The Constitutional Right of Access to Information

4. September 2000
St George's Hotel, Rietvlei Dam
Pretoria

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Introduction

The conference entitled *The Constitutional Right of Access to Information* – held on 4 September 2000 at St George's Hotel, Rietvlei Dam, Pretoria – was organised and sponsored by the Konrad Adenauer Foundation (KAF), Johannesburg office and the University of South Africa (Unisa) VerLoren van Themaat Centre for Public Law Studies.

The need for a conference dealing with access to information became evident following the promulgation of legislation regulating the constitutional right to access to information. The Promotion of Access to Information Act 2 of 2000 and the Promotion of Administrative Justice Act 3 of 2000 were enacted to comply with constitutional obligations laid down in section 32(2) (access to information) and section 33(3) (just administrative action) of the Constitution of the Republic of South Africa Act 108 of 1996.

The main purpose of these two statutes, which support and supplement each other, is to ensure the achievement of an open and democratic South Africa by promoting transparency, accountability, good governance and just administration on the part of government. The Promotion of Access to Information Act has gone a step further than the preceding Open Democracy Bill by extending the scope of the right to information held by private bodies – a fact which was debated and discussed at the conference.

The objectives of the conference – which was well attended by academics, legal practitioners, officials from government departments and representatives of non-governmental organisations – was two-fold:

Firstly, to provide delegates with presentations by persons well qualified to discuss the issues raised by the constitutional right of access to information and the statute giving effect to this right. In this respect the conference was privileged in having the expertise of Justice Kate O'Regan, Professors Karthy Govender, Iain Currie, Jonathan Klaaren, Esmé du Plessis and Anneliese Roos, covering constitutional issues, foreign law and practical questions such as the impact of access to information on intellectual property and data protection.

The second objective was to ensure that sufficient time for informal discussion and questions should be available. Judging by the number of important and relevant issues that were debated and discussed during the panel discussion and question times, coupled with the fact that the conference ended well after the allotted time, the second objective was also achieved.

The VerLoren van Themaat Centre and KAF wish to apologise for the delay in the publication of the papers delivered at the conference. This delay can in no way be attributed either to KAF or the Centre; it is a direct result of the heavy workload placed on the shoulders of the majority of those presenting

papers. This statement is borne out by the fact that some of the participants were unable to prepare and edit their papers in time for publication.

KAF and the Centre wish to thank those who presented papers as well as the delegates to the conference. A number of interesting views were presented on specific aspects of the right to freedom of information, and it is hoped that delegates will take these issues further, either by way of future conferences or publications.

Professor Yvonne Burns
Professor of Administrative Law
University of South Africa

Welcoming Remarks

Michael Lange

INTRODUCTION

On behalf of the Konrad Adenauer Foundation (KAF), I would like to extend a very warm welcome to you all.

This is the second conference KAF has organised jointly with the University of South Africa's Verloren van Themaat Centre for Public Law Studies, and I am thrilled that we have been able to attract so many eminent scholars here today.

This conference, entitled *The Constitutional Right of Access to Information*, will focus on an issue that is of particular importance at a time when countries such as South Africa enter the information age, while trying to assure the transparency of the new political dispensation.

By assisting in bringing about this conference, KAF hopes it is contributing in a meaningful way to the consolidation of democracy in the new South Africa.

1. BRIEF BACKGROUND

For those wondering what kind of organisation KAF is, allow me to sketch a brief background to the German political foundations and to outline some of the reasoning behind the involvement of KAF in academic endeavours of this nature.

The German political foundations are a unique feature of today's democratic culture in Germany. The move behind their creation, which dates back to the 1960s, was the expectation that political and civic education would help develop and consolidate democracy in post-war Germany.

Both in Germany and abroad, these foundations seek to development further and encourage people to engage in political debate, thereby strengthening democracy and promoting a pluralistic society.

