faithfully

Mbhazima Shilowa
Premier: Gauteng Province

MEMORANDUM

C T & H CHEADLE THOMPSON & HAYSOM ATTORNEYS

To : Mr Johnny de Lange

From : The Premier: Gauteng

Subject : **SUBMISSIONS ON THE OPEN DEMOCRACY BILL**

Date : 20 October 1999

The principles underlying the Bill are constitutionally enshrined. The Bill entitles the public to access to information held by government departments subject to limitations set out in the Bill. The provinces submissions at this stage should be related to practical issues regarding implementation of the legislation. The exception in this respect is on the critical issue of whistle blowers.

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SUBMISSION ONE – EXCLUSION OF EXECUTIVE COUNCILS

The interpretation of "governmental body" should also expressly exclude Provincial Executive Councils in the same was that cabinet is excluded.

SUBMISSION TWO – TIME PERIODS

Provincial Departments will not be ready to fully comply with the proposed legislation by February 2000 due to practical reasons. These reasons relate to the time periods within which information officers and heads of departments are required to respond to requests for information and appeals respectively. In this regard the memorandum

on the objects of the Bill correctly points out that the establishment of a right of access to information as a fundamental right in a Constitution is a new notion in law, not only in South Africa, but also elsewhere. Consequently the determination of the nature and extent of resources required to give full effect to this right can not be objectively assessed without some experience. In order to effectively implement the legislation, Provincial Departments would have to at least determine :

- Human resource needs;
- Material resource needs;
- Data management systems;
- Systems of handling access and request fees as well as deposits;
- Qualifications and training needs of personnel;
- Other budgetary needs.

In the light of the above, extended time periods would enable Provinces to effectively assess how best to give effect to this critical fundamental right. Therefore the Gauteng Province proposes :

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Decision on request and notice thereof

1. All references to 30 day periods in respect of obligations of information officers be extended to :

   1.1 90 days in the first year of operation of the Act;

   1.2 60 days in the second year; and

1.3 45 days thereafter.

Urgent Requests

2. The time periods for responding to urgent requests should be changed to:

2.1 20 working days in the first year of operation of the legislation;

2.2 15 days in the second year of operation; and

2.3 10 days in the third year and thereafter.

Extension of period to deal with request

3. The period of extension must be changed to provide for extensions up to:

3.1 90 days in the first year of operation of the legislation;

3.2 60 days in the second year of operation; and

3.3 45 days in the third year of operation and thereafter.

Notice to third parties

4. The period within which the information officer must give notice to third parties must be changed to:

4.1 60 days, or if an urgent request application has been granted, 15 days in the first year of operation of the legislation;

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4.2 45 days, or if an urgent request application has been granted, 15 days in the second year of operation; and

4.3 30 days, or if an urgent request application has been granted, 10 days in the third year of operation and thereafter.

Decision on representations for refusal and notice thereof

5. The period within which the information officer must decide and notify the third party must be changed to:

5.1 60 days, or if an urgent request application has been granted, 30 days in the first year of operation of the legislation;

5.2 45 days, or if an urgent request application has been granted, 30 days in the second year of operation; and

5.3 30 days, or if an urgent request application has been granted, 20 days in the third year of operation and thereafter.

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Correction of personal information held by governmental bodies

6. The period within which the information officer to whom a request for correction is made or transferred must decide if the request must be changed to:

6.1 90 days in the first year of operation of the legislation;

6.2 60 days in the second year of operation; and

6.3 45 days in the third year of operation and thereafter.

The time period in section 52(11) should also be amended as above.

INTERNAL APPEALS

Notice to and representations by other interested persons

7. The time periods set out in section 69 do not appear to pose any potential difficulties.

Decision on internal appeal and notice thereof

8. The period within which the head of the governmental body concerned must decide on the internal must be changed to:

   8.1 60 days, or if an urgent appeal application has been granted, 30 days in the first year of operation;

   8.2 45 days, or if an urgent request application has been granted, 20 days in the second year of operation; and

   8.3 30 days, or if an urgent request application has been granted, 15 days in the third year of operation and thereafter.

9. If notice is given in terms of section 69(6) the time periods should be changed to:

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9.1 15 working days after the requester concerned has made written representations or, in any other case, within 60 days in the first year of operation;

9.2 10 working days after the requester concerned has made written representations or, in any other case, within 45 days in the second year of operation; and

9.3 5 working days after the requester concerned has made written representations or, in any other case, within 30 days in the third year of operation and thereafter.

Urgent internal appeals

10. Decisions of the head of the body in respect of urgent appeals must be changed to 15 working days, 10 working days and 5 working days in the first, second and third years (and thereafter) of operation of the legislation, respectively.

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SUBMISSION THREE - PROVINCIAL COMPETENCY

The proposed legislation should enable provinces to determine the various time periods for compliance by proclamation subject to the maximum time periods proposed above. This submission is based on the fact that the degree of demands that will be made on various provinces in terms of the legislation will differ tremendously from province to province. Some of the relevant factors in this regard would be population concentration, economic activity and political activity. Therefore,

each province should at least have the opportunity to assess how effectively it can implement the legislation and to legislate accordingly.

SUBMISSION FOUR – WHISTLE BLOWING

The provisions in respect of Whistle Blowers should be extended to private bodies. As the chairperson of the portfolio committee has correctly pointed out in the media recently, the right of access to information is not limited to information held by government bodies but extent to private bodies. Consequently to achieve the objectives of the Constitution, the provisions of part 5 must also extend to private bodies.

SUBMISSION FIVE – ADVERSE INFORMATION HELD BY A PRIVATE BODY

The provisions of chapter three must also apply to any private body which holds information regarding the lack of credit worthiness of any person, with the necessary changes to the text. The chapter must also apply to any private body which holds information that may adversely affect a person if a third party is granted access to such information. This must be information which may potentially cause a person to be black-listed in any manner by another person.

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APPENDIX TWENTY ONE

QUESTIONNAIRE

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QUESTIONNAIRE / INTERVIEWS.

(1) What are you looking for in a submission?
What do you think is a good /bad submission and why?

(2) Do you expect people who are making the submissions to have done some research on the topic/issue at hand? If so, what kind of research (international study/practice)?
Do you consider international study or practice as persuasive/conclusive/directive?
Should there be any kind of competence/expertise on the part of the people making submissions?

(3) Have you been satisfied/dissatisfied by the quality of the submissions which you have received/received? If yes, why? if not why not?

(4) Can a submission change/alter the opinion of Parliament / Committee on a particular issue? If so, what drives the Committee to make such a change? (appeal to reason, to emotions or ethical appeal/facts)

(5) Is there a particular order in which a submission should be presented?
Is there a particular criterion which one should use or follow when making a submission?

(6) After you (the Committee) have received, say, all the submissions on a particular issue, how do you reconcile them, in order to produce or formulate a Bill?
What criterion do you use at that stage?

(7) Who in the past do you think has made good submissions and why do you think they can be considered good?

(8) What can you define as a truthful submission?

(9) How do you evaluate that a submission prepared by a researcher fits your understanding of the issue?

(10) With regard to the submissions made by people from the informal settlements/townships (grassroots submissions), do you use the same approach as applied, say, to NADEL, the Law Society (the legal institutions) and so forth? If yes why, if not why not?

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APPENDIX TWENTY TWO

A TRANSCRIPT OF INTERVIEWS

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No.	MEMBER	LETTER	RESP	FOLL - UP	INTERVIEW ONE	TRANSCRIPTION	
1	Adv. J de Lange (ANC)	I spoke to him in person. He referred me to his secretary.	I contacted her. She promised to get back to me.	She did not honour her promise and I had to call her, then she gave me the day for the interview	conducted on the 9th of Dec. 1999. It took an hour and a half	1. (a) You are looking for people to address particular issues in the Bill • This they could do from few perspectives: • firstly from a constitutional perspective • secondly from a perspective to create better legislation and thirdly • from a perspective where they would be trying to reflect their own best interests in such a submission, I think those would be the simple things • Secondly or broadly secondly, you would also want people to not just raise problems and complaints but to find solutions • and particularly solutions that address themselves to our history, our past, which is an apartheid one • What else you are looking for in a submission is a good dose of realism • You get many submissions that are based on what people perceive to be the reality or what is not really the reality of government because they do not understand government, they have never known what the government is, the submission would be very idealistic looking for a navanna that does not really exist • or to put duties on government that even if they wanted to, they just cannot fulfil financially or • because their staff would not have the capacity to do so, so realism in submissions is a very big problem sometimes, • but I think that on the whole the submissions that one gets, if you read them together that is important.	

