

Chapter 62

Access to Information

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62.1 Introduction

Section 23 of the interim Constitution introduced a free-standing right of access to information.¹ The right of access to information is generally treated, in international instruments and foreign legislation dealing with such rights, as a corollary of the

1 Section 23 of the interim Constitution provided that: 'Every person shall have the right of access to all information held by the state or any of its organs at any level of government in so far as such information is required for the exercise or protection of any of his or her rights.' The importance of this constitutional right was underlined by Constitutional Principle IX, which provided that: 'Provision shall be made [in the final Constitution] for freedom of information so that there can be open and accountable administration at all levels of government.'

right to freedom of expression.² The separate and constitutional entrenchment of this right underscores its significance in the South African constitutional order.³ In addition, this separate right makes it clear that the right is enforceable against the entity holding the information and is not simply a negative freedom to receive and impart information free of interference, which is a frequent interpretation of the right to freedom of expression.⁴

The final Constitution replaced and upgraded the interim Constitution's right of access to information with s 32, which reads 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 administrative and financial burden on the state'.

The right set out in s 32 did not, however, come into operation immediately. The transitional provision in item 23 of Schedule 6 to the final Constitution stipulated that Parliament must enact the legislation referred to in clause 32(2) within 3 years of the commencement of the final Constitution (that is, by 3 February 2000). Prior to such enactment, the right in s 32 was to be read as set out in item 23(2)(a) of Schedule 6, which was essentially the same as the text in s 23 of the interim Constitution.

The right contained in s 32 of the final Constitution significantly expands the right of access to information in two fundamental respects. First, in relation to information held by the state, it applies to all information and removes the proviso in the interim Constitution

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2 See, for example, art 19 of the International Covenant on Civil and Political Rights, 1966 and *International Fund for Animal Welfare Inc v R* [1989] 35 CRR 359 (Canadian freedom of expression includes access to information pertinent to intended expression). Such a right is specifically included in s 16 (1)(b) of the Constitution. For a comparison of the South African rights of freedom of expression and information with those of the international instruments, see L Johannesburgen 'Freedom of Expression and Information in the New South African Constitution and its Compatibility with International Standards' (1994) 10 *SAJHR* 216.

3 Interestingly, a number of formerly communist states have included a separate access to information right in their constitutions. For example, art 24 of the Russian Constitution, 1993 states:

'(1) It shall be forbidden to gather, store, use and disseminate information on the private life of any person without his/her consent.

(2) The bodies of state authority and the bodies of local self-government and the officials thereof shall provide to each citizen access to any documents and materials directly affecting his/her rights and liberties unless otherwise stipulated under the law.'

4 In *Leander v Sweden* 1987 (9) EHRR 433 at 456, the European Court of Human Rights held that the freedom to receive information in terms of art 10 of the European Convention on Human Rights 'basically prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him' but does not confer a positive right to personal information held by the state.

that the relevant information must be required for the exercise or protection of rights.⁵ Secondly, it expands the reach of the right of access to information to include information held by persons other than the state.

Following the trend towards legislation in a number of other democracies,⁶ s 32(2) of the Constitution goes further and obliges Parliament to enact access to information legislation to 'give effect to' the constitutional right. The national legislation envisaged in s 32(2) is the Promotion of Access to Information Act,⁷ which was enacted on the day of the deadline, 3 February 2000.⁸ Broadly speaking, the AIA provides for access to records held by both public and private bodies, and sets out the grounds on which disclosure must or may be refused and the manner in which such grounds may be overridden in the public interest, as well as mechanisms for the resolution of disputes over access, notably judicial review.

What are the rationales for a right of access to information?⁹ The most significant argues that there is a fundamental connection between access to information and South Africa's effort to create a constitutional democracy based fundamentally on the principle of openness and transparency.¹⁰ Access to relevant information is fundamental to meaningful participation in the democratic process and to ensure that government is accountable to the governed.¹¹ This 'good government' or 'open democracy' rationale has also been identified by the

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5 As G E Devenish, K Govender & H Hulme state in *Administrative Law and Justice in South Africa* (2001) 189, in relation to access to information held by the state: 'Section 23 of the Interim Constitution provides for access to information on a *need to know* as opposed to a *right to know*, whereas the 1996 Constitution provides for the latter.'

6 In addition to the American Freedom of Information Act see, for example, the Australian Freedom of Information Act, 1982; the Canadian Access to Information Act, 1980; the New Zealand Official Information Act, 1982; and the recently enacted United Kingdom Freedom of Information Act, 2000 (which will take full effect in 2005).

7 Act 2 of 2000 ('the AIA'). For a discussion of the drafting history of the AIA, previously called the Open Democracy Bill, see J White 'Open Democracy: Has the Window of Opportunity Closed?' (1998) 14 *SAJHR* 65; and Iain Currie & Jonathan Klaaren *The Promotion of Access to Information Act Commentary (2002)* paras 1.3-1.12 ('AIA Commentary').

8 The AIA did not immediately come into force. Section 93(1) provided that it would come into operation on a date determined by the President in the *Government Gazette*. The President brought the AIA, save for ss 10, 14, 16 and 51, into force on 9 March 2001 in terms of Government Notice 22125, R20 of 2001. Those sections were brought into force on 15 February 2002 in terms of Government Notice R9 of 2002 GG 23119. The Judicial Matters Amendment Act 42 of 2001 made a series of textual corrections to the Act.

In the period between 4 February 2000 and 9 March 2001 it appears that the wording set out in Schedule 6 continued in force (see *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 (3) SA 1151 (CC), 2001 (2) BCLR 652 (CC) at para 53 in relation to administrative action). See also *Nextcom (Pty) Ltd v Funde NO & others* 2000 (4) SA 491 (T) at 503, which held that, as the AIA had been assented to but was not yet in force, the applicable constitutional right of access to information was that set out in Schedule 6 to the Constitution.

9 For a detailed discussion of the rationales for the protection of access to information, see L Johannessen, J Klaaren & J White 'A Motivation for Access to Information Legislation' (1995) 112 *SAU* 45. See also *AM Commentary* paras 2.2-2.5.

Constitutional Court as underpinning the access to information right.¹² In other words, access to information is fundamental to a proper functioning participatory democracy. Another rationale, self-actualization, argues that access to information about oneself is necessary in order to gain self-knowledge and indeed to constitute oneself. A further rationale for freedom of information is that access to information is vital to protecting a person's other rights and interests (including, for example, the constitutional rights to privacy and equality).

The need for open and accountable government is particularly important given South Africa's recent past. This was characterized by extreme levels of government secrecy in which vital decisions were taken behind closed doors on the basis of documents to which the public (including persons whose rights or interests were detrimentally affected by the relevant decisions) could not have access. During the years of apartheid a number of legislative and other legal devices were used to withhold information or restrict access to information.¹³ The complete set of these rationales does not serve in the same manner to explain the right of access to information in private hands. In the private sector the justification for the right of access may lie more with the self-actualization and rights-based rationales, essentially more with promoting and supplementing rights than with enhancing democracy.¹⁴

In this chapter we begin by analysing the relationship between the Constitution, other legislation and the AIA. After a brief examination of the general structure of the AIA we discuss the few blanket exclusions from most of its provisions. This is followed by a discussion of the distinction between public and private bodies for purposes of access to information and an analysis of the fundamental requirement for access to private information — 'required for the exercise or protection of any rights'. We then examine a few of the grounds of non-disclosure under the AIA and the Act's public interest override. While this chapter adopts a constitutional perspective, it does, to some extent, necessitate an analysis of some of the provisions of the AIA. The detailed provisions of this Act are fundamentally important as it is these provisions that will form the real battleground for the protection of the constitutional right of access to information.

10 See, for example, *Qozeleni v Minister of Law and Order & another* 1994 (3) SA 625 (E) at 642: 'Section 23 [of the interim Constitution] is ... a necessary adjunct to an open democratic society committed to the principles of openness and accountability.' See also *Khala v Minister of Safety and Security* 1994 (4) SA 218 (W) at 225, 1994 (2) BCLR 89 (W): '[T]he purpose of s 23 is to enable a person to gain access to information held by the State in order to create, and thereafter to maintain, an open and democratic society.' This rationale of open and accountable administration is also emphasized in the wording of Constitutional Principle IX.

11 E Mureinik 'Reconsidering Review: Participation and Accountability' (1993) *Acta Juridica* 35 states that transparency serves the dual purpose of promoting public accountability as well as greater public participation in government.

12 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 83.

13 For example, the Official Secrets Act 16 of 1956, the Protection of Information Act 84 of 1982, the Nuclear Energy Act 92 of 1982 and the Internal Security Act 44 of 1950. See generally, A S Matthews *The Darker Reaches of Government: Access to Information About Public Administration in Three Societies* (1978).

14 See *AIA Commentary* paras 2.6–2.9.

From the point of view of Bill of Rights jurisprudence, the most dramatic effect of the Act is that it removes most access to information litigation from direct Bill of Rights control. In other words, from the time of implementation of the Act, most cases in this area will involve statutory causes of action and the application of statutory rights and remedies and will no longer involve the direct application of the Bill of Rights.