KAF is one of six political foundations in Germany today and is closely affiliated to the Christian Democratic Union Party – a centrist political party founded after the Second World War. It proudly bears the name of one of its founding members, Konrad Adenauer, who subsequently became the first Chancellor of post-war Germany.

KAF has been cooperating with partners throughout the world for almost 40 years. Currently, some 80 colleagues oversee some 200 projects and programmes in more than 100 countries. In this manner, the Foundation makes a unique contribution to policies serving peace and justice in international relations.

KAF currently has wide-ranging programmes in different parts of Africa, as well as in the different provinces of South Africa. The Foundation cooperates not only with centrist political parties and their respective think tanks but also with reputable academic institutions, as you will note from today's event.

2. KAF IN SOUTH AFRICA

Since establishing an office in South Africa we have been actively involved in projects focusing on constitutional issues, and a large number of our occasional research papers and seminar publications have tackled related problems.

We believed that issues relating to the right to access to information as much as the right to have one's personal data protected, are important to every South African citizen who feels challenged on an every day basis to assess the

legislative conduct and performance of South Africa's recently re-elected democratic government.

3. THE INFORMATION ERA AND DATA PROTECTION IN GERMANY

South Africa, as with any other industrialised country, is entering the information era. Freely available information has become a new factor in the economy: indeed it is now one of the most important factors of economic life.

Modern technology has made it easier to handle information, with the result that the amount of information being processed has soared to such an extent that finding relevant information is much less a problem than the selection of it.

It has become possible to collect, systematically assess and pass on virtually unimaginable quantities of data/information at high speed. This has led, among other things, to the need to protect personal data from unauthorised use.

In this sense, data protection is classically described as "one of the social limits that society has to impose on technological progress" and it is – as we all know – not the only one.

Data protection was introduced in Germany about 30 years ago, and since then it has developed in tandem with advances in electronic information technology.

German data protection law was initially based on principles derived from the right of the individual to determine the way information about himself/herself is used. In principle, the individual remained the master of his/her personal data, which were protected against any misuse.

Since then the basic criterion for the handling of personal data by the public administration and by private data processors has been the right of the individual to determine the use of his/her own data. In principle, this means that the individual has the right to decide whether his/her data should be revealed and, if so, how it should be used.

In a landmark decision, the Federal Constitutional Court ruled in 1983, that:

> "… If a person is unable to be sufficiently sure about what information affecting him in certain aspects of his social environment is known and if he is unable to make a general assessment of information held by potential interlocutors, his freedom to plan and decide his own action may be considerably restricted. A social system and a corresponding legal system in which the individual is no longer able to know who knows what, when and in what context about him is incompatible with the right to determine the use of his own data (…). This implies that, under modern day conditions of data processing, if an individual is to be able to develop his personality freely, he must be protected against the unrestricted collection, storage, use and transmission of his personal data (…). The fundamental right (to develop his personality) necessitates (…) powers for the individual himself to determine how his personal data are disclosed and used …"

In other words, it is particularly important to guarantee the transparency of the movement of information and it must be possible for the person affected to monitor the path this information takes.

Right from the start, the Federal Data Protection Act was conceived as a framework act which required additional legislation in specific areas, for example, the media.

In terms of data protection, the media in Germany enjoys "media privilege", which is based on the freedom of the press, as enshrined in the German constitution.

In addition to the possibilities that the law affords an individual to monitor his/her own data, there are also supervisory bodies. An example is the Federal Data Protection Commissioner, who is elected by parliament and therefore clearly separated from the public administration, not subject to instructions from state bodies and only required to act in accordance with the law.

A violation of data protection law can lead to prosecution. Offenders can expect to be sentenced to imprisonment of up to one year or to a fine.

CONCLUSION

South Africa is considered by many observers to be a legally consolidated democracy in which development towards a constitutional, pluralistic state, ruled by the new law of the land, appears to be irreversible.

Building and maintaining a strong and enduring democracy on these foundations will depend as much on a continuing commitment by all segments of South Africa's diverse popu-

lation to reconciliation and far-reaching economic and social transformation, as on outside support in consolidating this new political dispensation: KAF is willing to contribute to this process.