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						• It is not just the single submission that is important • If you get a wide spread of submissions across the broad, then you get a good balance of what the problems are, what are the possible solutions and so on, so I would say those are some of the factors than one looks at. • One other factor , I would say may be lastly, is that obviously the poor and the marginalised financially and resource wise have great difficulties to, put their views before the Committee, which is here in Cape Town. • It does not matter where Parliament was, whether it was in Johannesburg they would have the same problems • firstly, they would not understand what the Bill is all about • secondly, they would not even have access to the Bill • thirdly, they may not have been able to read the Bill • fourthly, even if they wanted to make submissions they would not know how to draft them etc. • Some of the submissions where it is NGOs particularly that talk on behalf of the wider community are also some submissions that you are looking for because they are the only voice other than the representatives of the parties (b) I do not think that I have ever thought that there is a **bad** submission, because each submission has got something in it • But I suppose as I have already said the submissions that just wine on about things and	

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						do not come up with solutions or • the submissions that are so just tune to their own little self interests, I do not regard them as **bad** (emphasis) because they add something to the debate • but they are not necessarily helpful to guide and to suggest • **Good** submissions would usually be the ones where people have analysed, particularly from the Constitutional perspective and from a political perspective, the Bill, put crisp views forward and made suggestions on how to ratify the problem that they see • I really do not want to classify submissions as bad, may be if you say useful and less useful, may be that is a way of looking at it, because those submissions have been made very genuinely, that is what people really believe • Even if I may feel that it is too wide, but it is a group of people who are putting forward those views in our country, those we will have to listen • and so that is why I say even when you say good or bad, you cannot look at the single submission • If you say to me were the amount of the submissions we had good or bad, then I can say to you yes they were good or bad • They were good because we had a good views across the spectrum, we had some good views on the law, on politics, on solutions • so it is all this that is woven into it and sop therefore the whole lot of submissions are quite good or we only received one or two solutions, those were bad in the sense that the submissions	

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						were bad, so that is how I would look at it. 2. It is absolutely vital • If you want to put me off completely, then you must sit there and just waffle on and do not know what is going on in the Bill. • And even if you drafted a good submission, if you do not know what is in the Bill you are not going to achieve anything. • But again the research that has to be done is legal and political. • What is the problem we are trying to solve? Does the law allow us to do that? and is it desirable? • So it is a legal research you do and a political, which is impact, desirability, need etc. • Sometimes you find that people have the one and not the other • Secondly is the comparative studies, what are the other countries doing? What are the countries in Africa doing? • Comparative research is very vital because our Constitution says that when you want to limit a right in the Bill of rights, you must do it in terms of what Open democracies and so on do, you can only do that if you study those democracies • **Directive**, they just direct. • South is South Africa. No one has problems we have. No one has the history we have. • It is definitely directive and sometimes persuasive, never conclusive • On the other hand I do not agree with this kind of sentiment that we in South Africa, that we are in Africa, so you just do not look at other	N&O arg by Emphasis

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						systems. • It is no use trying to reinvent the wheel • In any case when you reinvent the wheel you will land up where other people have been, so I think that there is a healthy balance that we have to strike • We have to remember that our country is unique, we have had a unique history, we find ourselves in Africa, so you try to balance all those. • We have got limited resources and we have a democracy which is only five years old, so all of those things you have to realise and try and balance very nicely when you take these comparative studies into account. • So I do not want to put inordinately high value on it, on the other hand I do not want to put inordinately low value on it. • These suggestions must be looked at on their own merits and within the South African context. 3. On the whole I am satisfied. • I think that the submissions have been very good. • They have been from a wide spectrum, they have been of a high quality • Also we got a lot of new people who did the submissions this time because the Bills (reference to the submissions on Open Democracy Bill and Administrative Justice Bill) have a wider impact across Government and the Justice Department • therefore we had a lot of Ministers and Director	

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						Generals that also made submissions on these two Bills and that has been invaluable because that is really bringing the problems from the Government side, how they find difficult to implement these. • It was not just your NGOs and your interest groups, it was a good cross-section. • I have been very, very happy with the submissions • Also, which is unique, has been that people have been sitting and listening to the arguments while they keep on making submissions. • That has been useful 4. Oh! Absolutely • A lot of submissions that have made have changed things, have made us redraft things, have made us rethink things. • They make you aware of things, they make you look at different angles and so on, • so I can say that when a legislation is passed you could say that it is a Bill containing every one's views, no one will be able to say "that is my Bill", it will be a Bill that has been drafted with everyone's views • The views have definitely impacted on the debates and the thinking of the Committee • In fact the whole debate has been dominated by inputs that have been given. • It is completely unbelievable 5. Not really, you see it depends on each Bill, what kind of a Bill you are dealing with and so on. • But in any case when you are drafting a	

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						submission you must remember you have to have two objectives in mind • one is to provide information arguments to people, so and hopefully to change their minds • the other is that in the end you are not going to have more than 15 minutes to make your input, so you have to draft with that in mind • But there are some people who have become very good with it, • they deal with the political and the legal in how they make submissions • but some people have now learnt in the Committee, they for instance start with the Executive summary in the beginning and the main submissions they want to make, • they then do the rest where they do the arguments on those executive summaries and then the clever ones would also make amendments and they would attach them to the document. • If you do that you have got a good chance that people are going to use your ideas and make the changes and so on, • because it is not just waffling on about this is wrong, this ~~must~~ must be changed, you are really giving people upfront what the issues are • you can the read more on it and then you have got substantial amendments that would reflect what you are trying to achieve, so that is a kind of format that works well. 6. The system I follow is that when I get a Bill I call for submissions • I give some time for the submissions to be	

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						handed in • When they arrive I listen to the Department what they want to achieve with the Bill • I then have public hearings in the Bill • I then let the Dept. summarise all the proposals that were made during the hearings and in the submissions • and then when we start as a Committee we discuss under section 1 all the submissions that have been made, • under section 2 all the submissions that have been made • plus what the parties' views are and • once we have done that we start discussing the amendments that have been made and so on, • and then we continue, of course amending, changing, 7. I would not want to list names. • That would be unfair. All of them make good submissions at some stage • Sometimes they have less impact, sometimes they have more impact because of their content or the approach taken, • but as I said I would rather say to you that people who really put it give you a framework, an executive summary or what they want, and then give you the details. • In those details must be legal issues being dealt with, the political issues being dealt with and then give you a summary of amendments and so on that they are proposing. 8. I would not use truthful as a gage for	

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						submissions because people have their own perceptions of life, their own perceptions of the world, and their different interests, so it is very difficult to see which ones are not truthful. • I suppose all of them people think are truthful and that is what they want to do. • I do not think that truthfulness is detect of the truth • It is really rather which ones make impact and those are the ones that understand the Bill, understand the Constitution, understand how the Bill fits in the Constitution • and understand how the Bill and the Constitution fit into the whole picture that you are trying to remedy • And so I would not use truthfulness as a measure, there are just many truths. Your truth is not my truth, my truth is not your truth, mine is not that one's, yours is not that one's and so forth. 9. Again that is too difficult. You would never be able to specifically answer that. • All that you can ask for is that people work hard, study the issues, know the Bill, know the Constitution, know comparative studies, compare those with each other and know the politics of the country and what they are trying to achieve. • But as I said there is a standard of a submission that I find attractive and that is the one I said in which you give the Executive Summary, all the law and the staff in it. • If I see that, even if I do not agree with it, but I know that these people have at least done a good	