62.2 The relationships between the constitution, the access to information act and other legislation

(a) The relationship between the Constitution and the AIA and between the Constitution and other legislation

In terms of s 32(2) of the Constitution the AIA was enacted 'to give effect to' the constitutional right to access to information. The AIA therefore provides a legislative basis for access to information and the starting point for access applications will be the Act itself. The question here is, what role does the constitutional right continue to play?

One approach would be that the AIA is now the sole basis of the constitutional right and that the right itself has no further application. This would be the case if 'give effect to' was read to mean 'created by'. This approach should, however, be rejected on the basis (among others) that it would be anomalous to include the right of access to information as a fundamental right in an entrenched Bill of Rights only to enable the substance of the right to be altered by simple legislative amendment. It may be consistent with constitutional democratic theory to give Parliament the ability to flesh out the detail of a fundamental right, but not to construct the very meaning of the right.¹⁵

The better argument is that the AIA gives effect to the right in the sense of making the right more effective through providing a detailed elaboration of both the scope and content of the informational rights, as well as providing an institutional framework for their implementation and enforcement.¹⁶ The thrust of this argument is that the constitutional right continues to exist, notwithstanding the enactment of the AIA. In other words, there is a freestanding constitutional right of access to information.

There appear to be three ways in which the constitutional right will continue to play a role: to challenge the constitutionality of the AIA itself; to challenge other legislation passed after the AIA; and to assist in interpreting the provisions of the AIA.¹⁷ Additionally, there may be rare instances of direct application. Each of these roles for the constitutional right of access is discussed in turn below.

15 *AIA Commentary* paras 2.12-2.13.

16 This is the view favoured by Currie & Kjaaren *AIA Commentary* para 2.12. In addition, it finds support in the Constitutional Court's judgment in *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC). During the course of its judgment the court held (at para 83) that the reason for the suspension of the right of access in terms of item 23 of Schedule 6 was 'a means of affording Parliament time to provide the necessary legislative framework for the implementation of the right to information. Freedom of information legislation usually involves detailed and complex provisions defining the nature and limits of the right and the requisite conditions for its enforcement.'

First, the most dramatic use of the constitutional right would be to challenge the constitutionality of the AIA itself. Currie & Klaaren divide these potential challenges to the AIA into two categories: 'underinclusive' and 'overrestrictive' challenges.¹⁸ Possible attacks on the AIA on the basis that it is underinclusive may include the blanket exclusion of Cabinet records and records held by members of Parliament in their capacity as such, as well as the fact that the Act only applies to recorded information. Overrestrictive challenges to the Act could be founded on the basis that the procedures that the Act imposes for the exercise of rights are overly burdensome. This may include the fees payable for access.

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It is unclear what approach our courts will adopt to assessing the constitutionality of the AIA. One argument is to treat the AIA in the same manner as other parliamentary legislation, that is, the AIA is unconstitutional if it infringes the rights in s 32(1), unless such infringement is reasonable and justifiable in accordance with the Constitution's general limitation clause. Another approach is to afford the legislature a greater degree of deference in relation to the AIA. There are essentially two reasons for this: the AIA, unlike most other legislation, is constitutionally mandated to give effect to a fundamental right; and s 32(2) expressly provides that this legislation 'may provide for reasonable measures to alleviate the administrative and financial burden on the state',¹⁹ Klaaren suggests a two-tiered approach to adjudication of the AIA's constitutionality.²⁰ In terms of this approach the provisions of the AIA can be divided into two categories: those which define and detail substantive rights, and those which set out procedures and structures to enforce the relevant rights. While some extra deference is due to the legislature in relation to the latter, no special deference is due for the former. As Klaaren states:²¹

'Where Parliament enjoys extra authority mandated by the text of the Constitution, it should receive greater deference. However, since this extra enforcement power does not extend to Parliament's interpretative authority over the rights, Parliament receives no extra deference there.'

Regardless of the approach, in the event of a court finding that a provision of the AIA unconstitutionally fails to give effect to the constitutional right of access to information, the appropriate remedy would be for the court to allow Parliament a specified period within which to remedy the defect. A judicial approach in terms of which Parliament is required properly to give effect to the right within a set time would be consistent with the scheme provided for in the Constitution itself (that is, that Parliament was required to enact the relevant legislation within a period of

17 For a detailed discussion of these uses of the constitutional right, see *AIA Commentary* paras 2.13-2.15.

18 *AIA Commentary* para 2.15.

19 It should be noted that the latter provision only indicates special deference in relation to burdens on the state, and not other non-state entities.

20 J Klaaren 'Constitutional Authority to Enforce the Rights of Administrative Justice and Access to Information' (1997) 13 *SAJHR* 549.

21 J Klaaren 'Constitutional Authority to Enforce the Rights of Administrative Justice and Access to Information' (1997) 13 *SAJHR* 549 at 563.

three years). The issue of individual relief in the particular circumstances would, of course, need to be considered as well.

Secondly, the constitutional right could be used to challenge legislation enacted after the AIA which unjustifiably limits the right. Although the AIA prevails over previous legislation which is materially inconsistent with its objects or provisions,²² the same cannot be said of subsequent inconsistent legislation. While every effort should be made to interpret the AIA and other subsequent legislation consistently, some such legislation may well be truly inconsistent. Such legislation can only be challenged by the constitutional right itself.

Finally, the constitutional right to access to information remains a valuable tool for the interpretation of the provisions of the AIA. In interpreting the Act, it should always be borne in mind that it is intended to give effect to the rights set out in s 32 of the Constitution. This is reiterated in the preamble to the Act and s 9, which states that the objects of the Act include

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giving effect to the constitutional right and promoting transparency, accountability and good governance of both public and private bodies.²³

It could also be argued that the constitutional right to just administrative action may be used as a residual right to obtain access to information which would not be available under the AIA. This could include, for example, obtaining access to information which is not in recorded form. It may also include direct adjudication of the application of the right of access to information to organs of state such as Cabinet, the records of which are exempt from the AIA. This would apply to all instances of overrestrictive challenges and may be attractive to courts as it obviates the need to strike down provisions of the AIA. In addition, the constitutional right may be relied on directly in circumstances where a particular piece of information is not being requested. This may include access to information through physical access such as where the media requests access to courts and tribunals for purposes of obtaining information and access to an event.²⁴

Courts should, in our view, resist directly invoking a residual constitutional right in circumstances where the AIA itself fails to 'give effect to' the constitutional right apart from in exceptional circumstances. First, the residual right approach undermines the role of Parliament, which the Constitution specifically contemplates as the body which is required to 'give effect to' the constitutional right. Whatever individual relief may be granted, the focus of a proper remedy would rather be for a court to order that Parliament rectify the position and give effect to the right through a suitable amendment to the AIA. Secondly, if applied generally, the residual right approach could create anomalies where the substantive law under the Constitution could differ from that under the AIA. Moreover, reliance on the residual right would create the anomaly that the procedural requirements of the AIA would not apply

22 Section 5 of the ALA.

23 See also s 2(1) of the AIA, which directs that a court interpreting a provision of the Act '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'.

24 See *In re Application NBC 635 F2d 945* (2d Cir 1980) (television networks entitled to copy and disseminate videotapes entered in evidence at a criminal trial subject to the orderly conduct of the trial).

where the constitutional right itself is invoked (for example, the internal appeal procedure of the AIA would not apply).

Nonetheless, in some instances, direct application of the constitutional right may be appropriate to adjudicate an access to information matter. Our conclusion on this issue differs from our conclusion with respect to the constitutional right of just administrative action, where we do not see any such rare instances. The difference between our conclusions is really the result of a major textual difference between s 32 and the AIA, on the one hand, and s 33 and the AJA, on the other. The AIA is not like the AIA in that there is no equivalent in the AIA of the definition of 'administrative action' which sets the limits of enforceability of the rights to reasonable, fair and lawful administrative action. The AIA has been built around the concept of a 'record' not the concept of 'information held by the State',²⁵ The lack of a precise statutory parallel in the AIA of the constitutional text in s 32 leaves room for rare instances of direct application.

A particular difficulty (and one instance where the right potentially directly applies) arises as a result of the fact that the AIA only applies to recorded information. An entity may have within its knowledge certain information that will not necessarily be recorded. A particular

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decision, for example, may not have been reduced to writing (or recorded in any manner). Information may be capable of being recorded but may not yet be compiled. In certain circumstances the information may not yet be in existence. For example, the media may request access to a particular tribunal where the oral evidence will only be adduced in the future.²⁶ Alternatively, the media may wish to have access to an event in order to record the event itself in some form. In such instances the AIA as currently drafted will not assist them.

