

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 10009/22

In the matter between:

THE HEALTH JUSTICE INITIATIVE

Applicant

and

THE MINISTER OF HEALTH

First Respondent

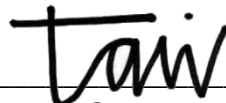
**THE INFORMATION OFFICER,
NATIONAL DEPARTMENT OF HEALTH**

Second Respondent

FILING SHEET

KINDLY TAKE NOTICE THAT the Applicant hereby files heads of argument.

DATED at JOHANNESBURG on 15 DECEMBER 2022.



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INTRODUCTION

1. The Covid-19 Pandemic had an immeasurable impact on the functioning of South Africa. Government was forced to make far-reaching policy decisions in truncated time periods and with limited evidence. But the extraordinary demands of the Pandemic stand in stark contrast to the very ordinary demand that forms the basis of this application: a public health organisation, acting in the public interest, seeks access to documents held by an organ of state regarding its procurement processes.

2. The right to access information held by the State is well-established, by the Constitution,¹ by legislation,² and by extensive legal precedent.³ Given the function of access to information as “*the lifeblood of democracy*”,⁴ a requester has the right of access to documents held by the state regardless of the reasons for which access is sought or the State’s view on the validity of those reasons.⁵ The Promotion of Access to Information Act 2 of 2000 (“PAIA”), casts its provisions in peremptory terms: the requester *must* be given access to the information held by the State so long as its request complies with the procedures outlined in the Act and the information requested is not protected from disclosure by one of the “*limited and*

¹ Section 32 of the Constitution states:

“(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.”

² Promotion of Access to Information Act 2 of 2000 (“PAIA”).

³ See, for example, *Brümmer v Minister for Social Development and Others* 2009 (6) SA 323 (CC) paras 62-3.

⁴ *President of the Republic of South Africa and Others v M & G Media Ltd* 2011 (2) SA 1 (SCA) (“*M & G Media SCA*”) para 1.

⁵ *De Lange and Another v Eskom Holdings Ltd and Others* 2012 (1) SA 280 (GSJ) (“*De Lange*”) para 35; *Transnet Ltd and Another v SA Metal Machinery Co (Pty) Ltd* 2006 (6) SA 285 (SCA) (“*Transnet*”) para 59.

*specific*⁶ exemptions set forth therein.⁷ The organ of state bears the onus to show that any refusal falls within one of PAIA's recognised grounds.⁸ A requester thus does not have to motivate a request; it is for the public body to motivate a refusal.⁹

3. Under our law, then, "*the disclosure of information is the rule and exemption from disclosure is the exception*".¹⁰
4. In this case, the Department of Health has refused disclosure of the vaccine contracts and records of negotiation sought by HJI, without a proper basis. These proceedings are brought to compel their production.

FACTUAL BACKGROUND

The PAIA process before the Department

5. On 19 July 2021, the applicant, the HJI, submitted a request to the Department of Health in terms of section 53(1) of PAIA¹¹ for access to two categories of records:

⁶ *Transnet* para 43.

⁷ Section 11 of PAIA. See also *South African History Archive Trust v South African Reserve Bank and Another* 2020 (6) SA 127 (SCA) ("*SAHA*") para 6.

⁸ See section 81(3) of PAIA, which states:

"The burden of establishing that—
(a) the refusal of a request for access; or
(b) any decision taken in terms of section 22, 26 (1), 29 (3), 54, 57 (1) or 60,
complies with the provisions of this Act rests on the party claiming that it so complies."

See also *President of the Republic of South Africa and Others v M & G Media Ltd* 2012 (2) SA 50 (CC) ("*M & G Media CC*") para 23; *M & G Media SCA* para 14.

⁹ *Transnet* para 25.

¹⁰ *M & G Media CC* para 9.