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work

10. You see there have not been many submissions like that.
- In fact, I do not know if there has been any really
- Obviously, without being paternalistic, because I think it is nothing worth than being paternalistic, I mean you really have to treat everyone the same and so on,
- but I imagine that when people come with less skills, in terms of the legalities and so on, I try to stop the Committee from going into legal issues with them because I do not think that is the issue with them.
- It is our job to make sure that what they want fits into the law.
- If it does not fit into the law we cannot give them what they want, so in that case I think one needs to be more understanding of where the people come from and you have to realise the value of the input.
- You cannot be as strictly as you judge NADEL and so on, where you want solutions, drafts and amendments drafted and people understand the Constitution.
- I think with those kinds of submissions what you want is for people to come and identify the problems they have, the problems they are experiencing as people in the informal settlements, in the townships where resources are different, skill levels are different and the understandings are different and so on.
- But I want to emphasise that I would not take any kind of paternalism, that is absolutely

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						nonsense. • Their submission has a different value. It has a value of bringing people's life experiences to us that fit into that Bill. • But that is theoretical because the problem is that the majority of the submissions in my Committee do not come from people from those communities	
2	Ms N Botha (ANC)	sent to her on the 8th of Sept. 1999	No response.	I called her office. She was not there, I therefore had to leave the message with the sec.	Conducted on the 18th of October 1999. Duration: 30 minutes	1. whether someone who is making a submission understands the objectives if the Bill 2. research is perhaps an inappropriate or a misapplied term. 3. yes and no • some have been mediocre • some have been better, others have been good 4. yes • appeal to reason 5. no 6. A summary of the submissions is made • if a summary misses out on a particular issue, that issue can be considered during deliberations • opinions of the opposition parties are also taken into account 7. I do not think that I can answer that one because in a submission you can find that there is something which is relevant and the other which	

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						is irrelevant 8. the one that shows a selfless approach • lying can easily be detected if someone comes to the Committee and tells lies. 9. If it is in line with the objectives of the Bill 10. it depends on the kind of the issue under discussion.	
3	Mr G Solomon (ANC)	sent to him on the 8th of Sept. 1999	as above (See Ms Botha)	I called the office. He was not there. I finally made an appointme-nt with him during the meeting of the Committee	took place on the 18th of October 1999. Duration: 40 minutes	1. (a) We are looking for public participation • We are looking at public concerns (b) A good submission is the one which comprises practical examples 2. No, research on the Bill is done by the South African Law Commission • People are not expected to do that • There is a duty on the state to make information available to the public, but there might be some constraints on it to do that • Things like the Government Gazette are available to all the sundries of SA • but there is also a civic responsibility to show a keen interest and to always check a Govt Gazette • Bills are available at Govt Printers and anyone can have access to such documents • There is incomparably too much transparency than ever in this country 3. Yes and no 4. Yes, if the submission is not in conflict with the	(1)

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						national policy or with the policy of the Department 5. No, people are at liberty to respond in a way that they think the Bill will affect them • All depends on the pertinence of an issue with regard to a person making a submission 6. A summary is made 7. NADEL, the Law Society • they are familiar with the system 8. It is not for us to judge whether a submission is "truthful" or not 9. We will look at each submission in terms of its own merits 10. People like NADEL will be much interrogated because they are familiar with the legal system especially with the technicalities	
4	Ms Chohan-Khota (ANC)	sent on the 8th of Sept. '99	No response	I made an appointment with her in person	conducted on the 20th of October '99 Duration: 35 minutes	1. A submission should bring about some sort of enlightenment • it should tell us about something that we do not know 2. Not really, but some NGO'S do research • Research is the responsibility of Parliament 3. A combination of both • it depends on how the media has advertised the Bill • ill information affects the perceptions of the	

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						people • sometimes you find that the submission is too far from the issue at hand because of the way it has been advertised by the media 4. Yes, that is why we consider submissions 5. No, but people should be concise • it would be better if they summarise at the end 6. A summary is made • A decision is reached as to what to include and exclude 7. Prof. Geoff Budlender, the DG of Land Affairs and the Institute for Security Studies (she was referring to ODB) in Italics [figure brackets. • Some NGO'S as well • Prof. Budlender's submission was impressive because he was talking from experience • In most instances it depends on the nature of the Bill • If it is too technical most people will have a problem with it 8. We never measure the veracity of a submission • We do not expect that people can come to lie to us • I personally believe that that can be detected 9. Sometimes it enhances your understanding of an issue but if it is in line with the objectives of the Bill	

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						10. In terms of evaluation there is no distinction • It depends on the authority.	
5	Ms M Smuts (DP)	sent on the 26th of Oct. '99	No response	An appointment in person during the seating of the Comm.	Conducted on the 9th of Nov. '99 Duration: 45 minutes	1 (a) One is looking for a full range of analysis from constitutionality to the legal aspects to the practical aspects (b) A **good** submission is the one that is very clear • very well argued • authoritative, from whatever view point like any other thing in life • clearly set out • clearly identifies the issues and addresses them 2. Absolutely • If a bit of comparative study can be done, then that adds to how influential a submission will be 3. On the Open Democracy Bill, I am more than satisfied • Obviously some are better than others • Some of them have been amongst the best I have ever seen 4. Yes, it can • If a submission knows the field very well and points to facts and factors that have not been taken into account in the drafting of the Bill 5. No, just be logical and clear because MPs have an unbelievable amount of reading that they have to do 6. We will try to find out whether it accords with our philosophical points of departure and	NB (1)

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						particularly our constitutional approach (from the party point of view) • We will discuss it as a study group and take it to our caucus and it will be measured against what our basic political principles are • Sometimes our position has coincided with that of the organisations like Cosatu, which has different views from ours	
						7. Black Sash • They have built a reputation of sound legal analysis • but as well a real understanding of those on the ground • When Black Sash speaks it matters politically because everybody knows that they have represented the interests of the poor for a very long time • The other ones are you legal NGOs, Legal Resources Centre, NADEL is often interesting, Lawyers for Human Rights, the Law Societies • the formal legal bodies as well, the Bar Council of South Africa, they are usually authoritative	NB (2) (3)
						8. People have their own interests and when you read a submission you read with that in mind • I do not think that I have come across a submission which has been untruthful.	
						9. You think about it, read it • A researcher's work might change your understanding of the issue, that would be the best kind of input • It might sometimes concur with your	

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						understanding of the issue and in which case it strengthens your point 10. May be you read them differently • I think that grassroots submissions get special attention, • it is important to know what these people think because they are the genuine citizens • For me they are almost more important than others (grassroots submissions)	
6	Mrs S Camerer (NNP)	sent on the 26th of Oct. '99	No response	Appointment in person	Conducted on the 11th of Nov.'99 Duration: 35 minutes	1(a) I am looking for expertise • because we cover a lot of things on the Committee on Justice, we therefore need expert advice on a lot of things, legal advice • that gives you a wide perspective on what you are dealing with • the point is that we are often over burden to look at legislation and it is quite long and very complicated • it is helpful to get specialists' inputs (b) a **bad** submission is a kind of a limited and a vague one • I can think of one or two of such submissions on the Open Democracy Bill, they were political in the sense that the body which was invited to make one thought that they ought to say something but they had not consulted someone who had knowledge on the issue at hand and it was a useless exercise • a <u>good</u> one is that which has an expert in the field 2. Yes, but sometimes it is within their specialised	

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						knowledge, so they do not really have to do much research • From the submissions I have seen it is clear to me that they have employed an expert to do the job or within their own organisations or an outside expert 3. On the whole I have been satisfied • Most of them are quite useful either to convince you to support the submission or not to 4. It is difficult to judge • For the opposition certainly we can be convinced on certain issues • Very often the submissions really confirm our party political position • It is more difficult for someone from outside to convince the governing party to change its mind, because basically the legislation comes from the party's senior members, the Cabinet • But to the ANC's credits I think that they have actually change their minds on some issues, not actually on the matter of principle 5. No 6. A summary is made by the Law advisers in relation to each clause of the Bill • Sometimes after the Committee has listened to a submission an organisation may like to make more points 7. In general the submissions have been positive	? NE Could convictions common place!