The question of the constitutional right's application then arises. As we see it, there are two possible approaches to this issue. First, one could argue that the constitutional right of access to information, properly construed, only applies to recorded information. This argument would probably emphasize the use of the term 'held' in s 32(1) together with the term 'information'. Unless a particular piece of 'information' has been reduced to a physical form, it cannot be 'held'. 'Information held' would thus mean information that already exists in physical form. A second approach would be to accept that s 32(1) contemplates access to all types of information, but to argue that Parliament's decision to limit the right to recorded information, through the mechanism of the AIA, amounts to a justifiable limitation on the constitutional right. If this is the case, the AIA is constitutional and adequately gives effect to the right of access to information. While the first of these approaches is unsatisfactory as it depends upon a rather strained purposive interpretation, the second is not entirely satisfactory either. In particular, access to information through physical access — a form of access to information that was at least partially catered

25 See *AIA Commentary* para 2.13.

26 In the latter case the constitutional right to freedom of expression would appear to be more appropriate as the information to be divulged cannot be said to be 'held' for purposes of s 32 of the Constitution (see, for example, *Dotcom Trading 121 (Pty) Ltd t/a Live Africa Network News v King NO & others* 2000 (4) SA 973 (C), which held that the blanket exclusion of broadcasting of the King Commission of Inquiry was contrary to s 16(1)(a) of the Constitution; see also *South Africa Broadcasting Corporation & others v The Public Protector & others* (unreported, TPD case no 13992/2001, relating to broadcasting of the arms deal investigations)).

for in the Open Democracy Bill in the sections on open meetings — may mean that the Act is significantly underinclusive. In addition to direct adjudication in these exceptional circumstances an appropriate remedy might direct Parliament to draft legislation giving effect to this dimension of the right of access to information.

In another particular difficulty (and a second potential instance of direct application of the right) the AIA exempts from its ambit records of the Cabinet and the judiciary, for instance. But this does not mean that the Cabinet and judiciary are not bound to give effect to the right. Their Act exemption (which is a limited one) just indicates that these bodies do not have to respond to AIA requests for records. In our view, the argument that in exceptional cases the right of access to information may be directly applied to the Cabinet is a plausible and persuasive one.²⁷ Likewise, one may rely on the constitutional right to challenge the laws and practices of the courts in relation to access to their records.

(b) The relationship between the AIA and other legislation

Two provisions of the AIA deal with the relationship between the AIA and other legislation. Section 5 provides that the AIA applies to the exclusion of other legislative provisions that

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prohibit or restrict disclosure and that are 'materially inconsistent' with the AIA. It therefore appears that if another piece of legislation is materially inconsistent with the AIA, the provisions of the AIA will apply to the exclusion of such other legislation. Section 6 of the AIA makes it clear that the provisions of the Act do not restrict the application of other legislation set out in the schedules which provide for access to information.²⁸

62.3 General structure of The AIA

The AIA provides for requests for access to all records held by public bodies and those records held by private bodies which are 'required for the exercise or protection of any rights'.²⁹ The Act therefore generally follows the distinction set out in s 32(1)(a) and (b) of the Constitution, although the distinction between the state and other persons is replaced by a distinction between public and private bodies.³⁰

The AIA could perhaps have been more accurately titled the Promotion of Access to Records Act. A 'record' is defined in s 1 of the AIA as recorded information, regardless of form or medium, in the possession or under the control of the relevant body, whether or not it was created by that body. Section 4 of the Act goes on to provide that every record in the possession or under the control of an official of, or

27 See below, 62-10. See also *AIA Commentary* para 4.17.

28 The only legislation currently listed in the schedule are the National Environmental Management Act 107 of 1998 and the Finance Intelligence Centre Act 38 of 2001. For a detailed discussion of the operation of this provision to other legislation not listed in the schedule, see *AIA Commentary* paras 3.5-3.7.

29 Sections 11 (1) and 50(1) in relation to public and private bodies respectively.

30 See below, § 62.6.

an independent contractor engaged by, a body is regarded as being a record of such body. Accordingly, although the AIA only applies to recorded information, it is clear that it extends to a wide range of recorded information.

Requests for access to records must be made to the information officer of the public body or the head of the private body. The relevant person must then consider the request within the stipulated time period and, in certain circumstances, must notify affected third parties of the request and allow such third parties to make representations as to whether the request should be granted.³¹ If the requester is dissatisfied with a refusal of access by a department of state or administration in any sphere of government, he or she must follow the internal appeal procedure provided in the AIA.³² In addition, a dissatisfied requester can, on application, appeal a decision to refuse access to a court.³³

The AIA then sets out a number of mandatory and discretionary grounds for refusal of requests for access' to records of both public and private bodies. If the request for a record falls within a ground of refusal, the body that holds the record must or may refuse to disclose it, unless the public interest override applies.³⁴

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The AIA additionally places some positive duties on public and private bodies to produce manuals identifying the types of records held by the body in order to facilitate requests and to encourage the Act's goal of participation and accountability.³⁵

62.4 What the AIA is not: data protection legislation

Prior to embarking on a more detailed discussion of the provisions of the AIA, it is important to point out what the AIA is not. It is not a data protection or privacy statute, like those which apply in a number of other jurisdictions,³⁶ which protects the right to privacy and other interests in data. Typically, data protection legislation performs three functions: it prevents unauthorized disclosure and use of private information; it allows for the correction of personal information held by another

31 The third-party notification and intervention procedures are set out in Chapter 5 of Part 2 and Part 3 of the AIA (ss 47-49 and 71-73).

32 Chapter 1 of Part 4 (ss 74-77).

33 Chapter 2 of Part 4 (ss 78-82). Section 79 provides that the Rules Board for Courts of Law must, within 12 months from the date on which that section came into force (that is, 9 March 2001), make and implement rules of procedure for the hearing of access to information appeals by the High Court and designated magistrates' courts. Prior to the implementation of such rules, applications may be lodged with a High Court or a court of similar status.

34 Sections 46 and 70. See below, §; 62.9.

35 See, for example, s 14 and s 51.

36 See, for example, the United Kingdom Data Protection Act, 1984 and the Canadian Privacy Act, 1985. See also the OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Information, 1980 and the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, 1981.

body; and it allows for access to one's own information (that is, for personal requesters). The focus of such legislation is on the protection of privacy and not on access to information.

The AIA does contain certain elements of data protection legislation in that it allows for personal requesters (defined as a requester seeking personal information about him- or herself) to obtain access to information. In addition, s 88 provides that public and private bodies must take reasonable steps to establish 'adequate and appropriate internal measures' providing for the correction of personal information, 'until legislation providing for such correction takes effect'.

Nevertheless, the AIA does not contain a general prohibition on the disclosure of certain categories of information. Rather, it is a request-driven statute which merely provides for mandatory grounds of non-disclosure in relation to requests under the Act.³⁷ The role of privacy in the AIA is merely a restriction (albeit a mandatory one) on the right of access to information.³⁸ In circumstances where private information is disclosed beyond the parameters of the AIA, affected persons would rather need to rely on the common law relating to breaches of privacy as well as the constitutional right to privacy.³⁹ The South African Law Commission is currently compiling a report with a view to preparing separate data protection legislation.

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62.5 Blanket exclusion of certain records

The AIA excludes certain categories of records from its application. Such exclusions have important consequences for the right of access to information as they have the effect that these categories of records may not be requested under the AIA even if the public interest override applies. We will briefly discuss each of these exclusions in turn.

(a) Records requested for criminal or civil proceedings

Section 7(1) of the AIA stipulates that the Act does not apply to a record that is requested for purposes of pending criminal or civil proceedings, where the production of or access to that record is provided for in any other law.⁴⁰ This provision relates to both public and private body requests. The provision indicates that the AIA was intended to have no impact on the current rules relating to

37 This creates the somewhat anomalous situation that a head of a private body or information officer is obliged, in certain circumstances, not to disclose information requested under the AIA. Nevertheless, the same person may disclose such information voluntarily where there has been no such request (for example, when data is transferred within a corporate group or to business partners). This, of course, also opens the way for abuse by bodies informally granting requests outside the Act, to the detriment of legitimate third-party interests.

38 See below, § 62.8(a).

39 Privacy protection provisions were included in the initial version of the AIA, that is, Part IV the Open Democracy Bill, but were excluded at a later stage.

40 Section 7(2) goes on to provide that any record obtained in a manner which contravenes s 7(1) is not admissible in the relevant criminal or civil proceedings, unless the exclusion of such record would, in the court's opinion, be detrimental to the interests of justice.

discovery and compulsion of evidence at criminal and civil trials.⁴¹ There are three elements that will have to be satisfied for s 7 to apply: the request must be for the purpose of proceedings, the request must be after the commencement of such proceedings, and the production of the records must be provided for in another law.⁴²

In a case decided before the AIA, *Inkatha Freedom Party & another v Truth and Reconciliation Commission & others*⁴³, Davis J had 'serious doubts' as to whether the constitutional right of access to information could be used to justify a principle of discovery before the time provided in the Court Rules, which 'would mean that a defendant who falls within the scope of s 32 [of the interim Constitution] must lay bare its entire case before any action is in fact launched'. While discovery is not so extended, since the exemption applies only where litigation has commenced and since reasons for requests to public bodies do not need to be furnished, the use of the AIA in pre-discovery contexts cannot be ruled out.