It is hoped that this conference will create the opportunity for more comparative analysis and evaluation so that South Africa can use the results of such comparative analysis to its advantage. This conference is KAF's humble contribution to the quest for a future in South Africa where data – especially personal data – are protected while general data and information – especially when held or collected by government – are as freely and widely available as possible.

Democracy and Access to Information in the South African Constitution: Some Reflections

Kate O'Regan

INTRODUCTION

> "Public Business is the Public's Business. The people have the right to know. Freedom of information is their just heritage. Without that, the citizens of a democracy have but changed their kings."[1]

The recognition of the importance of the right of access to information has come slowly to many democracies (though there are some remarkable exceptions – in Sweden, for example, legislation was enacted providing for public access to official documents as long ago as 1766). However, the recognition of the right of access to information as a central pillar to a functional democracy accelerated in the latter half of the 20th century.

In 1947 the General Assembly of the United Nations passed a resolution providing that freedom of information is a fundamental human right. Countries such as Australia, New Zealand, the United States, Finland, Denmark, Norway, France and the Netherlands have enacted such legislation.

This paper will discuss access to information and the conception of democracy that underlies the South African Constitution. I shall argue that the right of access to information is fundamental to our Constitution's conception of democracy in two key ways: first, by ensuring that citizens are informed of the activities of government to enable them to make informed choices when they exercise their democratic right. As James Madison wrote in 1822:

> "A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy; or perhaps both. Knowledge will forever govern ignorance. And a people who mean to be their own governors must arm themselves with the power which knowledge gives."[2]

Secondly, the right of access to information is central to the task of ensuring that public power is exercised legitimately and fairly. Unless we know what government is doing, we cannot curb arbitrariness. In the words of an American politician in the Senate, freedom of information legislation:

> "... proves that the best way to combat the cover-ups, the mistakes and the secret policies ... is to expose them to public view."

The right of access to information is therefore functional both to enabling citizens to exercise their rights in an informed manner, but also to ensuring that government wields public power properly. We shall consider both of these functions in relation to our specific constitution later. It will also be clear from what has been said that this paper will focus on the citizen's right to information held by government, not on the question of access to information held by non-governmental agencies.

The South African Constitution of course marks a turning point in this country's history. As the former Chief Justice Ismail Mahomed said in his characteristically ringing manner:

> "The South African Constitution ... retains from the past only what is defensible and represents a decisive break from, and ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian

ethos, expressly articulated in the Constitution."[3]

The Interim Constitution itself, in its epilogue, stated that:

> "This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex."

The 1996 Constitution states in its Preamble that the Constitution is to:

> "Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law."

As the Founding provisions state:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms;
>
> (b) Non-racialism and non-sexism;
>
> (c) Supremacy of the Constitution and the rule of law;
>
> (d) Universal adult suffrage, a national common voters' roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

These profound statements in our Constitution assert a conception of democracy for South Africa which requires government to be open, accountable and responsive. Central to the achievement of such a democracy will be the right of the public to have access to information held by government.

1. THE HISTORY OF THE RIGHT OF ACCESS TO INFORMATION IN THE NEW CONSTITUTIONAL ORDER

The authors of the Constitution placed the right of access to information firmly in our constitutional structure. In the Interim Constitution, section 23 of the chapter containing the Bill of Rights 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 of protection of any of his or her rights."

Even more importantly, however, Constitutional Principle IX provided that:

> "Provision shall be made for freedom of information so that there can be open and accountable administration at all levels of government."

The Constitutional Principle meant that the text of the final Constitution had to provide for freedom of information. If it did not do so, the text would not be certified by the Constitutional Court. In the result, section 32 of the 1996 Constitution provides:

> "(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."