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						8. Members of the Committee come from various political directions so there are varying views on a submission under consideration 9. A submission draws my attention to something I have not thought about • I read it and I have one or two queries, then it highlights aspects that require consideration • Submissions provide information 10. The answer must be yes because people from the grassroots usually go to the very respectable NGO which makes a submission on their behalf.	
7	Mr J H van der Merwe (IFP)	sent on the 26th of Oct.'99	Yes, a written latter dating the 27th of Oct. referring me to his secretary	I made an appointment with his secretary	Conducted on the 15th of Nov.'99 Duration: 1 hour	1(a) An input background, why are they doing it? What is the problem? • constructive proposals (b) A bad submission is where people do not clearly put their case • a confused lot of words • where the Committee does not understand what the input is about • when it is not properly written • where a proper case is not made out • A good one would be when they put the facts very clearly • if it is well researched legally, then it is a good submission 2. It is not necessary to do a very comprehensive research although in some cases it would be necessary 3. satisfied, although there and there you get stupid	

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						inputs eg where a person just writes a letter and says "I think we should bring back the death penalty" instead of saying "the death penalty should be brought back because of the following reasons." • Generally in the Portfolio Committee on Justice the inputs are well researched and well presented 4. Yes, if it is necessary 5. Yes, yes I would say this depends from person to person 6. When all the inputs are there the Committee sits and evaluate and eventually arrives at the conclusion 7. Various Law Societies • South African Law Commission, NADEL, Black Lawyers' Association, the Bar Council • Here and there individuals 8. It is when a person identifies a need or a wrong • and then researches that properly and makes a submission that the need be satisfied • that the wrong be put right • BUT out of an intention of good will • NOT an intention driven by profit or party political thinking or anything apart from the conscience of an individual making the input. 9. If a researcher has researched something, I must first test technically whether the research covers everything	

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						• The first thing is to try and establish whether a researcher has done a proper job • Has the researcher covered the whole field? • I would also like to know whether he/she has compared the situation with the other countries in the world • When that is done I read the input of the researcher and I try to marry that with my own thoughts and see whether it can convince me or not and it is a matter of convincing me 10. I will approach the one from the informal settlement (grassroots submission) in a totally different manner understanding that that person is not trained and putting into motion methods to assist that person. • that prevents the disappearance of a good input	NB (1)
8	Adv. H C Schmidt (DP)	sent on the 26th of Oct.'99	No response	An appoint ment in person	Conducted on the 18th of Nov. '99 Duration: 40 minutes	1.(a) Practical solutions • a practical example as to how this section could in that specific sector of the society be applicable • and if it is a problem how do you solve that problem • look for theoretical aspects, is it properly drafted? (b) A bad submission is the one which is too difficult • which is extremely technical • if it contains too little information that it does not make sense to the reader • A good one is the one which addresses a specific part of the Act and • gives a proper study as to what are the effects of the Act	

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						2. No, but I would appreciate if they do 3. I have appreciated some and I have not been impressed by some • some are very good, some are excellent • others constitute only a page as if they have been prepared in a hurry 4. Yes, if they can show an input and the understanding of what the article is about • if it has the persuasive power 5. I do not think it is necessary but one would like to see that someone has at least the quote of a section • identifies a problem which has prompted him/her to make a submission and • where he/she thinks that it will have a practical effect on the particular sector of society which he/she represents and gives a solution to the problem • background research is also necessary 6. One looks at the principles of the party and tries to reconcile those with what is said in the submission - That is very, very important • Secondly, see if it is reconcilable with community's values in general • in other words, can the society accept whatever that submission tells you • if you are a religious person, for instance it might not be out of line with the policy of your party, but it might be against your religious convictions	

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						which the society generally accepts • You have personal feelings and convictions as well, these also play a vital role in this regard • The object of the Bill is also taken into account 7. I would not like to mention names (then he gave me an example of the submission he had been reading the previous night - from the University of Wits, by Jonathan Claaren, he also mentioned the SACC's submission on the ODB) • They are good because they identify the problems and address them 8. One which has elements, the basic requirements of justice • In other words, it must be fair, reasonable, it must be able to keep in mind all the factors which the society considers as constituting a moral fibre, ethical issues • All those issues are the things which one scrutinises, tests and says these are the balancing factors to determine the truthfulness of a submission 9. I would evaluate it having in mind what I have read from the other submissions, in other words I will compare with the other submissions concerning that particular section • One then evaluates it again against one's principles, community principles and the purposes of the Act 10. There should not be a distinction in terms of whether a person comes from the informal settlement or from wherever	

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						• The submissions are equally important	
9	Mr M Masutha (ANC)	sent on the 08 of Sept.'99	No response	Appointment in person	Conducted on the 24th of Nov. '99 Duration : 35 minutes	1(a) You are trying to understand to which aspect of the Bill that you are considering does this submission relate to • The second thing is you want to understand what a person is actually asking for • whether that person is asking you to correct or to change what is there and to substitute that with whatever he is proposing (b) A bad submission is the one which makes generalised statements and • a submission which does not point to the specific provisions of the Bill • A good submission would be the one which avoids the above • BUT a very good submission would be the one which takes a Bill a step further by providing you things to work with such as whether those people have done their research and they know what they are talking about 2. Not necessarily, but if they have done research, then it becomes an additional positive thing to it because it strengthens the point that they are making • It is persuasive, our legislature is independent, only bound by our own Constitution 3. I have found the submissions generally which are very detailed and very organised 4. But definitely the whole purpose of the submissions is to influence whatever position that the Portfolio Committee has arrived at on the	

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						issue, otherwise the whole exercise would be a waste of time 5. I think different people have different styles, and one does not want to impose on them one's style 6. Usually the officials will make a copy of those documents and they would put those together, • collate them under each clause 7. I would not like to mention names 8. I always assume that all submissions are truthful 9. I am not sure whether I understand the question, but the researcher's duty is not so much information that is gathered by the researcher more than the researcher's opinion about the issue • His duty is to make sure that he interprets the information because the information can be interpreted differently by different people • and he/she should not impose his/her interpretation 10. You cannot treat them in the same way because of their different backgrounds, as far as the technicalities are concerned.	½ common place of difference. ½ compare
10	Ms Raenette Taljaard (DP)	Sent on the 18th of Nov.'99	No response	Appointment in person, on the 24th	Conducted on the 26th of Nov.'99 Duration: 40 minutes	1(a)First of all, clarity especially if you are going through a Bill • a quite clear delineation, which clauses are being dealt with • what are the cross references between clauses and clarity on that	½ NB

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						• but frequently if it is a modelled submission it is very difficult to follow the logic, so I would say, first of all clarity and a systematic approach in terms of what is covered and even if there is a broad outline at the beginning of what are the controversial areas that would be covered in the clauses, that would be helpful. • if there is an introduction that says these are the primary controversial areas that I am going to be picking upon then go in through a clause by clause (b) A bad submission would be the one that just raises the general question but does not go into details in the Bill • A weak submission goes on and on about the broad generalities, it does not get to the targeted problem and a possible solution, a possible suggested formulation • A good one is the one which is clear, identifies a problem and provides a suggestion 2. I would expect them not to have only looked at the Bill, to have read whatever is related • Considers comparative studies as persuasive and directive, not necessarily as conclusive • BUT, if you are dealing with an issue which is unique, then none of these aspects seems to apply. 3. I would say yes by the textual submissions, those based on the text • BUT not always satisfied with how it is presented because a lot of quality that is in the	

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						actual textual document gets lost if the person ~~he~~ who is presenting is not presenting properly • so whatever is in the submission textually is very contingent on the person doing a presentation 4. I think it can • and it is contingent upon other factors such as the persuasiveness of that relevant presenter • the ability to manipulate international bench marks to make them appear conclusive • Those issues are too important • reasoning 5. I know what I like to see in a submission, I am not saying it should be the ideal solution or template but I know what I like to see. • Let me give you what I would have liked to see in the AJ Bill: • I would have liked to see them take on board in the introduction what were the targeted problem areas • how did we deal with the constitutionality questions • the broad theoretical issues • and then go into the content of the Bill and make suggestions where relevant • Not only a whole theoretical debate on all the problems but creative suggestions and alternative wording and phrasing because that is when it becomes important when you can work with alternative suggestions and compare them. • That is where quality happens, when you have suggestions that you can compare and contrast	70 (1)