(b) Records of Cabinet

Section 12(a) provides that the AIA does not apply to records of the Cabinet and its committees. The purpose of this exclusion appears to be to perpetuate the Westminster tradition of Cabinet secrecy, a part of which is that the Cabinet as a whole is indivisibly responsible for the body's actions. As discussed above, this complete exclusion of a certain category of records from the application of the Act may arguably be unconstitutional.⁴⁴ There

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seems little justification for treating Cabinet records with such a degree of secrecy. In a legal system in which the right of access to all information held by the state is constitutionally protected, Cabinet should at least be required to disclose its records where the public interest in disclosure outweighs the instrumental value of Cabinet secrecy.⁴⁵ It is unacceptable for Cabinet secrecy, in effect, always to trump the right of access to information, particularly given the fact that such information goes to the heart of democratic decision-making.

(c) Records of judicial functions of courts

- 41 The Judicial Matters Amendment Bill [B43-2001] intends to amend s 7 and the index of the AIA to make it clear that the section applies to records *requested* and not records *required*.
- 42 Discovery is currently provided for in Rule 35 of the Uniform Rules of the High Court and Rule 23 of the Magistrates' Court Rules. Generally speaking, discovery can only be obtained after the close of pleadings.
- 43 2000 (3) SA 119 (C) at 135-6. It should, however, be noted that s 7(1) only applies to requests made after commencement of proceedings, whereas Davis J was dealing with pre-action discovery.
- 44 See *AIA Commentary* para 4.17, where the authors express the view that this provision is not unconstitutional.
- 45 In the English case of *Attorney-General v Jonathan Cape Ltd* [1996] QB 752 the Attorney-General sought to restrain a former Cabinet member from publishing an account of various Cabinet discussions, on the basis that such disclosure would amount to a breach of a duty of confidence. Lord Widgery CJ held that, although Cabinet discussions were confidential, the government's interest in maintaining confidence had to be balanced with the public interest in the freedom to impart information in a democratic society. In other words, the public interest in protecting Cabinet confidences was not indefinite.

The AIA does not apply to a record of the 'judicial functions' of a court referred to in s 166 of the Constitution,⁴⁶ a special tribunal established in terms of s 2 of the Special Investigating Units and Special Tribunals Act⁴⁷ or a judicial officer of such court or tribunal.⁴⁸ The relevant judicial functions are not defined in the Act. It is submitted that they should be restricted to those functions of the judiciary that relate to the hearing or the determination of legal proceedings.⁴⁹

(d) Records of members of Parliament

The AIA does not apply to a record held by an individual member of Parliament or of a provincial legislature 'in that capacity'.⁵⁰ For similar reasons to those discussed in relation to the Cabinet exclusion, this exclusion may be unconstitutional.

62.6 The distinction between public and private bodies

For purposes of deciding on requests for access to information the AIA adopts the distinction between a public and private body.⁵¹ The definition of a 'public body' is substantially similar to the definition of an organ of state in s 239 of the Constitution, and reads as follows:

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

46 Section 166 of the Constitution lists the Constitutional Court, the Supreme Court of Appeal, the High Courts, the magistrates' courts and 'any other court established or recognized in terms of an Act of Parliament'.

47 Act 74 of 1996.

48 Section 12(b) of the AIA.

49 See *AIA Commentary* para 4.18.

50 Section 12(c) of the AIA.

51 This distinction is different to the distinction between 'the state' and other bodies contained in s 32(1) of the Constitution. It is arguable that the state, properly construed, does not include all public bodies (see *Inkatha Freedom Party & another v Truth and Reconciliation Commission & others* 2000 (3) SA 119 (C) at 133, 2000 (5) BCLR 553 (C): '[T]he definition of organ of State in the 1996 Constitution expands the definition beyond [institutions which form part of the state] for it includes within the definition those institutions or functionaries who might otherwise be outside of the State but which exercise public power.' Davis J therefore concluded that the TRC was an organ of state even though it 'is not under the direct control of central government'). For example, an institution which performs a public regulatory function may be independent of the state. This development extends the effect of the right to access to information and is to be welcomed.

Paragraph (a) of the definition would include, for example, the Department of Agriculture and a local municipality.⁵² Paragraph (b) (i) would include the Judicial Service Commission and the Auditor-General.⁵³ Paragraph (b)(ii) expands the scope of public bodies much wider and would cover entities such as the Financial Services Board, the Independent Communications Authority of South Africa and other entities exercising public power or performing public functions in terms of legislation.⁵⁴ This could include, for example, financial exchanges, universities and parastatals such as Eskom, Telkom and Transnet.⁵⁵

In relation to the latter category it is important to note that s 8(1) of the AIA provides that such a public body may in one instance be a private body and in another a public body, depending on whether the relevant record relates to the exercise of a function as a public body or as a private body.⁵⁶ For such bodies the distinction between a public and private body is therefore less important. The important enquiry is rather whether the function to which the record relates is a public or private one.⁵⁷

The crucial question in establishing whether a body, other than a state department or constitutional body, is a public or private body is therefore whether it is 'exercising a public power of performing a public function in terms of legislation'.

In light of the similarity between the definition of public body and that of organ of state in the Constitution it may be useful to have regard to the number of cases

52 See also *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC), 2001 (9) BCLR 883 (CC) at para 27 (the Independent Electoral Commission is not an organ of state within the national sphere of government).

53 The Truth and Reconciliation Commission would arguably fall within this category (see Davis J in *Inkatha Freedom Party & another v Truth and Reconciliation Commission & others* 2000 (3) SA119 (C), 2000 (5) BCLR 553 (C). holding that the TRC forms part of the state for purposes of the access to information clause). Davis J at 131-2 emphasized that, amongst other things, the commissioners are appointed by the President, s 41 of the Promotion of National Unity and Reconciliation Act 34 of 1995 provides that the State Liability Act 20 of 1957 applies to the Commission, and the TRC's function was mandated by the postscript to the interim Constitution.

54 See *Nextcom (Pty) Ltd v Funde NO & others* 2000 (4) SA 491 (T) at 503, where the court held that the South African Telecommunications Regulatory Authority (the predecessor to ICASA in relation to the regulation of telecommunications) amounted to an organ of state.

55 See *Hoffman v South African Airways* 2001 (1) SA 1 (CC), 2000 (11) BCLR 1211 (CC).

56 Section 8(1) provides for the same position in relation to private bodies. Section 8(1), however, does not apply to those public bodies falling within paras (a) and (b)(i) of the definition and applies only to para (b) (ii). This is important as it would arguably be unconstitutional for s 8(1) to apply to government departments as this would, in effect, mean that a requester would, in certain instances, be entitled to access to information held by the state only where it is necessary to exercise or protect rights. If this were the case, the AIA would not properly give effect to the right in s 32(1)(a) of the Constitution. To the extent that any body falling under para (b)(ii) of the definition constitutes part of 'the state', the operation of s 8(1) could be constitutionally problematic.

57 This enquiry will often be a difficult one, particularly where a record may be prepared or kept for numerous purposes, some of which are public and others are private. Additionally, the requester may face an issue in choosing which forms (public body request or private body request) to use. Requests may of course be made in the alternative.

relating to the meaning of 'organ of state' under the interim Constitution. Although there was some initial

disagreement, our courts generally adopted the control test as to whether an institution amounted to an organ of state for purposes of the interim Constitution. In terms of this test an institution, which was not a state department, was an organ of state if it fell under the control of the state in one way or another.⁵⁸ It is, however, important to bear in mind that, whereas the interim Constitution defined an organ of state as 'any statutory body or functionary', both the final Constitution and the AIA shift the focus to the public nature of the function or power.⁵⁹ Accordingly, the cases decided under the interim Constitution are only of limited assistance in determining whether a body amounts to 'public body' under the AIA.⁶⁰ The focus should rather be on whether the function or power performed by the relevant entity is public in nature.⁶¹

An important consideration in assessing whether a body is exercising a public power or performing a public function in terms of legislation is whether the institution is obliged to act in the public interest. As Lawrence Baxter states,⁶² discussing whether an institution is a 'public authority':

'Ultimately we are driven to an assessment of whether the institution concerned is under a duty to act in the public interest and not simply to its own private advantage.'

This emphasis on public interest is also consistent with the judgement of the Witwatersrand Local Division in *Goodman Bros (Pty) Ltd v Transnet Ltd*.⁶³

An additional issue will be whether the public function is exercised 'in terms of national legislation'. For instance, the function of providing universal service in terms

58 See, for example, *Directory Advertising Cost Cutters v Minister for Posts, Telecommunications and Broadcasting & others* 1996 (3) SA 800 (T); *Oostelike Gauteng Dienste Raad v Transvaal Munisipale Pensioene Fonds* 1997 (8) BCLR 1066 (T). See above, ch 10 'Application' for a detailed discussion of these cases.

59 Section 233(1)(x) of the interim Constitution. See Y Burns *Administrative Law under the 1996 Constitution* (1998); and see I M Rautenbach & EFT Malherbe *Constitutional Law* 2 ed (1996) 299.

60 See, however; *Nextcom (Pty)Ltd v Funde NO & others* 2000 (4)SA 491 (T) at 503, which applied the control test in finding that SATRA constituted an organ of State under the final Constitution. See also *Hoffman v South African Airways* 2001 (1) SA 1(CC) and *Korf Health Professions Council of South Africa* 2000 (1) SA 1171 (T) at 1177, in which Van Dijkhorst J held that the definition in the final Constitution was not intended to differ materially from that under the interim Constitution and the control test thus remained determinative.