Item 23(1) of schedule 6 to the Constitution provided that the legislation envisaged in subsection (2) should be enacted within three years of the date on which the Constitution came into effect. The Constitution came into effect on 4 February 1997 and the effective date by which the legislation had to be enacted was therefore 3 February 2000. Item 23(2) of schedule 6 provided that until the legislation envisaged had been enacted, section 32(1) would be deemed to read:

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

In other words, the provisions of section 23 of the Interim Constitution were to persist until the legislation envisaged by the Constitution was enacted. In the first certification judgment, the Constitutional Court held that this arrangement was permissible. It noted:

> "What is envisaged by [CP IX] is not access to information merely for the exercise or protection of a right, but for a wider purpose, namely to ensure that there is open and accountable administration at all levels of government."[4]

2. ACCESS TO INFORMATION AND DEMOCRACY – THE RIGHT TO BE INFORMED

Freedom of information is important, first, because it ensures that citizens have the right to be informed. This enables citizens to make informed decisions about political choices. However, the right of access to information held by government does more than facilitate the making of informed choices. As Justice Thomas, an Australian judge, observed:

> "Power and information are inextricably linked. ... The move towards open government can be perceived as an attempt to redress the imbalance in power by securing for the citizen greater access to official information. Open government, therefore, is essentially about a shift in power from government to the people, so that democratic sovereignty of the people is not diminished by being reflected imperfectly in the machinery of government."[5]

The relationship between power and information must be emphasised. Providing citizens with a right of access to information, both that held by the government and that held by private institutions, is to give citizens power to make informed choices about government. It can also give them the power to ensure that government is acting lawfully, which is the second important purpose of the right of access to information.

3. FREEDOM OF INFORMATION AND DEMOCRACY – ENSURING THE PROPER EXERCISE OF PUBLIC POWER

The relationship between freedom of information and the control of the exercise of public power was perhaps most cogently spelt out for South Africans by a much missed colleague, Etienne Mureinik. He elaborated on the metaphor of the bridge which was used in the epilogue of the Interim Constitution, and to which I have referred above, in the following terms:

> "What the bridge is from is a culture of authority. Legally, the apartheid order rested on the doctrine of parliamentary sovereignty. Universally that doctrine teaches that what Parliament says is law, without the need to offer justification to the courts. In South Africa, since Parliament was elected only by a minority, the doctrine taught also that what Parliament said was law, without a need to justify even to those governed by the law. The effect of these teachings, at the apogee of apartheid, was to foster an ethic of obedience. The leadership of the ruling party commanded its bureaucracy, the bureaucrats commanded the people.
> ...
> If the new Constitution is a bridge away from a culture of authority, it is clear what it must be a bridge to. It must lead to a culture of justification – a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command. The new order must be a community built on persuasion."[6]

A culture of justification cannot root in a society where government is clandestine and closed. As Etienne himself stated:

> "Access to official information is a matter of the utmost importance to any effort to bring about a culture of justification. A government which can close its files will be under much weaker pressure to justify its decisions than one which has to open them."

The need for justification for the exercise of public power is a recurring theme in our Constitution and the judiciary is given an important role in monitoring the exercise of public power. I will briefly consider three provisions of the Constitution to indicate this: the limitations clause (section 36), the right to just administrative action (section 33) and the socio-economic rights.

3.1 Section 36

A provision of the Bill of Rights may only be limited in terms of a law of general application that is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom". The Constitutional Court has held that to determine whether a limitation passes the test so set by section 36, it is necessary to determine the proportionality between the extent of the limitation of the right considering the nature and importance of the infringed right on the one hand and the purpose, importance and effect of the infringing provision, taking into account the availability of less restrictive means to achieve that purpose, on the other.[7]

In simple terms, the exercise requires government to show that what it has done in causing a limitation of a right is justified. Section 36 therefore imposes a clear burden on those to seek to meet the test of justification. That onus, albeit a persuasive burden on the legal principle of justification, often carries with it a factual burden too, in terms of which evidence must be furnished particularly to demonstrate the effect of the infringing provision. Section 36 itself is therefore an access to information provision, which legitimately burdens government with the task of justification.