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						6. I use the criteria of what has become the clearest problem areas from all the submissions • and then I go back to the submissions to tackle that adequately and I exclude those submissions which did not touch on those problem areas that ultimately arise, the key areas that the Bill will need to amend • then I go back to the submissions that targeted those problem areas and those that did not look at it or did not deal with it at all go by the way of side • But equally having said that I do not only look at the problem areas, if there was a creative angle that arose out of one submission that nobody else tackled, that needs to be addressed, I would include that as well but that would probably be the basis • Those that were noble areas, those that nobody has thought about or nobody has travelled through in the course of the Bill and those areas that have emerged problematic, those submissions I will go back to. 7. I would say the Legal Resources Centre, Prof. Budlender, Police Anti- Corruption Unit • they present the information clearly • it is the clarity of thought, following through in how the information is presented 8. It's difficult because every single submission clearly has an unstated agenda, I would say it is a political agenda by its very nature • so when you work with the concept "truth" it is	

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						packed within what is the underlying political agenda of that submission and it is difficult to label a certain political version "truth" and another political version not "truth", so that's where it becomes difficult to say what is a truthful submission • But having said that, may be a truthful submission is the one that is quite open about its biases, and be that in the text or in the way it is presented is another matter • and uses some of those biases to try and work with the power of persuasion 9. I suppose you go in with your own preconceived angles on the issue and if that researcher's angles miraculously marry your own, then it is fine. • If there, I am talking now as if I am the person for whom the research has been conducted because I have very distinctive preconditions as to what I want to see included and you do not always communicate that properly to the researcher when the researcher goes off and does what he/she believes needs to be done, but it is contingent upon me then to communicate clearly what I want so that my angle on an issue finds its way into the researcher's conceptualisation of what he/she needs to research, so that I will be satisfied with the end product, otherwise there would be areas that the researcher would have not looked at or has not found because I did not clearly communicate what needs to be looked at. 10. To be quite frank upfront I have not seen an	NS

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						adequate amount of submissions from people who are not organised in civil society, so you do not really get the voice of the little people because they are not organised than some conglomerate bodies that can actually do something with their opinions • It is only institutionalised organs of civil society that we have had making submissions • It is actually sad that there have not been more submissions of people beyond civil society because not everybody can afford to be organised • You can adjust the margins at how you look at it • but when it comes to the substance of what you want to take out and try and contribute in terms of the suggestions, be they from the individual or an organised body the criteria may remain the same because clearly you are looking at the suggestion or the concern coming from an individual or a body, so the criteria for looking at the suggestion should be the same.	
11	Mr P F Smith (IFP)	Sent on the 28th of Oct. '99	No response	Appointment in person	Conducted on the 29/11/99 Duration: 35 minutes	1.(a) Something which proves useful to us in assessing the impact of the Bill in whatever a particular organisation is involved • impact of the Bill in a broader sense • one seeks the things which assist in taking the Bill further (b) A <u>bad</u> submission is the one which consists of too many generalities • which wonders all over the place • which is not succinct • which does not relate to the structure of the Bill • A <u>good</u> submission will be the one which says amend clause so and so	

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						2. It depends on the organisation • an interested party does not need to do intensive research • a higher level of research is expected of the NGOs and other organisations which play a watchdog role • what is useful from them is comparative staff 3. In general, fine 4. The Committee is a filter, it filters inputs and decides which is valid and which one is not • sometimes the submissions have a big influence, sometimes they do not have 5. I expect them to make submissions which are succinct • clear • easily processible • which cover their concerns 6. We do not have to reconcile them • each one is looked at on its merits to the extent that it contributes to the Bill 7. I have no views on that • I hate to isolate individual contribution to the process • in general terms, civil society makes valuable contribution to the process 8. I do not think that the question means anything to me	NB Common place of difference

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						• one has to read between the lines whether an organisation has a sinister agenda 9. No response 10. A different approach will have to be used.	
12	Mr Swart (ACDP)	Sent on 28/10/99	No response	Appointment in person on 26/11/99	Conducted on 01/12/99 Duration: 40 minutes	1. (a) Coming from the legal background, I first look to see if the person that makes the submission understands the Bill that he is commenting on • Secondly, whether he is making substantive law changes/amendments to the Bill • Thirdly, what are the main objections to the Bill, it might be on a moral basis • Coming from us as a Christian Party we will look definitely to see to what degree there is a moral objection to a Bill • It would depend on the extent to which the submissions goes into the details of the Bill itself. • If it is a one page comment that says "We are against this Bill" without motivating then it would not hold much weight (b) In order for me as an opposition party to use a submission, it must have substance to it • The legislative process is a legal process, so there must be substance to it. 2. One would like them to have background research, but it depends because some people might be lay persons from rural areas who might not have access to research facilities, but might have a particular need , for example on a crime	

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						issue they know the crime is affecting them and they want to make that point very clearly but they do not have the research facilities, so it must be considered where you are getting your submission from. • if it comes from a more intellectual group like Idasa or Legal Resources Centre, then you would expect a lot of research because these are lawyers. • it helps a lot if there is research done into comparative law, international law, similar statutes, case law • Persuasive, in terms of our Constitution one can look at international law, but purely as persuasive 3. I have been very pleasantly surprised at the submissions that we have received particularly in the ODB and AJ but these are highly technical fields and the standard of the submissions has been of the very high standard • South African Law Commission, Legal Resources Centre, Idasa - these are law groups • In non governmental organisations I have got Black Sash, the standard of their submission has been of high standard, where they really come up with solutions, they would say they have a problem with this Bill and propose a draft solution • which is very useful because as one argues and debates it always help to have a draft solution where a person who makes a submission or an organisation says they have got this problem and this is the proposed solution, that helps a lot.	

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						4. Clearly, if a submission holds very good legal point which has not been considered yet by the Committee • Alternatively where it is representative of a certain group of people or large group of the population it might also hold a lot of weight as one considers that that is what that particular group of people says, so in those instances the submissions can sway the Portfolio Committee, may be not so much on policy. • By the time it gets to us the Cabinet has already decided on policy, on the desirability of the Bill and ~~then~~ even we will look at the Bill, but on the technical correlation we can be swayed a lot and if you look at the example of ODB where the whole provisions relating to the whistle-blowers have been taken out, this is an example. 5. It is useful to have a summary at the beginning and the executive summary particularly if it is a long 20 or 30 page submission, • you have an executive summary of what you are dealing with, • summarise succinctly because often what happens is that the Department summarises the submissions and might not capture every submission that that person who has made a submission wants and we had complaints in the past that the submissions were not correctly summarised, • so it would be good to have an accurate executive summary, and then to • deal with your submission	NB NB

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						• and then have a conclusion with proposed amendments and propose solutions, go beyond just criticising or objecting 6. A summary of each clause is made 7. The Law Society, Legal Resources Centre, Idasa and the others • they make substantive amendments with good objections to the Bill by proposing drafts and amendments • they have a legal background and are therefore able to draft useful amendments that fit into the scope and ambit of our legislative structure 8. I suppose "truth" is a difficult concept • I know what to me is truth, that might not be truth to another person, but it is a perception by certain group of people. • They might perceive in their eyes this is how it should be a truthful submission but other people might disagree and say they do not perceive that submission to be correct. • This is the perceived truth • But there is an absolute truth • In our view, as a Christian Party, we have Christianity against which we test the truth 9. Researchers have wide access to background information, to precedents, to case law, to other foreign jurisdictions so they will be helpful. • Researchers from other organisations might have access to literature that we are not able to access. • It helps for them to do the research and give us a	

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						summary of that • We do not have the time to do that research • We also, as MPs have our own researchers , that also helps us. Their role is fundamental 10. Yes, I particularly consider all submissions, but where it comes from your grassroots structures I would consider it representative of the voice of the people of that community • whereas where it comes from NADEL, which is a particular smaller group, so one looks at who that group represents • and whereas your grassroots submission might be of excellent quality, it might also indicate a need in that community in a basic format and it must be weighed exactly the same as any other submission, particularly when it comes from a grassroots structure. • Clearly where you have lawyers drafting documents, it might have a better formulation with proposed amendments but it should not have more weight than a grassroots structure submission because that is actually why we are here, we are here to serve the people. That is very important.	
13	Mr J Jeffery (ANC)	Sent on 28/10/99	No response	Appointment in person and I gave him a second letter	Conducted on 02/12/99 Duration: 45 minutes	1. (a) The aim of having submissions is to get public comment on the Bill, so you really want as much detailed comment as possible. • You do not want broad political statements • You want the submission to be dealing with the subject matter • what the problems are that the person or the organisation has with the Bill • and then what amendments are they suggesting	