61 A useful analysis of the term 'public function' is set out in De Smith, Woolf & Jowell *Judicial Review of Administrative Action* 5 ed (1995) at 167-8: 'A body is performing a "public function" when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest. This may happen in a wide variety of ways. For instance, a body is performing a public function when it provides "public goods" or other collective services, such as health care, education and personal social services, from funds raised by taxation. A body may perform public functions in the form of adjudicatory services ... They also do so if they regulate commercial and professional activities to ensure compliance with proper standards.'

62 *Administrative Law* 100.

of a cellphone licence granted to a private body in terms of telecommunications legislation may not be a function undertaken 'in terms of' that legislation but rather undertaken in terms of the licence.

62.7 Required for the exercise or protection of any rights

Section 50(1) of the AIA, following the lead of the constitutional right, provides that one can only obtain access under the Act to the record of a private body if such record is 'required for the exercise or protection of any rights'. The existence of a right and a link between the request and the protection or promotion of that right is therefore necessary in order to obtain access to a record of a private body.

The term 'rights' should not be limited to constitutional rights but should rather be read widely as including all legal rights whether constitutional, statutory or arising in common law. This was the position taken by Cameron J in *Van Niekerk v City Council of Pretoria*,⁶⁴ which was subsequently endorsed by the Supreme Court of Appeal.⁶⁵

In another respect the term 'rights' could be broadly interpreted, namely, it should include circumstances where the state has unilaterally incurred liability without establishing a contractual *nexus* between the individual and the state.⁶⁶ In this case the term 'rights' moves closer to the meaning of legitimate expectations.

The other important term in relation to private bodies is 'required'. Several different interpretations of this term are possible.⁶⁷ Although often textually linked to the term 'required', the interpretations vary in their treatment of two analytically

63 1998 (4) SA 989 (W). In this case Blieden J, in concluding that Transnet amounted to an 'organ of state' in terms of s 239 of the Constitution, stated at 995-6: 'Of particular importance are the provisions of ss 15 and 17 of [the Legal Succession to the South African Transport Services Act 9 of 1989], that the respondent is required to provide a service "that is in the public interest" and can be directed by the Minister not to act contrary to the strategic or economic interests of the Republic. In my view, this brings it squarely within the definition of an organ of State as required by s 239 of the Constitution in that it performs a public function in terms of the relevant legislation.'

64 1997 (3) SA 839 (T).

65 *The Cape Metropolitan Council v Metro Inspection ServiceJ (Western Cape) CC & others* 2001 (3) SA 1013 (SCA), 2001 (10) BCLR 1026 (SCA) at para 27. During the course of his judgment Cameron J described the previous decision in *Directory Advertising Cost Cutters v Minister for Posts, Telecommunications and Broadcasting & others* 1996 (3) SA 800 (T), which held that 'rights' was limited to constitutional rights, as 'clearly wrong'. For the protection of at least statutory rights, see *Van Huyssteen & others v Minister of Environmental Affairs and Tourism & othim* 1996 (1) SA283 (C) at300B-E, 1995 (9) BCLR 1191 (C) and *Balmoral Investments (Edms) Bpkv Minister van Mineraal- en Energiesake en andere* 1995 (9) BCLR 1104 (NC) (treating a statutory right of appeal under s 57(1) of the Minerals Act 50 of 1991 as falling within the category of rights protected by IC s 23, but finding that no such right of appeal existed against the action of a Regional Director). See also *Aquafund (Pry) Lid v Premier of the Province of the Western Cape* 1997 (7) BCLR 907 (C) at 913E-F; *NISEC(Edms) Bpk v Western Cape Provincial Tender Board & others* 1998 (3) SA 228 (C), 1997 (3) BCLR 367 (C) at 374H; *ABBM Printing and Publishing (Pry) Ltd v Transnet Lid* 1998 (2) SA 109 (W), 1997 (10) BCLR 1429 (W) (contractual and delictual rights).

66 See the discussion of *Premier Mpumalanga, & another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC), 1999 (2) BCLR 151 (CC) at 106nIO. See below, ch 25 'Just Administrative Action'.

distinct ideas: the element of need and the element of relevance.⁶⁸ For present purposes, the element of need is most important. A strict interpretation of this element would demand that the information be necessary for the exercise or protection of a right. A more expansive interpretation would demand that the information be 'reasonably required', where all the circumstances promoting

need and relevance may be examined.⁶⁹ It is the latter, generous approach which has found favour with our courts. Such a generous interpretation is consistent with the constitutional value of openness and is to be welcomed.⁷⁰

There is a potential further weakening of the right of access to information held by private bodies within the term 'exercise or protection'. Courts may read narrowly the forum in which a right is to be exercised or protected. In particular, access may be granted only where such information is required to exercise or protect one's rights through litigation, that is, through formal action in the courts. However, a broader reading is possible and, it is submitted, desirable. As the decided cases have recognized, one can also exercise or protect rights through informal action before administrative bodies, in front of a political forum, and through the public media.⁷¹

67 *Shabala v Attorney-General, Transvaal & another; Gumede & others v Attorney-General, Transvaal* 1995 (1) SA 608 (T) at 624C-D, 1994 (6) BCLR 85 (T): 'the word "required" is capable of a number of meanings ranging from "desired" through "necessary" to "indispensable" ... To my mind, "required" in s 23 conveys an element of need: the information does not have to be essential, but it certainly has to be more than 'useful' ... or "relevant" ... or simply "desired".'

68 For a detailed discussion of both the elements of need and relevance, and support for a generous approach to both elements, see the previous edition of this chapter. A strict interpretation of the element of relevance might demand that the information be personally relevant to the person asserting the right of access rather than relevant to the exercise or protection of that person's rights. A generous interpretation of this element would demand only that the information be relevant to the exercise or protection of the relevant right. The generous interpretation is supported by the text of s 32(1)(b) of the final Constitution, which refers to 'any rights' and not merely those of the requester.

69 See *Van Huyssteen & others v Minister of Environmental Affairs and Tourism & others* 1996 (1) SA 283 (C) at 299D-300F, 1995 (9) BCLR 1191 (C); *Nortje & another v Attorney-General (Cape) & another* 1995 (2) SA 460 (C) at 474H; *Aquafund (Pty) Ltd v Premier of the Province of the Western Cape* 1997 (7) BCLR 907 (C) at 913G-H; see, in particular, the discussion of Cameron J in *Van Niekerk v City Council of Pretoria* 1997 (3) SA 839 (T) at 842J-846G; *ABBM Printing and Publishing (Pty) Ltd v Transnet Ltd* 1998 (2) SA 109 (W), 1997 (10) BCLR 1429 (W); *Inkatha Freedom Party & another v Truth and Reconciliation Commission & others* 2000 (3) SA 119 (C), 2000 (5) BCLR 553 (C).

70 See ss 1 (d), 36(1) and 39(1)(a) of the final Constitution.

71 See *Van Huyssteen & others v Minister of Environmental Affairs and Tourism & others* 1996 (1) SA 283 (C) at 300E, 1995 (9) BCLR 1191 (C) ('It is to be noted that s 23 of the [interim] Constitution does not limit in any way the rights for the exercise or protection of which an applicant is entitled to seek access to officially held information, nor is there any limitation or restriction in respect of the manner or form in which such exercise or protection will take place'); *Qozeleni v Minister of Law and Order & another* 1994 (3) SA 625 (E) at 642; 1994 (1) BCLR 75 (E); *Le Roux v Direkteur-Generaal van Handel en Nywerheid* 1997 (4) SA 174 (T) at 183F-G, 1997 (8) BCLR 1048 (T).

At a minimum, applicants for access to information would need to comply with the following requirements of the Supreme Court of Appeal in *The Cape Metropolitan Council v Metro Inspection Services*:⁷²

'Information can only be required for the exercise or protection of a right ... It follows that, in order to make out a case for access to information in terms of s 32, an applicant has to state what the right is that he wishes to exercise or protect, what the information is which is required and how that information would assist him in exercising or protecting that right.'

A number of cases which have turned on the issue of whether the relevant information is 'required' for the exercise or protection of rights, relate to requests for information which the requester believes will reveal whether the requester has a legal claim (to either claim damages or to take a particular administrative decision on review).⁷³ Our courts have generally adopted two different approaches to this issue.

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The one approach requires the applicant to make out some *prima facie* case that its rights have been infringed. For example, in *Goodman Bros (Pty) Ltd v Transnet Ltd* ⁷⁴ Blieden J refused to order the disclosure of certain documents relating to a tender because no basis has been established by the applicant that its constitutional rights had been infringed.⁷⁵

A similar approach was adopted in another Witwatersrand Local Division decision⁷⁶ by Heher J, who stated that persons were only entitled to information in terms of s 23 of the interim Constitution if they could

'show a reasonable basis for believing a disclosure of documents in the possession of the State or an organ of State will assist him to protect or exercise a right, however derived ... Even allowing for a broad and generous purposive approach to constitutional interpretation ... the section is not capable of meaning that access should be ordered if insight into the document is required in order to determine whether a right needs to be protected. Desirable as that may be in theory, it seems to me to be commercially impracticable and wide open to abuse.'