¹¹ Section 53 states:

"(1) A request for access to a record of a private body must be made in the prescribed form to the private body concerned at its address, fax number or electronic mail address.
(2) The form for a request for access prescribed for the purposes of subsection (1) must at least require the requester concerned-
(a) to provide sufficient particulars to enable the head of the private body concerned to identify-
(i) the record or records requested; and
(ii) the requester;
(b) to indicate which form of access is required;
(c) to specify a postal address or fax number of the requester in the Republic;

- 5.1. First, the vaccine procurement contracts, memoranda of understanding, and agreements concluded with any vaccine manufacturer, licensee or supplier or with any of Janssen Pharmaceuticals/Johnson & Johnson; Aspen Pharmacare; Pfizer; Serum Institute of India; Cipla; Sinovac/Coronavac; the African Union Vaccine Access Task Team (AU AVATT); Covax (with the Global Vaccine Alliance, GAVI, or otherwise) and the Solidarity Fund; and
- 5.2. Second, the minutes, correspondence, and negotiation meeting outcomes with those parties.¹²
6. Those records clearly exist. The Department admits that:
- 6.1. Meetings and negotiations were held over a protracted period with Pfizer,¹³ Johnson and Johnson,¹⁴ Moderna,¹⁵ the Covax Facility,¹⁶ the Gamaleya Institute,¹⁷ Astra Zeneca,¹⁸ the Serum Institute of India,¹⁹ and Sinopharm.²⁰ In several instances, those discussions resulted in the conclusion of term

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- (d) *to identify the right the requester is seeking to exercise or protect and provide an explanation of why the requested record is required for the exercise or protection of that right;*
- (e) *if, in addition to a written reply, the requester wishes to be informed of the decision on the request in any other manner, to state that manner and the necessary particulars to be so informed; and*
- (f) *if the request is made on behalf of a person, to submit proof of the capacity in which the requester is making the request, to the reasonable satisfaction of the head.”*

¹² Request, annex A, p 1-9. See also FA p 1-15 para 10; p 1-31 para 66.

¹³ AA p 4-16 para 19; p 4-22 para 37: engagements with Pfizer began on 24 July 2020 and an agreement was ultimately concluded on 30 March 2021.

¹⁴ AA p 4-16 para 19; p 4-21 para 35: engagements with Johnson and Johnson began on 4 September 2020 and an agreement was ultimately concluded on 26 February 2021.

¹⁵ AA p 4-16 para 19; p 4-22 para 37: engagements with Moderna began in November 2020 and a term sheet was agreed on 24 December 2020.

¹⁶ AA p 4-16 para 19.

¹⁷ AA p 4-16 para 19.

¹⁸ AA p 4-20 paras 31-32.

¹⁹ AA p 4-20 para 30.

²⁰ AA p 4-32 para 78.

sheets.²¹

6.2. Purchase agreements were concluded with Pfizer,²² Moderna,²³ the Serum Institute of India,²⁴ Johnson and Johnson,²⁵ and, potentially, Aspen.²⁶

6.3. The Department also concluded agreements with:

6.3.1. Biovac, to ensure that vaccines were properly received, handled and distributed;²⁷

6.3.2. the AU AVATT, in respect of South Africa's participation therein;²⁸

6.3.3. GAVI and COVAX in respect of South Africa's participation in the Covax Facility;²⁹

6.3.4. the Solidarity Fund, in respect of a donation by the Fund to enable South Africa's participation in the Covax Facility;³⁰ and

6.3.5. the African Union in respect of the on-sale of South Africa's unused AstraZeneca vaccines.³¹

7. Each of these records falls within the scope of the HJI's request, and ought to have been produced.

²¹ AA p 4-22 para 37; p 4-21 para 35; p 4-22 para 37; p 4-20 para 32.

²² AA p 4-20 para 29; p 4-22 para 36; p 4-30 para 70.

²³ AA p 4-20 para 29; p 4-22 para 37.

²⁴ AA p 4-20 para 29; p 4-20 para 32.

²⁵ AA p 4-20 para 29; p 4-21 para 35; p 4-30 para 66.

²⁶ AA p 4-21 para 35.

²⁷ AA p 4-18 para 24.

²⁸ AA p 4-18 para 26; p 4-28 para 57.

²⁹ AA p 4-18 para 26; p 4-33 paras 82-85, 87.

³⁰ AA p 4-19 para 27; p 4-33 para 82.