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						(b) A good submission is one in which they say "these are our problems, our problems are with clauses 5,8 & 9, • this is why we have got problems • and these are our proposals for what you can do to accommodate them" • A bad submission would be the one where a person does not deal with the subject matter of the Bill • where they talk about broad problems with the subject matter not specific 2. Obviously, we would expect that they know what they are talking about • The resources of Parliament do not seem to be that good,, as far as back up for the Committee is concerned, so if somebody is proposing an amendment, we would them to have all the details as to why they want that amendment and probably it is not essential in every case, • but probably to be able to propose amendments which are researched amendments, which are legally valid amendments. • Persuasive, it is useful to see what is happening in other countries, with the Administrative Justice Bill we are drawing on the Australian and the German examples, what are the difficulties with ODB and extending the right to information to the private sector has not been done in any other country so we do not have any precedent. • It cannot be conclusive because legal systems are different, so terminology is different. • In a particular country you might refer to things in a particular way, in SA it is different.	

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						3. The only ones I have been involved in are the Constitutional Bills and I think generally the submissions have been of a good quality, meeting those criteria I spoke about. 4. It depends on the nature of the change • Whatever the view of the Committee, you listen to the submissions but it will depend on what they are making a submission about, • if it is on a fundamental policy issue, say for example with the Equality Bill the Institute for Race Relations came along and said this was a bad Bill, that is not going to have any impact because it is a policy decision. • But generally all the submissions are listened to and they do influence the Committee and the whole process of taking submissions is essential to the Committee 5. It is a good idea to know who the person is that is making a submission, what the organisation is • How many members they have got • What are their problems with the Bill • Which specific clauses do they have problems with • What amendments are being proposed 6. A summary is made 7. Professor Budlender • He is able to bridge both worlds in terms of having been the head of an NGO, the Legal Resources Centre and then having the experience	NP 1

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						of the civil service, that kind of perspective is very useful • It depends a lot on where the person is coming from and is this something that the Committee wants to hear • The difficulty with the NGOs is that there is a sense probably ~~form~~ Members of Parliament that while they have got a valuable contribution to make they may not be that in touch with the reality, what is actually achievable, in touch with the problems of the administration of government. • It is still important to get that perspective, but you can sort of write off a bit what they are saying by saying, "Well, look this is not practical." 8. Of course, it must be accurate. • Somebody must not come with false information, that is misleading and destructive. • Very often bodies come and raise concerns but to a large extent they have sort of misread the Bill and it is not as bad as they think it is, that also is not useful. • Bodies which are making submissions need to have considered the Bill that they are making submissions on. • They need to be accurate. 9. It would be through questioning the person making the submission primarily, and trying to evaluate from that • You have got a wide range of skills and experience in the Committee so if I am not	

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						knowledgeable on something, there are people on the Committee who have that and you can pick up whether something is accurate or not 10. The answer would be no, obviously the types of things that I was saying are expected from the submissions that one is expecting from the NGOs, from the bodies with some kind of resources, some kind of skills - that kind of thing- • if it is straight from members of the public, then it is obviously a completely different criteria. • They are not going to have been able to thoroughly understand the Bill • they are not going to be able to propose amendments • They are going to be voicing more sort of gut concerns, things they may have heard that this Bill may be doing and what their concerns are, • so obviously it is a completely different criteria.	
14	Mr G Magwanishe (ANC MP)	Sent on 28/10/99	No response	Appointment in person	Conducted on 17/01/00 Duration: 35 minutes	1. (a) We are looking for suggestions on how to better draft the Bill. • We are also looking at how people want the Govt to be run through a particular Bill (b) A <u>good</u> submission is the one which focuses on the issues that are under discussion • and a submission that will try and come up with solutions rather than stick to problems • A <u>bad</u> one would be the contrary of the above 2. It helps a great deal to have done research, but it does not mean that we do not accept the submissions which have not been researched	

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						because I think that research is a very broad term. • You might not have done a research using the established methods, academic methods but through your experiences where you live you would come up with very good and concrete proposals, that will be accepted. • I would consider international studies to be persuasive because we need to learn from the other countries, but you must also appreciate that South Africa is unique, with a unique history and unique experiences so that is why I would say that • it is sometimes directive but we can be persuaded sometimes by international practice 3. The submissions that we have received especially from the Departments have been very helpful because they help us to be able to understand what is really happening in the Departments, because you find sometimes that sometimes some of us might not know what is exactly happening so that experience from the Departments and from the NGOs helps us to fine tune the Bill • There have been outstanding submissions, e.g Prof. Budlender's submissions • He has been really helpful in making us amend some of the things in the original draft. 4. Yes, we ask for submissions so that people can make input in the drafting of the Bills and that is how people centred democracy should work • In most cases we are persuaded by the	

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						submissions that are made by people and I think it constitutes a great deal in terms of how the Bill must be drafted. We get a lot from the submissions. 5. I would say that because people who make submissions are very diverse in terms of their education , professions and so forth, so they are influenced by their backgrounds but at the end of the day we look at the content of the submission rather that the format which would be a technical issue. 6. A summary of all the submissions is made • We discuss all the submissions one by one • those which make sense to us we put them as options because of parties' differences • You find that a particular party favours a particular submission, it would be under discussion until we come to a voting stage where we will vote for a single, one particular option. • You might find that the ANC will vote for Option One and the DP will vote for Option Three and after that it will go to the plenary. 7. Prof. Budlender, the Director General • He has made us aware of the issues like how much time goes into the researching of the information(for it to be accessible to whoever may want it - in line with one of the provisions of the Bill) • He has made us aware that if this Bill is not properly drafted and it can just bring the Govt to a stand still.	

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						8. It is difficult to say whether a submission can be truthful or not • but I think what is more important is if a submissions comes up with solutions, viable solutions that can be put into practice • I think that with solutions that are based on experience that was experienced you can be able to develop a very progressive Bill. 9. If the research is such that it addresses the fundamental questions and it is written in a precise and in an understandable language with tangible solutions, then I would consider that one 10. I think the issue comes back to the question of technicalities - how you write a submission • but we do not look at the technicalities as such but we look at the content, what is the person trying to say, so you might find that a submission drafted by a Law Society or by a Bar Council technically is much more sound but you might find that its content is not useful at all and you might find a hand written submission by somebody from the squatter camps with a lot of logic in it and which gives solutions, so we will go for that. • There is a technical aspect of it and there is a content of that particular submission. • We will look at the content because after all, after we have finished drafting these Bills they go to the Chief Law Advisers who will try and fine tune them, so that is why we focus on the content rather than the technicalities, how it is	

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						drafted. • We ask basic questions about what a person has written and then we try and make sense of that, so we are guided by what a person has written	
15	Mr P H K Ditshetelo (UCDP MP)	Sent on 28/10/99	No response	Appointment in person	Conducted on 19/01/00 Duration: 25 minutes	1. (a)My personal view is that the submission should reflect what the needs of the people are, by various institutions, for instance this Bill (the Open Democracy) is really talking about the interests, the accessibility to information and various institutions like private companies should indicate, because this is the reflection of the Bill of Rights. The Bill of Rights states that everybody has rights and these are the rights that we are now exploring so I would be looking for things that will centre on people, also with respect to the process, to the procedures that are to be followed. (b) A <u>good</u> submission would be the one that would be relevant to the needs of the people • it would be the one that would augur well with the Bill • A <u>bad</u> one would be the one that would cause us to refer to the past regimes where the interests of the people were never taken on board 2. Well, fortunately all the submissions that we have had reflected that people have researched because we have looked at other countries, what is it that they have done relevant to those types of submissions that we have - the American views, the English views, the Canadian views etc. • I think it is persuasive. We cannot live in isolation, we have got to compare our needs here with the needs of other people	① argument by comparison