3.2 Section 33 – just administrative action

This provision too imposes a burden of justification on government. The text provides that:

> "(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
> (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
> (3) National legislation must be enacted to give effect to these rights, and must:
> (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
> (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
> (c) promote an efficient administration."

Like section 32, the schedule to the Constitution imposed an obligation upon the legislature to enact the legislation envisaged in section 33(3) by 4 February 2000. The entrenchment of a constitutional right to reasonable administrative action as well as the right to be furnished with reasons for administrative action are powerful provisions in the nourishment of a culture of justification. Speaking of section 24 of the Interim Constitution which dealt with administrative justice, he stated:

> "[The section] would lift the shutters that now veil the inner workings of so much administrative decision-making, and expose it to the lights of the ethic of justification."

3.3 Socio-economic rights

The South African Bill of Rights entrenches not only civil and political rights, but also social and economic rights. Rights of access to land (section 25(5)), to adequate housing (section 26), to health care, food, water and social security (section 27) and to education (section 29) are all to be found in the Constitution. Most of these rights clearly impose a positive obligation upon government to take steps to achieve the realisation of those rights. The obligation imposed upon government requires it to take reasonable legislative and other measures to achieve the progressive realisation of the rights in question within its available resources.

Although the precise scope of the justiciability of these rights is yet to be fully developed by our courts, it is clear that government is required to take reasonable steps to achieve the rights.

It was Etienne Mureinik again in his essay arguing for the inclusion of socio-economic rights in the Constitution who argued that the inclusion of such rights would empower courts to consider whether government action is justified. Were a right to nutrition to be entrenched, he argued that:

> "... the court would be entitled to ask the government to explain how it envisaged eradicating starvation. That in itself would improve the quality of government, because any decision-maker who is aware in advance of the risk of being required to justify a decision will always consider it more closely than if there were no risk. A decision-maker alive to that risk is under pressure consciously to consider and meet all the objections, consciously to consider and thoughtfully to discard all the alternatives, to the decision contemplated. And if in court the government could not offer a plausible justification for the programme that it had chosen — if it could not show a sincere and rational effort to eradicate starvation — then the programme would have to be struck down. The Court therefore would be reviewing policy choices not making them."[8]

In the first case concerning socio-economic rights considered by the Constitutional Court, *Soobramoney*, Chaskalson P held, in assessing the guidelines established by the relevant health authority for the provision of renal dialysis:

> "It has not been suggested that these guidelines are unreasonable or that they were not applied fairly and rationally when the decision was taken by [the hospital] that the appellant did not qualify for dialysis."[9]

And later that:

> "A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility is to deal with such matters."

At the heart of our constitutional dispensation, therefore, lies a commitment to the legitimate exercise of public power and a vision of the separation of powers which enables the judiciary to play an important role in ensuring that the exercise of public power is legitimate.

The judiciary, however, is not the only safeguard of the legitimate exercise of public power. The media, non-governmental organisations (NGOs) and other institutions of civil society also have an important role in that regard. The constitutional entrenchment of the right of access to information enables these institutions to perform that role.

4. LIMITATIONS

It would be misleading to conclude without observing that there are, of course, legitimate limitations on the right of access to information. Every democracy that has entrenched the right of access of information on the one hand, has recognised that there are justifiable limitations on that access on the other. In the first certification judgment, the Constitutional Court recognised this:

> "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."[10]

Widely recognised limitations on the right of access include limitations to protect personal privacy, commercial confidentiality, national security and law enforcement, for example. What constitutes an appropriate limitation on the right is something which will no doubt form the basis of constitutional challenges in the future.

CONCLUSION

The right of access to information should not be seen as an afterthought or optional extra in our constitutional dispensation. It is integral to the conception of democracy that our Constitution adopts that conception, encourages participation, abhors secrecy and seeks to ensure that public power will not be abused.

A range of overlapping and related tools are created by the Constitution to ensure that its vision is achieved. Section 32 is one of those tools. It places a burden both on government to honour it and on citizens to use it wisely and well.