³¹ FA p 1-27 para 50 read with AA p 4-32 para 76.

8. On 29 July 2021, the Director-General of Health responded to HJI's request to say that the Department would notify the vaccine manufacturers and distributors of the request, and invite them to make representations in response.³² That accorded with its obligation, imposed by section 47(1) of PAIA,³³ to inform third parties to whom a record relates, of a request for access and to afford them an opportunity to be heard in respect thereof. The HJI has not been informed of the third parties' responses, but presumably they refused to consent to production. Had any of the pharmaceutical companies consented to disclosure of a relevant record, the Department would have been obliged to produce it.³⁴
9. The Department did not respond to the HJI's request thereafter – either to apprise the HJI of the response of the vaccine suppliers or to advise it of the outcome to its request.³⁵
10. The HJI understood the Department's lack of response to amount to a deemed refusal of the request, section 27 of PAIA. Accordingly, on 15 September 2021, the HJI submitted an internal appeal in terms of section 77 of PAIA.³⁶ In terms of section 77(2) and (3) of PAIA, the Department had until 15 October 2021 to inform third parties of the internal appeal and until 14 November 2021 to decide the internal appeal.³⁷

³² FA p 1-32 para 68 ; letter of 27 July 2021, HJI40 p 1-202.

³³ Section 47(1) provides:

“The information officer of a public body considering a request for access to a record that might be a record contemplated in section 34 (1), 35 (1), 36 (1), 37 (1) or 43 (1) must take all reasonable steps to inform a third party to whom or which the record relates of the request.”

³⁴ See PAIA ss 34(2)(a), 35(2), 36(2)(b), 37(2)(b) & 42(5)(b).

³⁵ FA pp 1-32 to 1-33 paras 70-73.

³⁶ FA p 1-33 para 74; internal appeal, HJI4 pp 1-65 to 1-68.

³⁷ FA p 1-33 para 75.

11. Once again, the Department did not respond to the HJI – either to inform it of the attitude of the vaccine suppliers or to apprise it of the outcome of the internal appeal. In terms of section 77(7) of PAIA,³⁸ the internal appeal is regarded as having been dismissed.

The current proceedings

12. The HJI consequently launched this application to compel production of the records sought.
13. We highlight that this application is neither a review nor an appeal of the Department's refusal of the PAIA request or the internal appeal. Proceedings brought under section 78(2) of PAIA are original proceedings for the enforcement of the HJI's right of access to the records sought.³⁹ The Court must consider the request *de novo* and determine, on the information before it, whether the documents sought ought to be produced. It has a broad discretion, under section 82 of PAIA, to grant any order that is just and equitable.⁴⁰ The requester need only show that the records have been properly requested and declined; it is then for the public body to

³⁸ Section 77(7) provides:

"If the relevant authority fails to give notice of the decision on an internal appeal to the appellant within the period contemplated in subsection (3), that authority is, for the purposes of this Act, regarded as having dismissed the internal appeal."

Section 77(3) requires that a decision be made within 30 days.

³⁹ *Transnet* para 24; *M & G Media CC* para 14.

⁴⁰ Section 82 states:

"The court hearing an application may grant any order that is just and equitable, including orders-

- (a) confirming, amending or setting aside the decision which is the subject of the application concerned;*
- (b) requiring from the information officer or relevant authority of a public body or the head of a private body to take such action or to refrain from taking such action as the court considers necessary within a period mentioned in the order;*
- (c) granting an interdict, interim or specific relief, a declaratory order or compensation; or*
- (d) as to costs."*

See also *Transnet* para 22.

justify its refusal.⁴¹ The Department consequently bears the burden of proving that, on the probabilities, the information it has withheld falls within the scope of the PAIA exemptions relied upon.⁴² Nor is this burden lightly discharged since:

*“These exemptions and grounds of refusal must be narrowly construed because they involve limitation of a constitutional right. While access may be denied where it is clearly justified, doubts should typically be resolved in favour of disclosure, and a discretion exercised accordingly”*⁴³