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						• We are a developing country, other countries have already been there and we have to be seen to be always moving in that direction. 3. I have been satisfied because they have been well researched • They are of a very high quality 4. It is possible because we are looking for something that will be good and if in the submission we discover that this will do good for SA we would always be persuaded by the submission 5. There is no particular order because the various institutions will decide where their emphasis will be, • what other things they would like to be taken on board, so we would not have a hard and a fast rule 6. We come together as a Committee and then later on there is a summary on our views as representing different parties on what we feel should be taken on board with the Bill 7. The Law Societies • The other institutions as well • They have come up with things which were an eye opener to us • Those things helped us to shape the Bill to what we really want 8. As far as I am concerned it would be very	

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						difficult to decide which is a "truthful" submission. • To me all the submissions have been made in good faith 9. I would rate this very highly because these people take time to do their work • It is not a matter of drawing up something, it is a submission that has been really well researched to come to this understanding, so my evaluation is that this has been of a very high standard 10. It would be very unfair to ordinary people to say they should approach a submission in the same way as the academics • But whatever grassroots people say will have to be looked at seriously	? Comment plan on comparative difference.
16	Mr L Landers (ANC)	sent on 08/09/99	No response	Several appointments in person	Conducted on 28/01/00 Duration : 35 minutes	1(b) A <u>good</u> submission should address the Bill, the contents of the Bill, that is the actual objectives and the actual clauses of the Bill. • You will find that there are some organisations and most of these are the organs of civil society who have become very professional about this and as a result we get excellent submissions from them, whether you agree with a submission or not. • There are those submissions where you find that they do not address what is in the Bill and try and assist you, the Legislature, to improve what is already there but instead focus on the issues that are outside the ambit of the relevant Committee • But more and more as civil society becomes involved in the legislative process, I am sure that they will learn that is the way to do it,	

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						• sometimes you find that the Chairperson has to actually appeal to the people when they make the submissions to actually address what is in the Bill and not raise other issues. 2. Obviously they would have done some research but most people make submissions out of their own experiences, so it is a combination of both, research as well as experiences • It is persuasive but it is not necessarily always the best 3. Generally speaking, I have been satisfied • They have been pretty professional and have tended to assist us. 4. It depends on the content and the substance of the submission • The Law Society and the General Council of the Bar, they have special Committees that look at legislation particularly that that deals with justice matters and they often make us aware of the legal problems that we should address in the specific clauses and as a result we change those • Yes, most definitely they can persuade us 5. Not necessarily • Different people use different formats • But I think the most important thing is that the submission should address those issues in the Bill that a particular organisation or person wants to bring to our attention, firstly • Secondly, they should address the clause	common place difference

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						6. Every member is expected to read all the submissions, but there are those you just put aside either because they do not say much or you do not agree with what they say • and then there are those that address specific issues which you put your mind to • What we always do is that we ask the drafters of the Bill to take all the submissions and then present us with a concise document that deals with the most important or salient points in each submission • Alternatively, what we ask the drafters to do is to set out the clause Bill by Bill and tell us which submissions address each clause. 7. I cannot answer that one now because the list is endless • The Law Society, General Council of the Bar, some magistrates, some judges, Lawyers for Human Rights, Idasa 8. One that honestly addresses what is in the Bill • One of the issues you find most prevalent in the submissions is that they tend to deal with vested interests, which I suppose is understandable. • All of us naturally do that, we try to deal with what is closest to us, what affects us directly • but then the other aspect in the legislation is also what is good for society, what is good for the people or the country • Quite often you find that people tend to ignore that. • As long as the Bill addresses their own vested interests, then they are quite satisfied,	

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						• but when you challenge them on what is best for society, for the people of SA in the Bill, they beat about the bush. 9. You can quickly see from your understanding of the Bill and what is contained in the submission whether they have completely missed the point, • whether they are trying to bring into the debate of the Bill issues that are actually outside of the Bill's ambit • and that is how you decide whether the submission is worth considering or not 10. I think we have tended to be a little more compassionate and sympathetic with the submissions that come from the grassroots and from the townships • Anyone wanting to make a submission, it would be good if they do it under the auspices of a civic body, but that does not mean that an individual who wants to speak to Parliament must not be allowed to do that, but it is a next step in the process where we might have a difficulty • The grassroots submissions have been far from enough • 98% of submissions, in my view, come from organised bodies, organisations, organs of civil society who are well organised and well funded and so are in a position to make those submissions, professional, well thought out, clear submissions.	
17	Mr Mgidi (ANC MP)	Sent on 08/09/99	No response	Continuous appointments in person	Conducted on 02/02/00 Duration: 25	1. (a) For relevance, in the first place • In other words we are looking for information of facts in the submission which have a bearing to	

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				and through telephone	minutes	what we are legislating upon or the aim of the legislation that we are envisaging • We are not looking at rhetoric, we are not looking at personal opinions, we are looking for facts, especially broader facts which will cover all the spectra that we are trying to cover with the legislation • We are being influenced by our philosophy that the legislation should ~~cover~~ cover the widest spectrum as possible, in other words it must cover the public interests more than an individual interest (b) It is difficult to classify submissions as <u>good</u> or <u>bad</u> because everybody puts some effort in making a submission and what is good to me may not be good to another person • I think all submissions are good, but probably the <u>better</u> one I would submit would be the one that addresses the issues in a broader sense • and that excludes probably personal or individualistic and sentimental issues. • The one that shows the understanding of the issue which the legislation is intending to regulate, that would basically be a better one because it actually would be in a position to influence the legislators, the opinion makers, in a particular direction because if you just talk, you just relate your own situation which is not common to the majority of the people, • it is just a sentimental submission which will not necessarily influence the legislators, but some case studies do influence legislators as well • the individual experience could as well influence the thinking of the legislators so that in a broader sense using that as a case study broadens it to	

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						cover the widest spectrum of our community as possible 2. Yes and no • It depends on a kind of legislation • There are cases of legislation that have nothing to do with research, for instance, that address practical issues that everybody knows. • But having said that, if we are having a Bill which deals with technical issues we would prefer some research to be done in such a way that it actually empowers us as well to think scientifically, broader in our approach to legislating that • I consider them as persuasive, not directive because we are not bound by the legislation of any country, we rely on our own • but what is important about comparative study, foreign legislation, best practices as we call it, is that it tells you in a more experience way what other things other people have experienced so that you do not reinvent the wheel when you can make use of something which is already available. • When we find something applicable to our own situation, we take that into account 3. Yes • They are well-researched • They show a lot of insight and expertise and experience • I think I was satisfied with the submission and a lot people, through submissions, have been trying to be part of the process of legislating and	(1) (1)

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						we have tried to accommodate as many concerns that have been raised in the submissions as possible 4. Yes, the very basic intention behind the submissions is that we are open to submit to persuasion • What makes the opinion makers to change their minds is a fact that will come before the Committee and convince the members that we did have these facts when we thought in a particular way • we therefore change in the best interest of our country 5. No, you could submit anyhow • submissions can be made in any form • There are people who would concentrate on one particular clause in a Bill, that submission is fine • you do not say you must start from clause one to the last clause or something in that order • Some people will be interested in the last clause, for instance, and we do not care how you structure, • you can start by introducing your submission through citing some historical facts, experience and anything that you think or even academic expertise could be accommodated , including research findings if you have got any and use those to persuade us to look at a particular clause in a particular way 6. There are officials from the Department who must come and listen to all submissions, take all submissions ,	

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						• follow the instructions of the Committee, put them together as they are, group them in a particular way, for instance those that deal with clause one put them together and you try to structure them in an easier way to read and those that are similar you put them together so that when they come they are a one list of submissions, well reconciled by the officials • and we start reading them one by one, going through them, addressing the issues that they raise and isolate what is relevant to our Bill and leave out those things that are not relevant 7. The Law Societies, the Law Commission, some Heads of Departments, organise institutions 8. At face value we do not have any reason to doubt any submission • But obviously as you read through submission you could see that it has a personal thing as oppose to the interest of the people, we are not saying that they are wrong because everybody has a ~~right~~ right to voice out his interests • Truthful or not, it is difficult to read from the paper • Normally people would come and convince you, but if you have a particular object or purpose which you are trying to direct, you would see that the particular submission is actually not addressing what you are addressing, it has more to do with individual things and you do not take it into account, but that does not mean that it is not truthful, it simply means it is individualistic.	