The new legislation under discussion today represents an important first step in ensuring that the right of access to information does indeed play the role the Constitution envisaged for it.

ENDNOTES

1) Harold L Cross *The People's Right to Know*, (1993).
2) *The Complete Madison* (1953) at 337.
3) *S v Makwanyane and another* 1995 (6) SA 665 (CC) at para 262.
4) In *re Certification of the Constitution of the RSA* 1996 (10) BCLR 1253 (CC) at para 83.
5) "Secrecy and Open Government" in Finn *Essays on Law and Government* Vol 1 (1995) at pp 184–5.
6) E Mureinik "A Bridge to Where? Introducing the interim Bill of Rights" (1994) 10 *SAJHR* pp. 31–48.
7) (See, for example, *S v Manamela* 2000 (5) BCLR 491 (CC)).
8) Mureinik "Beyond a Charter of Luxuries: Economic Rights in the Constitution" (1992) 8 *SAJHR* 464 pp. 471–2.
9) At para 25.
10) At para 83.

Analysing Foreign Access to Information Legislation from a South African Viewpoint

Jonathan Klaaren, Iain Currie & Andrew Smith

INTRODUCTION

The enactment of the Promotion of Access to Information Act 2 of 2000 (the Access to Information Act, AIA, or the Act) marked the end of a protracted legislative drafting process.[1] While refining amendments to the Act will no doubt be made, the basic features of the legislation are in place and can now be analysed. It is thus an appropriate time for a comparative assessment of the Act. Moreover, with the legislative process completed, much of the significant work in access to information will now come at the level of implementation. In part, implementation will mean training of public body officials and private body office-holders. Additionally, it will mean access to information compliance audits to be conducted by those bodies themselves. It is inevitable that at least some disputes regarding the implementation of the Act will not be capable of being resolved within the Act's administrative structures – especially given the lack of a specialised tribunal – and will instead come to the courts for definitive resolution. In all these aspects of the implementation of the Act – all requiring giving meaning and institutional shape to its words – it is likely that actors will draw upon comparable foreign access to information legislation for support and guidance. This heightens the need for a comparative assessment.

It is the aim of this paper to develop a model for comparing the South African Act with foreign access to information legislation. Our method is to identify key features to serve as points of comparison between the various statutes providing for access to information in a number of national jurisdictions.[2] Though developed with the South African legislation in mind, we contend that these key features map the significant similarities and differences among the various pieces of legislation surveyed. In choosing the key features, we have focused on the implementation of access to information legislation. The substance and relative breadth of exemptions (as we shall see, an almost invariable feature of access to information legislation) is not a focus of this paper. Instead, we have identified key features that are particularly significant from a current South African point of view. These go to the *implementation* of access to information legislation. It is these features which are pertinent to the immediate concerns of South African lawyers and institutions.

Part 1 of this paper briefly sketches the background to South Africa's access to information legislation. Part 2 then identifies and introduces 11 key features bearing on implementation of the South African access to information legislation. Briefly, these are (2.1) coverage of private/public bodies, (2.2) status of the underlying right of access, (2.3) relationship to administrative justice/procedures, open meetings, privacy/data protection legislation, and whistle-blower legislation, (2.4) specialised rights of access to information including environmental information, (2.5) formal structure of the right to know, (2.6) breadth of categorical exemption of state bodies, (2.7) use of mandatory/discretionary exemptions, third-party notification and override provisions, (2.8) degree of centralisation of implementation, (2.9) influence of e-government concepts, (2.10) structure of fees

provisions, and (2.11) structure of enforcement mechanisms. The paper identifies the relationship of each key feature to our principal analytical focus — the process of implementing the legislation. Using these key features as the basis of comparison, Part 3 then analyses the access to information legislation of two national jurisdictions: the United States (US) and Canada.