14. Prior to launching these proceedings, the HJI wrote to the Department and to the local representatives of the pharmaceutical manufacturers whose vaccines have been approved for domestic use, to inform them of its intention to bring these proceedings and to request that they identify the entities that had negotiated or concluded vaccine procurement agreements with the State.⁴⁴ Neither the Department nor the pharmaceutical companies provided the information sought.⁴⁵ (The former cited confidentiality obligations which, it said, precluded it from providing the information requested.)⁴⁶
15. The HJI consequently does not know which particular juristic entities have negotiated and concluded agreements with the Department. That information has been purposefully withheld from it, even in the Department’s answering affidavit.⁴⁷

⁴¹ *M & G Media SCA* para 11.

⁴² PAIA s 81(3); *M & G Media CC* para 23; *M & G Media SCA* para 14.

⁴³ *Smuts N.O. and Others v Member of the Executive Council: Eastern Cape Department of Economic Development Environmental Affairs and Tourism and Others* (1199/2021) [2022] ZAECKMHC 42 (“*Smuts*”) para 15.

⁴⁴ FA p 1-19 para 21; letter of 8 December 2021, HJI5 pp 1-89 to 1-90.

⁴⁵ FA p 1-19 para 21.

⁴⁶ Email of 7 January 2022, HJI14 p 1-107.

⁴⁷ In relation to Pfizer, for example, the HJI averred, in FA p 1-25 paras 40-43 that Pfizer Inc is an American multinational with multiple subsidiaries incorporated in South Africa and that the HJI is uncertain which Pfizer entity the Department has contracted with. In AA p 4-30 para 70, the Department responded that “*the government entered into an agreement with Pfizer*”. That is unhelpful and evasive. The same approach has been taken in respect of each of the other suppliers;

The HJI is accordingly unable to join the relevant pharmaceutical companies in these proceedings. Nor has the Department joined them, despite its obligation⁴⁸ and the HJI's express invitation that it do so.⁴⁹ The pharmaceutical companies have similarly elected not to intervene, although they must be aware of this application.

THE DEPARTMENT'S BASIS FOR REFUSAL

16. The Department's basis for refusing production of any of the records sought is set out in paragraphs 38 to 41 of its answering affidavit.⁵⁰ It states:

“38. I must mention that the procurement contracts, were negotiated in good faith and in the best interests of the country under the prevailing circumstances. The department had signed the agreements, which contained confidentiality clauses regarding non-disclosure of the procurement agreements. I have mentioned in the previous paragraphs that there was an intense competition between the countries to procure vaccines for their citizens.

39. The vaccine manufacturers equally have negotiated in good faith and signed a non-disclosure clause in the agreements. The agreements signed with the manufacturers mentioned in the paragraph above contained confidentiality clauses. These clauses prohibit any disclosure to the procurements without the consent of other manufacturers. Any disclosure will constitute a breach of the agreement.

40. If the NDoH provides access to these contracts, the department will be in breach of the terms of the confidentiality clauses, and the disclosure will prejudice the respondents and the vaccine manufacturers in future engagements as contemplated in sections 36(1)(c)(i) (ii) and 37(1)(a) of the PAIA.

41. I submit with respect that there is no basis to suggest that disclosure of the agreements would reveal evidence a substantial contravention of, or failure to comply with, the law: or an imminent and serious public safety or environmental risk: and that the public interest in the disclosure of the record clearly outweighs the harm as contemplated in section 46 of PAIA.”

the Department discloses the group name, but not the particular juristic entity with whom agreements have been concluded.

⁴⁸ This Court has confirmed that it is the organ of state – not the requester – that bears the obligation to inform a third party of a request for access to information: see *De Lange* para 57. See also *SAHA* paras 29-31.

⁴⁹ FA p 1-18 para 18; p 1-19 para 22.

⁵⁰ AA pp 4-23 to 4-24.