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						9. A researcher would try to come up with facts more than anything else, lest he exposes his own credibility to doubt • Normally a submission made by the researcher makes our work easier because it is well structured, it addresses the relevant issues and discards those which are irrelevant and it makes it easier for us because we can always call a researcher and ask him where did you get this and he can produce his source and we could even ask him to submit more things. 10. The approach will be different • Things like resources, education and so forth are taken into account	NB common place difference
18	Dr Delport (DP)	Sent on 26/10/99	No response	Numerous appointments in person	Conducted on 10/02/00 Duration: 25 minutes	1. (a) I am looking for a concise statement of how the Bill can be improved , with a clear recommendation of how it should be worded • Then secondly, that submission must contain a very self-motivation and must preferably contain some material reference, material which would back up the submission (b) A **good** submission would be a submission that is concise and that is based on authorities, quoted authority • and which clearly spells out ~~ether~~ either the objections or reasons for objections or reasons for support • and if there are objections then alternative wording for the specific section that is under discussion. 2. Yes, submissions must be backed up • Representations that are based on "This is how I	NB ①

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						feel" are insufficient • there should be some form of competence on the part of a person making a submission otherwise it is, for practical reasons, worthless • We are not dealing with public opinion poll when we get representations. 3. I would say most of them were good submissions, I am quite satisfied, in general 4. Yes definitely, one must distinguish between two types of submissions • one would be dealing with a question of policy where a political choice is made between two views, • the other one is where you deal with the more technical or administrative issue where you can approve of the Act, now it is easier to influence the majority party which is in the position to force through its views by majority votes, but it is easier on non political issues to influence • Even on the political issues it is possible not to change the view but to adjust the views, you either soften them or you improve them. 5. There is no prescribed format but it is preferable that you should start with the existing section that is being addressed, • stating out clearly what problems are encountered, • secondly what is suggested • and thirdly the reasons, bases for the suggestions or recommendations	

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						6. With regard to the three Bills which we have dealt with I do not think that any member, thanks to time constraints, was in a position to have really studied 80 or 100 submissions that we received. • If there is time available, normally, one would prefer to bring people to explain to the Committee so that time is allowed for further questions. • Bu when you work within time constraints then the impact is minimised because there is no time for people to come and make argument presentations and sometimes there is not even time to really study the submission or to study them thoroughly as one would like to. 7. I came back to Parliament after the 1999 elections so I am not in a position to really judge the quality of the submissions. I have been here for less than a year 8. A truthful submission is the one where you cannot say that a political view was taken and then the reasons found to support that view. • That is often amongst lawyers, it is a common phenomenon that you represent a client and now you must find reasons or argument to support your view that he is not guilty or that the claim should succeed. • Politicians or rather in a political arena that is always a danger, in other words what I am saying is that a submission must give you an objective, reason. • You do not expect people making submissions to	7

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						do so from a particular political perspective because it, as far as I am concerned, loses its impact. 9. Well, the first thing is that I must understand the issue. • The Committee member must understand the issue, otherwise he would not be able to evaluate the contribution of somebody making a submission and sometimes I think it cannot be said that all the Members of the Committee understand the basic issues. • But having said that the researcher, what I want from the researcher is to throw more light, to assist me in forming my own judgement and come to a conclusion • and he must give me , may be due to my academic life may be I expect more to come from representations than the normal Committee member would, may be my standard is a bit high, but I do not even notice, I stop reading if I can see that this is just an opinion of somebody and not backed up by proper research, proper authority 10. The submission of the people from townships or for that matter from a farm or a farmer who make s a submission on a technical legal issue will influence only to the extent that I gain the impression of how the general public feels but not more than that. • On a more technical issue you cannot rely on intuitive judgement or feeling without proper research.	

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						• It will not influence me, except in so far as I can say yes it seems to me this is how the general public feels but on the other hand how many submissions do I get? Can I rely on a particular view of a particular person to represent the view of the general public? • I would even question that too. • Having been an academic I would not put all my trust on representations except to gage from that the need for legislation and a general evaluation.	
19	Ms P Jana (ANC MP0	Sent on 08/09/99	No response	Numerous appointments in person	Conducted on 17/02/00 Duration: 20 minutes	1. I am looking for the issues that relate to the Bill, how the Bill will affect the people , generally, how do they view the Bill • You expect people to have some knowledge of what the implications are, what the current issues are and how it will generally implicate people and their lives. • I think that sometimes we get submissions particularly from people who do not actually understand the Bill. • I think that we have a problem with ill informed public. Many people in SA are not attuned to reading legislation and understanding legislation, so there is a great deal of misinterpretation. 2. Yes, I think, first of all, research on what international standards and norms are and • secondly what the prevailing circumstances are. You have got to balance the two. You cannot pick up things from abroad, what has been a practice for example in the First world countries or in all established democracies. • You have to bring it in the context with our own Constitution, our own country, and our own	(3)

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						circumstances and our own experiences. • I expect comparative study to be there because of guidance, but I do not think that it is conclusive and certainly I do not think that it is a precedent that must be followed. • We have to adapt it to our own experiencies, our own social context, our own understanding, our own Constitution, our own circumstances. 3. Ja, I think I have been, but unfortunately we still have a lot to capture there because what has happened is that most submissions are from institutions and organisations and I think that at the moment I cannot say that NGOs and organisations captured the opinions of all people in this country, so I think we still have to reach out largely to the public. 4. Yes, I think what we do especially in our Committee we take every submission and we debate it and obviously there are differing views • and sometimes you find that it does influence our decisions and sometimes it does not, but we debate them , we take them into consideration • and if we think that we need to ask further questions from the person or the institution that made a submission we call a person to a hearing so that a person has an opportunity to answer questions. 5. I think, largely, yes, I think the one thing that people fail to do and this goes for organisations as well is that they make submissions and for example they do not approve of it but they do not	NA

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						give an alternative and they do not give reasons. • It is not sufficient to say that we do not want this, but people must motivate it, first to understand why and I think it is very useful to have alternative suggestions. 6. We have a summary and we take each clause, we summarise under that clause every submission received and then we discuss it and we extract from all the submissions the ones that we think are the ones that we need to consider and then we further debate those and then of course, we put the options and then we vote on it. 7. I think that many institutions. It depends on the legislation. • I think that on the *Freedom of Information Bill* certainly the Human Rights Commission - it had extensive workshopping, they made very good submissions. • I think that various parastatals like Telkom - they made good submissions • NADEL, BLA, the Bar Association - they always give us comparative studies, so they tell us where they are coming from. 8. I think a submission that is weighed in all circumstances and a submission that is looked at objectively, not from one perspective, from the perspective of individual interests and public interests and a submission that is not motivated by emotions. 9. We have some very good researchers who do	NB

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						very excellent job and they apply their minds to it and sometimes we have no so good researchers who just take things form other places and reproduce them without putting them into context. • We have researchers who give two philosophical views on it, we have the researchers who balance it with the practical implications in the community and we have researchers who do not do in depth research and we have researchers who are very, very good. 10. No, certainly not. • First of all I think we have a problem because as much as we have an open system where everybody is allowed to make submissions, we have several flaws in that. • The one is accessibility, Parliament is not accessible to all the people. We cannot go out, we do not have the resources to go out in rural areas and people cannot come here. • The second issue is that we have a high rate of illiteracy and poverty and these are the drawbacks because things do not reach the person in this country. • They cannot buy radios and newspapers, so they are not informed in that way. On the other hand, they themselves cannot read and understand legislation, so it is still a kind of a dream. • We are still getting submissions from NGOs and organisations that make them on behalf of the people. • We do not really get people, but I must say that in a Committee that I chaired two years ago, I	

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						took my Committee to the rural areas and I was pleasantly surprised that once you are there on the ground and you explain these, people understood the issues and they could make an impact, and they could relate to the issues and they were able to make very valuable submissions.	

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