In two earlier cases our courts adopted a more liberal approach to this issue in holding that an applicant was entitled to access to information in order to establish whether he or she had a claim, without the need to show the existence of a *prima*

72 *The Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC & others* 2001 (3) SA 1013 (SCA). 2001 (10) BCLR 1026 (SCA) at para 28.

73 These cases arose under the right of access to information against the state in the interim Constitution or Schedule 6 of the final Constitution.

74 1998 (4) SA 989 (W).

75 During the course of his judgment the learned judge remarked as follows at 1000-1: 'It seems that the whole basis for the present portion of the application is for the applicant to gather information which it might or might not use in further legal proceedings which it might or might not embark upon ... [I]t is my view that the applicant needs to have more than just an unsubstantiated apprehension of harm to it before it is to be entitled to [claim access to the relevant information].'

76 *SA Metal Machinery Co Ltd v Transnet Ltd* (unreported, WLD, 22 March 1998) at page 11.

facie case. In *Van Niekerk v Pretoria City Council*⁷⁷ Cameron J held that the applicant was entitled to access to a report for purposes of establishing whether the applicant had a delictual claim against the local council in relation to a power surge which caused the applicant damage. As the learned judge stated:

'In the present case, there can be no doubt that having sight of the electricity department's report would assist the applicant in either proceeding with or abandoning his claim against the respondent. The report will disclose why the respondent considers that the report exonerated it of negligence. It may also reveal information which would advance the applicant's claim. Either way, disclosure will promote an early settlement of the dispute and bring the envisaged litigation, by settlement or abandonment, to a short, sharp end. In this sense, the applicant can in my view be said reasonably to "require" the report.⁷⁸

Similarly, Schwartzman J, in *ABBM Printing and Publishing (Pty) Ltd v Transnet Ltd*,⁷⁹ held that an unsuccessful tenderer was entitled to access to the other tenders and other relevant documentation, in order to assess whether its rights to procedural fairness had been infringed. During the course of its judgement, the court expressly rejected the argument that the applicant must show the appearance of an irregularity in the tender process in order to be entitled to the documentation:

'The applicant clearly requires the documents ... in order to determine whether the tender process complied with the requirements of s 33 of the Constitution. Until it has had sight thereof, it cannot decide whether it has any claim for relief against the respondent. Sight of the documents could well result in forestalling any further litigation which is in itself a good reason for ordering their

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production at this stage ... To hold that a tenderer such as the applicant is required to lay a jurisdictional basis before being able to assert his constitutional right to information would serve to undermine the basis on which I am required to interpret the Bill of Rights.⁸⁰

A particularly interesting case in this context is the decision of the Cape Provincial Division in *IFP v TRC*.⁸¹ In this case the IFP requested access to relevant documentation of the TRC in order to establish whether it had a claim for defamation against the TRC. Of particular relevance here was that the relevant legislation⁸² provides that persons who perform tasks on behalf of the Commission may only be

77 1997 (3) SA 839 (T).

78 At 848.

79 1998 (2) SA 109 (W).

80 At 119. This approach was subsequently endorsed by the Supreme Court of Appeal in *Transnet Ltd v Goodman Bros (Pty) Ltd* 2000 (1) SA 853 (SCA) at 867, 2001 BCLR 176 (SCA). This liberal approach is also consistent with the approach of the SCA in *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC & others* 2001 (3) SA 1013 (SCA), 2001 (10) BCLR 1026 (SCA) at paras 28-9.

81 *Inkatha Freedom Party & another v Truth and Reconciliation Commission & others* 2000 (3) SA 119 (C), 2000 (5) BCLR 553 (C).

82 Section 41(2) of the Promotion of National Unity and Reconciliation Act 34 of 1995.

liable if they act in bad faith. As a result of this statutory exclusion of liability the applicants contended that they could only assess whether they had an action in law if they had sight of the relevant documents on which the TRC based its actions. Davis J, in principle, appeared to endorse this approach, stating that the applicants were entitled to information which would enable them 'to launch proceedings in an informed fashion' and held that:

'In the present case the question is thus whether information is reasonably required for the enforcement of applicants' rights in that, based on such information, applicants can obtain advice as to whether they have a claim and can then frame their pleadings in a manner which discloses a cause of action'.⁸³

This liberal approach was, in our view, particularly appropriate in determining whether an applicant was entitled to access to information against the state in terms of interim Constitution. This is because such an approach better facilitates the underlying rationales of access to information against the state, that is, open and accountable, democratic governance. Nevertheless, this liberal approach may be less appropriate in deciding disputes relating to access to information held by private bodies under the final Constitution, where the focus is more on the protection of rights and less on the promotion of democracy, than in the public sector.

One case effectively avoids substantive limitations analysis by determining that there is no right at issue to be protected or exercised, exploiting the particular language (and the use of the past tense) of the internal limitation of the interim Constitution's formulation of the right. The danger of this 'no right to be protected' approach is demonstrated pointedly by *Tobacco Institute of Southern Africa & others v Minister of Health*.⁸⁴ This case essentially disregards any role for the right of access to information to play in a deliberative democracy

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by completely denying a multi-pronged request for information with regard to proposed legislation on the rationale that proposed legislation can affect rights only after it becomes enacted into law. With respect, this case eviscerated one aspect of the core rationale for the right of access to information — participation in democratic decision-making.⁸⁵ The preferable approach would have been instead to examine which of the requests for information were validly refused and which not. For instance, with the use of the exemptions in the AIA much, if not most, and perhaps all, of the information sought could have been validly withheld.⁸⁶

62.8 Grounds of refusal

83 At 135. Davis J, however, expressed grave doubts as to whether the right of access to information gave rise to a general right to pre-action discovery. Interestingly, the learned judge rejected the argument that an ordinary defamation plaintiff is entitled to relevant information held by the defendant in order to establish whether the defendant had acted reasonably, in light of the new defence to defamation of reasonableness (see above, ch 20 'Expression'): '[T]o suggest that s 32 of the Constitution can now be interpreted so as to impose upon defendants in such cases an obligation to provide information to plaintiff and therefore to disclose the basis for their defence is indeed to extend the light of information far beyond that which is reasonably required for the enforcement of applicants' rights, that is to be able to launch proceedings in an informed fashion.'

84 1998 (4) SA 745 (C), 1999 (1) BCLR 83 (C).

85 This rationale, however, does not hold in the private sector.

Like all other constitutional rights, the right of access to information is not absolute and may be limited, provided such limitation complies with the limitation clause of the Constitution, in that it is provided for by a law of general application and is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.⁸⁷ The ALA, which is intended to give effect to that constitutional right, provides such a law of general application in at least most instances and allows for certain mandatory and discretionary grounds of non-disclosure. Such grounds will only withstand constitutional scrutiny if they constitute reasonable and justifiable limitations on the right.

In interpreting the grounds of refusal, as with interpreting the Act as a whole, it should be borne in mind that the primary object of the ALA is to promote openness and transparency through giving effect to the right of access to information. This should result in courts adopting a restrictive approach to the grounds of non-disclosure. As Currie & Klaaren state⁸⁸

'Access to information is the normal course. The Act is intended to give effect to the constitutional right of access to information. Access should only be denied where the denial is clearly justified. Any doubts as to whether the withholding of particular information is justified should be resolved in favour of disclosure.'⁸⁹

A detailed discussion of all the grounds of non-disclosure is beyond the scope of this chapter.⁹⁰ We will, however, briefly discuss three of the grounds set out in the Act which raise particularly constitutional legal issues: privacy, national security and defence, and the operations of public bodies.

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(a) Privacy

The protection of the privacy of third parties is an internationally recognized restriction on freedom of information.⁹¹ In the context of the South African Constitution, this ground of non-disclosure is particularly important as it gives effect

86 The Constitutional Court case of *Mphahlele v First National Bank of South Africa* 1999 (3) BCLR 253 (CC) also entertained an access to information claim, but denied it on the basis of the internal limitation. This case upheld the Supreme Court of Appeal's practice of not giving reasons for the dismissal of a petition to the Chief Justice for leave to appeal. The expressed rationale of the court was that since the petition was final, there was no right to be exercised or protected.

87 Section 36 of the 1996 Constitution. See above, ch 12 Limitations'.

88 See *AIA Commentary* para 2.10.

89 It should, however, be borne in mind that one specific object of the Act is to give effect to the constitutional right, subject to justifiable limitations aimed at the reasonable protection of privacy, commercial confidentiality and effective, efficient and good governance (s 9(b)(ii)AF. Section 3(2) of the Australian Freedom of Information Act, 1982 specifically adopts a restrictive approach to exclusions, in providing that 'any discretions conferred by this Act shall be exercised as far as possible so as to facilitate and promote, promptly and at the lowest possible cost, the disclosure of information'.

90 For such a discussion, see *A/A Commentary* ch 8.

91 See, for example, the Australian Freedom of Information Act and the jurisprudence of the European Court of Human Rights interpreting art 10(2) of the European Convention on Human Rights.

to the constitutionally protected right to privacy.⁹² In principle, this ground of non-disclosure (which amounts to a limitation on the right of access to information) is therefore reasonable and justifiable. Nevertheless, interpreting this ground of non-disclosure in a constitutionally acceptable way will involve a careful balancing of the values of these two constitutional rights, the right of access to information and the right to privacy.