17. The Department thus justifies its non-disclosure by relying on three assertions:
 - 17.1. First, it claims that it is bound by confidentiality clauses that preclude disclosure under section 37(1)(a) of PAIA;
 - 17.2. Second, it alleges that disclosure would prejudice it and the vaccine manufacturers in future engagements, and thus that disclosure is precluded under section 36(1)(c)(i) and (ii) of PAIA; and
 - 17.3. Third, it says that that there is no adequate public interest reason for compelling disclosure of the records under section 46 of PAIA.
18. None of those grounds is sufficient to justify withholding the contracts and negotiation records sought. We turn now to address why that is so.

THE DEPARTMENT HAS NOT DISCHARGED ITS ONUS

19. The Department's response to the HJI's request has been marked by a disdain for the HJI's (and the public's) right of access to information, and the Department's own obligations to act transparently and to account publicly for its vaccine procurement decisions. It has refused to disclose a single record of its vaccine negotiations, or a single clause of any of those agreements, or even to identify the actual entities with whom negotiations were held. Nor has it filed any confirmatory affidavits from the personnel it says were involved in the negotiations or party to the conclusion of the agreements.⁵¹
20. The Department has also failed to put up:

⁵¹ The complaint is raised in RA p 5-4 para 5. No confirmatory affidavits have been filed in response.

- any basis whatsoever for withholding the negotiation meeting minutes and/or outcomes, or the correspondence relating to vaccine procurement;
- the terms of any of the confidentiality clauses on which it relies;
- the scope of the protection conferred by those confidentiality clauses;
- the reasons underpinning the non-disclosure agreement;
- the real risks of proceedings being brought in respect of any compelled disclosure by the Department; or
- what foreseeable prejudice it and the vaccine suppliers are likely to face, should disclosure of (some or all of) the documents be made.

21. In short, the Department satisfies itself – and expects this Court to be satisfied – with mere assertions as to why it should be exempted from disclosing the public records sought.

22. That is insufficient to meet its onus in these proceedings. An organ of state that refuses a PAIA request must provide adequate reasons to justify its refusal⁵² - and it must do so in respect of every document sought, and each portion of the documents withheld. As this Court has explained in *Ccii Systems*,⁵³ vague justifications for refusal make it “*impossible to evaluate*” whether a claim for non-disclosure is properly made. The Court went on to state:

“In my view, and because of the onus created in s 81, it will be necessary for the information officer to identify documents which he wants to withhold. A description of his entitlement to protection is to be given, one would imagine, as in the case of a discovery affidavit in which privilege is claimed in respect of some documents. The question

⁵² PAIA s 25(3)(a); *M & G Media SCA* para 11.

⁵³ *Ccii Systems (Pty) Ltd v Fakie and Others NNO (Open Democracy Advice Centre, as Amicus Curiae)* 2003 (2) SA 325 (T) (“*Ccii Systems*”).

of severability may come into play. Paragraphs may be blocked out or annexures or portions may be detached.”⁵⁴

23. Indeed, our courts have repeatedly affirmed that organs of state must put up a proper explanation to justify withholding public records, and have been scathing in their critique of public bodies that deal with PAIA requests as the Department has.

- 23.1. The Supreme Court of Appeal in *M & G Media* found:

“The affidavits that have been filed by the appellants are reminiscent of affidavits that were customarily filed in cases of that kind [during apartheid]. In the main they assert conclusions that have been reached by the deponents, with no evidential basis to support them, in the apparent expectation that their conclusions put an end to the matter. That is not how things work under the Act. The Act requires a court to be satisfied that secrecy is justified and that calls for a proper evidential basis to justify the secrecy.”⁵⁵ [emphasis added]

- 23.2. When the matter came on appeal, the Constitutional Court found similarly:

“The recitation of the statutory language of the exemptions claimed is not sufficient for the state to show that the record in question falls within the exemptions claimed. Nor are mere ipse dixit affidavits proffered by the state. The affidavits for the state must provide sufficient information to bring the record within the exemption claimed.”⁵⁶

- 23.3. In *SAHA*, the Supreme Court of Appeal found:

“Some comment must be made on the overall approach taken by the SARB. I think it is fair to say that the answering affirmation is long on stock phrases which merely repeat parts of this chapter of PAIA. The affirmation falls woefully short on fact, detail or proper application of the provisions of PAIA.”⁵⁷

- 23.4. This Court, in *CALS*,⁵⁸ found:

⁵⁴ *Ccii Systems* para 16.