1. THE BACKGROUND OF ACCESS TO INFORMATION LEGISLATION IN SOUTH AFRICA[3]

This section provides a very brief history of the law reform effort that resulted in the passage of the Promotion of Access to Information Act.[4] The right of access to information found a place in the Bill of Rights of the Interim Constitution as well as in the Constitutional Principles by which the final Constitution was to be measured. Although legislative drafting work based at the Centre for Applied Legal Studies had begun even before the drafting of the 1996 Constitution, that Constitution included a provision mandating that legislation "giving effect to" the constitutional right of access to information be passed within three years of the Constitution's commencement.[5] With drafting taking place more and more within government and outside the view of civil society, the process appeared to stall although the constitutional deadline of three years apparently had the desired effect of concentrating the governmental mind. After a fairly public and controversial Parliamentary process, legislation giving effect to s 32 of the 1996 Constitution was enacted by Parliament as the Promotion of Access to Information Act 2 of 2000. Draft regulations for most of the sections of the Act have been published and implementation dates of first 15 September 2000 and more recently 4 January 2001 have been mooted.[6] Other components of the original draft access to information legislation[7] have been spun off as the Protected Disclosures Act[8] and yet-to-be drafted legislation dealing with privacy and data protection issues.[9]

Throughout the drafting process, the primary driving force as well as the primary resistance was directed at the purpose of public monitoring of government through disclosure of government information. Constitutional Principle IX explicitly stated "Provision shall be made for freedom of information so that there can be open and accountable administration at all levels of government." As the Constitutional Court noted, section 32 of the Constitution is "directed at promoting good government".[10] The Act confirms this democratic rationale.[11] In this vein, the criticisms that have been directed at the various drafts and at the final result of the legislative drafting process have essentially taken two forms. Some have criticised the legislation for not measuring up to the standards of its aspirations. Such criticism was directed particularly at the Cabinet-approved version of the Act in comparison to its earlier versions.[12] A more radical and far-reaching criticism has focused on the potential of the Access to Information Act to inhibit rather than to promote the disclosure of information.[13]

2. ELEVEN KEY FEATURES OF THE PROMOTION OF ACCESS TO INFORMATION ACT

2.1 Coverage of private/public bodies

The traditional rationale for access to information legislation is based on democratic principles: to increase governmental accountability by improving citizen monitoring of public bodies. However, other more contemporary justifications for access to information laws focus instead on information held by the private sector and on using access laws to supplement market and political mechanisms to achieve public policy goals.[14] The South African Act can be understood to move in this direction. The Promotion of Access to Information Act creates, in s 50, a duty to provide access to information held by private bodies on request, to the extent that the information is "required for the exercise or protection of any rights". The Act will need to be implemented by both public and private bodies.

2.2 Status of underlying right to information

The position of the access to information regime within the legal hierarchy can influence its implementation in obvious ways. Most commonly, access to information rights have their origins in legislation. To the extent that the right of access to information was sourced in a constitutional right, it often came under the umbrella of the right of free expression. The Interim Constitution signified a decisive break from this tradition by providing for a specific constitutional right of access to information. The constitutional right in the 1996 Constitu-

tion has been implemented by national legislation, but retains its constitutional backing. This means that the legislative access to information scheme can be assessed for compliance with the constitutional right to information, and statutory limitations of the right of access can be tested against the limitations clause of the Bill of Rights.

2.3 Relationship to administrative justice/procedures, open meetings, whistleblower, and privacy/data protection legislation

Access to information regimes are often legislatively linked to closely allied subject matters. For example, access to information law often overlaps with the protection of administrative justice and procedural fairness. There is a further common purpose of increased public accountability with laws promoting open meetings of government bodies. Extending accountability into the private as well as the public sphere, there is a further overlap with whistleblower protection regimes. Finally, at the interface of regulating information flows and protecting personal privacy, access to information legislation often overlaps with data protection/ privacy legislation. The AIA provides an almost textbook example of this relationship. While during its drafting history, the Open Democracy Bill at one point included three of these four subject matters (and the inclusion of the fourth was informally discussed at one stage), upon enactment freedom of information stood essentially alone. The four allied subject matters are the subjects of separate legislative regimes. The Administrative Justice Act provides for separate implementation of the right to administrative justice.[15] To the extent that South Africa has laws promoting open meetings, this is a matter of constitutional provisions relating to local government.[16] A separate Act has been enacted dealing with whistleblower protection (the Protected Disclosures Act 26 of 2000) and a drafting process is under way with regards to data protection/privacy.