The text of the relevant ground of refusal in the AIA provides that a body must refuse a request for access if disclosure 'would involve the unreasonable disclosure of personal information about a third party, including a deceased individual'.⁹³ 'Personal information' is broadly defined as 'information about an identifiable individual'. The definition goes on to list a number of examples of personal information, including information relating to race, gender, pregnancy, medical, criminal or employment history, address, fingerprints or blood type, personal opinions, views or preferences, and private or confidential correspondence.⁹⁴ The relevant sections provide that this ground of refusal does not apply to certain information, including where the relevant individual has consented in writing to its disclosure, he or she was informed at the time that it was given to the relevant body that it belongs to a class of information that would or might be made available to the public; it is already publicly available; and, importantly, information 'about an individual who is or was an official of a public body and which relates to the position or functions of the individual'.⁹⁵

92 Section 14 of the Constitution. See generally above, ch 18 'Privacy'.

93 Sections 34 and 63 for public and private bodies respectively.

94 Section 1 of the AIA provides that 'personal information', includes, but is not limited to:

(a) information relating to the race, gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, sexual orientation, age, physical or mental health, well-being, disability, religion, conscience, belief, culture, language and birth of the individual;

(b) information relating to the education or the medical, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved;

(c) any identifying number, symbol or other particular assigned to the individual;

(d) the address, fingerprints or blood type of the individual;

(e) the personal opinions, views or preferences of the individual, except where they are about another individual or about a proposal for a grant, an award or a prize to be made to another individual;

(f) correspondence sent by the individual that is implicitly or explicitly of a private or confidential nature or further correspondence that would reveal the contents of the original correspondence;

(g) the views or opinions of another individual about the individual;

(h) the views or opinions of another individual about a proposal for a grant, an award or a prize to be made to the individual, but excluding the name of the other individual where it appears with the views or opinions of the other individual; and

(i) the name of the individual where it appears with other personal information relating to the individual or where the disclosure of the name itself would reveal information about the individual,

but excludes information about an individual who has been dead for more than 20 years'

It is important to note that the AIA only prohibits the 'unreasonable' disclosure of personal information. The crucial question in applying these provisions will therefore be whether, in the relevant circumstances, disclosure will be unreasonable. The first stage of this enquiry will be whether the disclosure amounts to an infringement of privacy in that it is a disclosure of private facts.⁹⁶ This will only be the case where the third party can be said to have a legitimate or reasonable expectation of privacy in relation to the particular information.⁹⁷

The next stage is to determine whether the disclosure is 'unreasonable'. This requires an examination of all the surrounding circumstances, including the strength of the third party's privacy interest, the nature of the particular record and the importance of the purpose for which it is requested.⁹⁸ It is submitted that our common law, as interpreted in the light of the Constitution, could play an important role in this enquiry as the 'common-law test for a breach of privacy is essentially the same. Under the common law a disclosure of private facts would only be wrongful if it is unreasonable in the circumstances and if one of the established defences is not met, including consent; qualified privilege, and truth in the public interest.⁹⁹ It is difficult to contemplate a situation in which disclosure would not be wrongful under the common law but would be prohibited under the AIA. For example, if the public

95 Sections 34(2) and 63(2). The latter exception is particularly important as it gives effect to the related principles of open and accountable government and the diminished expectation of privacy of public officials. The privacy of such officials may not be used to frustrate access to information about that individual, which relates to that person's official functions. This type of information is obviously important in promoting an informed electorate and enhancing participatory democracy.

96 An alternative approach would be that ss 34 and 63 of the AIA contemplate that any disclosure of 'personal information' (other than the categories of information set out in sub-secs (2)) amounts to the disclosure of private facts. The only relevant question in each case is therefore whether such disclosure of private facts is reasonable in the circumstances. We, however, believe that the suggested preliminary enquiry is preferable in that the aim of the relevant sections, as their headings indicate, is to protect the privacy interests of third parties. If the privacy rights of a third party are not undermined by disclosure, this mandatory ground of non-disclosure would not be justified under the Constitution. In any event, the strength of the third party's privacy interest plays an important role in determining whether disclosure will be unreasonable.

97 See above, ch 18 'Privacy' and especially the Constitutional Court in *Bernstein v Bester NO 1996 (2) SA 751 (CC)* para 75: '[T]he party seeking suppression of the evidence must establish both that he or she has a *subjective expectation* of privacy and that the society has recognized that expectation as *objectively reasonable*... It seems to be a sensible approach to say that the scope of person's privacy extends *a priori* only to those aspects in regard to which a legitimate expectation of privacy can be harboured.' One way of understanding the exceptions in ss 34(2) and 63(2) is that no legitimate expectation of privacy arises in relation to such information. See also G E Devenish, K Govender and H Hulme *Administrative Law and Justice in South Africa* (2001) at 203-4.

98 A similar balancing approach is applied by the United States Courts in interpreting the Federal Freedom of Information Act. [In *US Department of Justice v Reporters Committee for Freedom of Expression et al* 489 US 749 (1989) the United States Supreme Court stated that 'whether disclosure of a private document ... is warranted must turn on the nature of the requested document and its relationship to "the basic purpose of the Freedom of Information Act to open agency action to the light of public scrutiny" ... rather than on the particular purpose for which the document is being requested'. See also *Department of Airforce v Rose* 425 US 352 (1977).

99 See, generally J Neethling, J M Potgieter & P J Visser *Neethling 's Law of Personality* (1996) at 239-77.

interest in disclosure outweighs the individual's privacy interest, disclosure would not be 'unreasonable'.¹⁰⁰

(b) Defence, security and international relations

This discretionary ground of non-disclosure, contained in s 41 of the ALA, applies only to public bodies. This provision provides, in s 41 (1), that the information officer of a public body may refuse a request if disclosure 'could reasonably be expected to cause prejudice to' the defence, security or international relations of the Republic.¹⁰¹ Subsection (2) goes on to include a number of examples of specific records.¹⁰² Section 41(4) goes further in providing that the information officer may refuse to confirm or deny the existence or non-existence of the record if such a disclosure would harm South Africa's defence, security or international relations.

National security is an important concern for any state. Instances where a genuine threat to national security or defence outweighs the constitutional right of access to information would accordingly constitute a justifiable limitation on that constitutional right.¹⁰³ Such an approach is consistent with the approach in foreign jurisdictions¹⁰⁴ and international conventions.¹⁰⁵ For example, in the Canadian decision of *Zanganeh v Canadian Security Intelligence Service*¹⁰⁶ the court held that the refusal to disclose information relating to national security was a justifiable limitation under the Canadian Charter's limitations clause, notwithstanding the fact

100 It should be noted that the public interest contemplated here is broader than the public interest override contained in the AIA (see below, § 62.9). For example, while the disclosure of malfeasance has long been recognized as being in the public interest, this would not necessarily amount to a substantial contravention of law contemplated in the statutory public interest override. This is also consistent with the position in the United Kingdom that a defence to an action for breach of confidence exists if the public interest in disclosure outweighs the public interest in preserving the confidence (see, generally, G Robertson and A Nicol *Media Law* 3 ed (1992) 183-7 and D Feldman *Civil Liberties and Human Rights in England and Wales* (1993) 438-41).

101 Information which could prejudice the international relations of the Republic is subject to a sunset provision that this ground cannot be relied upon if the record came into existence more than 20 years before the request. Information which could prejudice defence or security is not, however, subject to such a provision.

102 These records are records including information relating to: military tactics, strategy, exercises or operations 'undertaken in preparation of hostilities or in connection with the detection, prevention, suppression or curtailment of subversive or hostile activities'; the quantity, characteristics, capabilities, vulnerabilities or deployment of weapons; the characteristics of any military force and information held for the purposes of defence intelligence. The crucial issue is whether the list is of information that can be presumptively assumed to reasonably be expected to cause prejudice or whether the list is just a set of examples of the type of information that *could* have that effect, that is, if a record contains information about military tactics can it be refused for this reason, or is it additionally necessary for the public body to show that its disclosure can reasonably be expected to cause harm to defence? See *AIA Commentary* paras 8.89-8.95 for a more detailed discussion of this ground of non-disclosure, concluding that s 41 (2) is presumptive.

103 As Cameron J stated in the *Commission of Inquiry into Armscor Transactions, Ruling on in camera proceedings*, (7 November 1994) the concept of national security 'may be invoked to inhibit the public debate on the problem and the State's response to it. Thus, in South Africa, massive legislation was introduced under apartheid to preclude comment on the armaments and nuclear industries and other issues. In our view, the Commission needs to find a balance between too broad and too narrow a determination of national security and the national interest. In finding that balance, as we have indicated, we consider that commercial interests related to the country's future well-being and prosperity may play a legitimate role.'

that the Canadian government had made a false denial that it did not have the relevant information in its possession.