⁵⁵ *M & G Media SCA* para 19.

⁵⁶ *M & G Media CC* para 24.

⁵⁷ *SAHA* para 36.

⁵⁸ *Centre for Applied Legal Studies v Acting National Commissioner: Department of Correctional Services and Others* (37578/15) [2020] ZAGPPHC [unreported] (“*CALS*”).

“The third respondent merely recited the statutory language of the exemptions claimed and provided no information as to why the record falls within the exemptions claimed. In respect of each of the sections relied upon the third respondent merely made the bald allegation that the report may contain evidence which is protected by the particular section without in any way trying to justify these conclusions.”⁵⁹

24. The Department’s response is flawed on precisely the same basis. It does no more than cite the statutory provisions on which the Department seeks to rely, without putting up any facts that demonstrate that the records sought fall within the scope of those exemptions. It has consequently failed to make out any basis for its refusal of the records sought.
25. Moreover, the Department’s claim to confidentiality is undercut by its own partial disclosure of details of its agreements with Johnson & Johnson, Pfizer, and the Serum Institute of India, regarding the number of doses, the price per dose, and clauses concerning the ‘No Fault Compensation Fund’ and non-refundability.⁶⁰ Its conduct demonstrates that disclosure of at least some information is permissible and lawful. It has failed to provide any proper explanation for why full disclosure is not.⁶¹
26. We submit that disclosure should be ordered on this basis alone.

SECTION 37(1)(a) OF PAIA: THE ALLEGED CONFIDENTIALITY CLAUSES

27. In citing the confidentiality clauses to justify its withholding of the records, the Department invokes section 37(1)(a) of PAIA. It states:

⁵⁹ CALS para 24.

⁶⁰ Evidence of such disclosure is contained in PMG report, NGC1 pp 4-37 to 4-38, PMG report, FH2 pp 5-36 to 5-58; and in RA p 5-15 paras 50-53.

⁶¹ See, by analogy, *Mandag Centre For Investigative Journalism and Another v Minister of Public Works and Another* (67574/12) [2014] ZAGPPHC 226 (“*Mandag*”) para 11; *De Lange* para 76, finding that a claim to an absolute prohibition of disclosure is undermined where there has already been some disclosure of information through presentations to Parliament, and that in such cases, specific evidence is needed to justify why sharing the full record, as opposed to what was already shared, would prejudice the public body or a third party.

“(1) Subject to subsection (2), the information officer of a public body—

(a) must refuse a request for access to a record of the body if the disclosure of the record would constitute an action for breach of a duty of confidence owed to a third party in terms of an agreement;

... .

(2) A record may not be refused in terms of subsection (1) insofar as it consists of information—

(a) already publicly available; or

(b) about the third party concerned that has consented in terms of section 48 or otherwise in writing to its disclosure to the requester concerned.”

28. Section 37(1)(a) does not justify the refusal to disclose the records sought in this case for each of the following reasons.

29. First, the Department states that the confidentiality clauses form part of the purchase agreements it concluded with Pfizer, Moderna, the Serum Institute of India, and Johnson and Johnson.⁶² It does not allege that those clauses apply either to the negotiations minutes and correspondence, or to its other agreements (identified in paragraph 6.3 above). The confidentiality clauses consequently cannot exempt those latter documents from disclosure.

⁶² AA p 4-23 para 38.

30. Second, the Department is constitutionally obliged to act accountably and transparently,⁶³ and may only procure vaccines in a fair and transparent manner.⁶⁴ It cannot conclude and invoke a confidentiality clause in order to circumvent these constitutional duties. As the SCA confirmed in the *Transnet* case:

“To my mind the overriding consideration here is that the appellant, being an organ of State, is bound by a constitutional obligation to conduct its operations transparently and accountably. Once it enters into a commercial agreement of a public character like the one in issue (disclosure of the details of which does not involve any risk, for example, to State security or the safety of the public) the imperative of transparency and accountability entitles members of the public, in whose interest an organ of State operates, to know what expenditure such an agreement entails. I therefore fail to see how the confidentiality clause could validly protect the successful tenderer’s tender price from disclosure after the contract has been awarded.... Parties cannot circumvent the terms of the Act by resorting to a confidentiality clause.”⁶⁵ [Emphasis added]

31. It follows, we submit, that the Department is obliged to produce its vaccine procurement records (or, at the very least, the non-confidential portions thereof) in response to a PAIA request, even in the face of a confidentiality clause.

⁶³ In terms of section 195(1) of the Constitution, which provides:

“Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

- (a) A high standard of professional ethics must be promoted and maintained.*
- (b) Efficient, economic and effective use of resources must be promoted.*
- (c) Public administration must be development-oriented.*
- (d) Services must be provided impartially, fairly, equitably and without bias.*
- (e) People’s needs must be responded to, and the public must be encouraged to participate in policy-making.*
- (f) Public administration must be accountable.*
- (g) Transparency must be fostered by providing the public with timely, accessible and accurate information.*
- (h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.*
- (i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.”*

⁶⁴ In terms of section 217(1) of the Constitution, which states:

“When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.”

⁶⁵ *Transnet* paras 55-56.

32. Third, and in any event, the mere reference to a confidentiality clause does not justify withholding records sought. More is required, including:

“[D]etails as to the nature of this confidence, whether it arises from the agreements themselves or some other basis, what aspects of the agreements the duty of confidence covers, and whether the duty of confidence contains any exceptions, for example, in relation to disclosures required by law or pursuant to a court order.”⁶⁶

33. None of those details has been provided by the Department.
34. Moreover, the mere existence of a confidentiality clause is not sufficient to shield the Department from disclosure. It must also show that a breach of clause would probably result in a successful claim for damages.⁶⁷ There is nothing in the Department’s papers to motivate for such a finding.
35. We therefore submit that the Department has failed to show that the records sought are covered by the exemption contained in section 37(1)(a) of PAIA, and it consequently provides no basis for the relevant records to be withheld.

SECTION 36(1)(c): COMMERCIAL PREJUDICE

36. Section 36(1)(c) prohibits the disclosure of information supplied in confidence by a third party *“the disclosure of which could reasonably be expected”* to put the third party at a disadvantage in contractual or other negotiations⁶⁸ or to prejudice the third party in commercial competition,⁶⁹ unless the third party consents to its disclosure.⁷⁰

⁶⁶ *De Lange* para 128.

⁶⁷ *Transnet* para 57; *SA Airlink (Pty) Ltd v Mpumalanga Tourism and Parks Agency and Others* 2013 (3) SA 112 (GSJ) (“*SA Airlink*”) paras 23-24.

⁶⁸ PAIA s 36(1)(c)(i).

⁶⁹ PAIA s 36(1)(c)(ii).

⁷⁰ PAIA as 36(2)(b).

37. As with section 37(1)(a),⁷¹ a mere recital of the provision is not sufficient to invoke the exemption from disclosure. The public body must put up facts to show that disclosure would likely result in harm to the third party's commercial interests. "*A party relying on this provision must show that harm is not simply possible, but probable...*"⁷².
38. Again, the Department falls far short of this requirement. It does not identify which records the exemption is said to apply to, or why their disclosure would likely put the pharmaceutical supplier at a contractual or commercial disadvantage. The exemption can, in the circumstances, simply not apply.

SECTION 46: PUBLIC INTEREST OVERRIDE

39. Finally, even if the Department had justified its refusal of disclosure on one of the grounds set out in PAIA (which is denied), we submit that disclosure would nevertheless have been required under section 46 of PAIA.
40. Section 46 requires that a record that would otherwise be exempted from disclosure be disclosed 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.”*
41. In applying section 46, courts have noted that since "*a requester of information invariably has no, or very little, information at his or her disposal concerning the*

⁷¹ The SCA has recognized the interrelationship between these provisions in *Transnet* para 57.

⁷² *SA Airlink* para 23.

*information requested... it may very well be impossible to prove that disclosure 'would' reveal legal contraventions".*⁷³ Section 46 must not be read or applied to create insuperable barriers to the exercise of the constitutional right of access to information.