In the context of national security the important terms which require interpretation in s 41 of the ALA are 'reasonably be expected to cause', 'prejudice', 'defence' and 'security'. In interpreting these terms our courts should be careful to strike a proper balance between this

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compelling interest and the constitutional right of access to information.¹⁰⁷ In striking the correct balance it is important to stress that access to information is a fundamental right. As Cameron J stated in the *Armstrong* inquiry, assessing whether there was 'reason to believe' that the national security of South Africa may be threatened if the hearing is not conducted *in camera*:

'Reasonableness as a standard of public conduct in South Africa now requires that decision-makers should have due regard to appropriate constitutional standards and principles. These include in the present case the value of openness and visibility in the government and official processes. In other words, an assessment whether the reasonable justification test has been fulfilled may include, in the weighing process, giving consideration to the public's constitutional right to know, and the constitutional value of an open society. To put the matter differently, the public's right to know should not be omitted from the assessment whether the "reasonable justification" standard has been fulfilled.'¹⁰⁸

Courts should, in particular, closely scrutinize an assertion of national security in view of the long history of the abuse of this ground in South Africa and elsewhere and in view of the conflict between the notion of national security and the constitutional value of openness.¹⁰⁹ It is all too easy for the government simply to assert national security as a ground for non-disclosure, particularly where the very existence of the record need not be confirmed under this ground. As David Feldman states:

104 For example, in the context of freedom of expression, the United States Supreme Court adopted the 'clear and present danger' test in *New York Times v United States* 403 US 713 (1971), in holding that the United States administration had not justified its attempt to prevent publication of the so-called 'Pentagon papers'.

105 See, for example, art 19 of the International Covenant on Civil and Political Rights, 1966 and art 10 of the European Convention on Human Rights, 1950.

106 (1988) 50 DLR (4th) 747.

107 This balancing is implicit in the approach of Cameron J in the final *Armstrong* inquiry judgment, in which he 'accept[ed] that no decision as to disclosure in this area can be without risk or harm, or without anxiety as to its consequences ... [T]hat risk, in the present case, however, is not sufficient to entitle us to bar from the press and the public an important right to examine our past, including our past armaments dealings, whether or not that examination causes embarrassment, and even complexity, for other governments, and indeed for the present Government of National Unity.' (*Commission of Inquiry into Armstrong Transactions, Ruling 011 in camera application — country classification for armaments trade: log 17 Pam 19.*)

108 It should be noted that Cameron J specifically stated that this consideration may 'have a marginal influence' in that case. Nevertheless, it is submitted that its emphasis is useful in interpreting s 41 of the AIA.

'The security of the state and its institutions is an important public interest. Yet the law which buttresses those institutions is inevitably viewed with suspicion by democrats and libertarians, as a threat to state security can too easily be asserted by those in power, as a justification for restricting a wide range of freedoms in ways which protect the interests of the governing party rather than the public.'¹¹⁰

(c) Operations of public bodies

Section 44 of the AIA provides that the information officer of a public body may refuse access to a record if that record relates to the operations of the public body in a particular manner. Section 44(1)(a) applies if the record contains an opinion, advice, report or recommendation or an account of a consultation, discussion or deliberation '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'. Paragraph (b) applies if 'the disclosure of the record could

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reasonably be expected to frustrate the deliberative process in a public body or between public bodies' by inhibiting candid communication or deliberation; or the disclosure, by prematurely disclosing a policy or contemplated policy, could 'reasonably be expected to frustrate the success of that policy'.

This ground of non-disclosure protects the disclosure of public decision-making and therefore draws on the purposes behind the state communications privilege.¹¹¹

The most striking feature of this ground of non-disclosure is the breadth of para (a). On the face of it, this provision will permit public bodies to refuse to disclose almost all information which is formulated for the purposes of formulating a policy or taking a decision, including decisions which would constitute administrative action for purposes of the just administrative action clause.¹¹²

109 As G E Devenish, K Govender & H Hulme state in *Administrative Law and Justice in South Africa* (2001) at 192: '[I]n South Africa, there is no doubt that the courts will meticulously scrutinize any claim that information is privileged by virtue of considerations of national security as a result of the manifest abuse of national security as a cloak for covering up human rights violations and abuses that were committed on an inordinate scale during the era of white minority rule.'

110 D Feldman *Civil Liberties in Human Rights in England and Wales* (1993) at 682.

111 Cases interpreting the executive privilege in the content of the US FOIA have distinguished three purposes behind the state communications or executive privilege. First, the privilege is designed to encourage open, frank discussions on policy matters between subordinates and superiors. Secondly, the privilege is designed to protect against premature disclosure of proposed policies before they are finally adopted. Thirdly, the privilege protects against public confusion by disclosure of reasons and rationales that were not the actual reasons for state actions. *Coastal States Gas Corp v Department of Energy* 617 F2d 854 (DC Cir 1980).

112 Although s 44(4) provides that this provision may not be used to refuse a record 'insofar as it consists of an account of, or a statement of reasons required to be given in accordance with s 5 of the Promotion of Administrative Justice Act, 2000', this would not prevent a body from refusing to disclose information leading up to the decision. Applicants in judicial review applications would be entitled to such information as part of the record under Rule 53 of the Uniform Rules of the High Court of South Africa. G E Devenish, K Govender & H Hulme (eds) *Administrative Law and Justice in South Africa* (2001) at 206 argue that the 'or' between paras (a) and (b) of s 44(1) is an error and that the conjunctive 'and' should have been used instead, 'because otherwise a completely untenable and absurd situation would arise in terms of which the exception to the right of access to information would completely negate the operation of the right itself'. But see *AIA Commentary* para 8.99.

While the breadth of this provision may be constitutionally suspect, it is important that it is restrictively interpreted. In this regard, there are three respects in which it should be restrictively interpreted. First, this provision only protects pre-decision, and not post-decision, documents. A post-decision document cannot be 'for the purpose of assisting' in formulating policy or taking a decision. Thus, a pre-decision document which is adopted or incorporated in an administrative decision should also lose its protection.¹¹³ Secondly, this ground should not ordinarily protect internal secret law, working law or administrative guidelines as such documents would constitute a policy or decision in themselves.¹¹⁴ Thirdly, this provision should ordinarily be limited to documents containing opinion and not those which set out facts. These restrictive interpretations of the ground of non-disclosure are justified by the fact that the records contemplated in this ground go to the heart of open government and democratic functioning.

Section 44(2) further provides that the information officer may refuse a request if disclosure could 'reasonably be expected to jeopardize the effectiveness of a testing, examining or auditing procedure or method used by a public body'; or if the record contains evaluative material and disclosure would breach a promise to hold the information in confidence. Subsection (2)(c) provides that the information officer may refuse access if the

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record 'contains a preliminary, working or other draft of an official of a public body'. The latter provision is unclear but appears to envisage draft documents held by a public official.¹¹⁵

62.9 Public interest override

Sections 46 and 70 of the AIA, in relation to public and private bodies respectively, contain public interest overrides which provide for mandatory disclosure in the public interest. These provisions override all the grounds of non-disclosure included in the Act, save for one,¹¹⁶ In terms of this provision, a request for access to a record must be granted, notwithstanding the other provisions of the Act, if:

- (a) the disclosure of the record would reveal evidence of-
 - (i) a substantial contravention of, or failure to comply with, the law; or
 - (ii) an imminent and serious public safety or environmental risk; and
- (b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question.'

113 AIA Commentary paras 8.100 and 8.101.

114 See Justine White 'Open Democracy: Has the Window of Opportunity Closed?' (1998) 14 *SAJHR* 65 at 71-2 for a criticism of secret guidelines.

115 This is consistent with the previous draft of the Open Democracy Bill, which contained the term 'working draft or note of an official of a government body'.

116 Namely, s 35(1), which provides for the mandatory protection of certain records of the South African Revenue Service.

The public interest overrides therefore contemplate a particularly serious type of public interest, namely, a substantial contravention of law or an imminent and serious public safety or environmental risk. This provision does not require the mandatory disclosure of information which is in the public interest, in the general sense.¹¹⁷

It is unfortunate that the wider provision in clause 44(2) of the Open Democracy Bill was abandoned in the drafting process of the AIA. This clause would have required mandatory disclosure if the public interest in disclosure of the relevant information outweighed any right or interest which would be protected by the relevant ground of refusal.

Of particular concern is that the emphatic language of these provisions ('substantial contravention', 'imminent and serious' and 'clearly outweighs') could have the effect that the public interest override will seldom apply. If this is the case, the constitutional right of access to information could be undermined, which could call into question the constitutionality of the entire structure of the AIA.¹¹⁸ Even with the liberal interpretation in favour of openness of information which is in the public interest which these terms should therefore be given, the clause seems unavoidably restrictive.

117 The public interest, as a defence to a delictual claim for defamation or invasion of privacy, is significantly wider. The public interest, in this sense, is simply something which is of serious concern or benefit to the public. In *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA) at 1212, Hefer JA stated that the 'public interest' is 'material in which the public has an interest' as opposed to 'material which is interesting to the public'. For example, it would include a disclosure of simple malfeasance.

118 It is, however, acknowledged that the broad public interest could have the effect that a particular ground of non-disclosure will not apply, in which case the public interest override is irrelevant. See above, 62–20 for a discussion of the manner in which a public interest may result in a disclosure of personal information not being unreasonable.