42. The HJI has set out grounds for believing that the Department has failed to comply with the law in its vaccine procurement process. It points out that:

42.1. The Department admits to having bound itself to confidentiality clauses,⁷⁴ which the HJI submits are at odds with its obligations under sections 195 and 217 of the Constitution, and which are otherwise *contra bonos mores*;⁷⁵

42.2. Media reports suggest that the Department procured vaccines at differential and inflated prices (again, in breach of its obligations under section 217 of the Constitution);⁷⁶ and

42.3. The vaccine procurement agreements contain unreasonable and inequitable terms, including in relation to indemnification; prohibitions on export, on-ward sale and donation; and non-refundability of down-payments.⁷⁷ Indeed, the Department has admitted as much.⁷⁸ It is, we submit, unlawful for the Department to enter into contracts on unreasonable

⁷³ *Centre for Social Accountability v Secretary of Parliament and Others* 2011 (5) SA 279 (ECG) para 90.

⁷⁴ See AA p 4-28 para 58.

⁷⁵ FA p 1-15 para 9; p 1-20 para 26.

⁷⁶ FA p 1-20 para 27.

⁷⁷ FA p 1-21 para 27 read with RA pp 5-16 to 5-18 paras 52-54.

⁷⁸ PMG report, FH2 pp 5-36 to 5-58. See also AA p 4-30 para 66, where the Department expressly admits that the Johnson and Johnson agreement precludes restrictions on locally produced vaccines.

and unenforceable terms, and then to seek to shield them from disclosure and potential challenge.

43. There are weighty public interest considerations that weigh in favour of disclosure:

43.1. The records sought are necessary to understand the basis and terms upon which the Department has negotiated and procured Covid-19 vaccines. Those terms may continue to bind South Africa for many years to come. In the absence of disclosure, the HJI (and the public at large) cannot ascertain the terms on which vaccine procurement has been negotiated and concluded, and cannot challenge the validity and enforceability of the terms struck. Non-disclosure thus serves, in effect, to oust the Court's oversight over the terms of the vaccine procurement agreements, and to violate the HJI's right of access to court.

43.2. Moreover, reports on the conduct of pharmaceutical manufacturers elsewhere, as well as the Department's own reports to Parliament, suggest that some or all of the vaccine manufacturers/suppliers insisted that government provide them with far-reaching indemnities, and establish a vaccine injury fund, failing which vaccines would not be supplied.⁷⁹ The public is obviously entitled to know all relevant details included in the agreements related to this, what their cost to the fiscus is, and what their implications are for people who suffer vaccine injury. Government cannot lawfully bind itself secretly to commitments of this kind.

43.3. Even in the absence of such a fund, large sums of public money have been used to procure Covid-19 vaccines in circumstances where credible

⁷⁹ RA p 5-12 para 38.2, PMG report, FH1 pp 5-26 to 5-35; PMG report, NGC1 pp 4-37 to 4-38.

allegations of corruption and misuse of public funds have been levelled around procurement during the Covid-19 pandemic generally. It is a constitutional requirement that procurement, on the one hand, and public spending and future financial commitments, on the other, be open and transparent. The need for transparency and accountability is heightened during a state of disaster, where the usual checks and balances for procurement have been relaxed.

44. In those circumstances, we submit that the need for disclosure plainly outweighs any harm entailed by it – particularly since no such harm has in fact been identified by the Department. Section 46 compels disclosure of all the records sought.

CONCLUSION

45. The Department has failed to provide a proper basis for refusing to disclose any of the records sought by the HJI. Once that is so, “*there can no longer be anything in the way of the requester’s right to access*”.⁸⁰ The information sought must be disclosed.⁸¹
46. The HJI consequently seeks an order:
- 46.1. directing the Department to furnish it with copies of all of the records sought in its PAIA request, within 10 days of any order granted; and
 - 46.2. ordering the Department to pay the costs of the application, including the costs of two counsel.

⁸⁰ *Transnet* para 58.

⁸¹ *De Lange* para 36.

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15 December 2022