2.4 Specialised rights of access to information including environmental information

While there can be specialised access to information regimes in many substantive areas of law, a particularly significant feature of access to information regimes is their relationship to environmental regulation. Often, access to information legal questions first emerged in this field. The South African regime is an example of this. The primary piece of environmental legislation – the National Environmental Management Act 107 of 1998 – is the only piece of legislation specifically permitted by the AIA to regulate a supplementary but separate access to information scheme.[17]

2.5 Formal structure of the right to know

There are two important dimensions to the formal structure of the right to know which can be seen as two sides of the same coin. The first is the degree to which the freedom of information regime is structured around a right to know (a claim-right in Hohfeldian terms)[18] as opposed to a duty to disclose. The second is the degree to which a request is required to trigger the legal obligation. In the South African legislation (as opposed to the Bill of Rights), there is no clear right to know. Instead, s 11(1) of the Act provides that a requester must be given access to a record if procedural and substantive requirements relating to a request have been fulfilled.

As is inherent in the concept, the duty to disclose is dependent upon a request. There is thus no duty to satisfy the right to know in the absence of a request.

2.6 Breadth of categorical exemption of state bodies

A regime of access to information often has only partial coverage throughout the state. While the thrust of access to information is to exempt information from disclosure based on the content of the information, some state bodies often succeed in obtaining exemptions based on the source of information. An exemption for Cabinet or Presidential documents is the most common. Sometimes the exemption takes the form not of a categorical exemption but rather of a system of Ministerial certification or (in a weaker version) of classification operated by that body.

In the South African regime, Cabinet has succeeded in obtaining a categorical exemption. However, the overall breadth of categorical exemptions is relatively narrow, extending further only to judicial functions and parliamentary members' privilege.

2.7 Use of mandatory/discretionary exemptions, third-party notification and override provisions

In the implementation of the right to know or the duty to disclose, the interaction between rules and discretion can affect the effectiveness of disclosure. Mandatory exemptions will tend to lessen access to information although perhaps provide a more cost-effective mode of implementation. Discretionary exemptions hold the promise of potential availability of information, but may be difficult to administer. Third-party notification procedures would appear to constitute a cumbersome step in the administration of the access to information regime, although litigation by third parties to prevent access may have the consequences of preventing more disclosure. Finally, the public interest override provision is in a slightly different situation. As with the issue of mandatory or discretionary exemptions, its operation will tread a line between disclosure and efficiency. Nonetheless, as an added weight towards disclosure, it would indicate greater liberality in an access to information regime. The South African legislation opts largely (but not exclusively, see for example, the discretionary defence, security and international relations grounds for refusal in s 41) for mandatory exemptions and for formalised and extensive third-party notification procedures. The South African public interest override clause (s 46) is relatively limited.

2.8 Degree of centralisation of implementation

There are two elements here. One is the degree to which implementation is centralised. Certainly, a government-wide agency for access to information would represent a high degree of centralisation. It is most often the case, as it is in South Africa, that the implementation of the access to information legislation is given to the usual line-function administrative bodies of national and provincial government. In South Africa, implementation is given as well to private bodies. Even here, the centralisation as opposed to the integration of access to information within the function of the agency will be important. A second element is the degree to which the regime attempts to empower and facilitate citizen access to information. In the South African regime, there is no single government-wide access to information body, although such a role was mooted for the Government Communication Information Service (GCIS) during the drafting process. Instead, the Act is to be implemented initially by the separate line-function agencies and departments. National, provincial and local governments are covered. In this implementation, the information officers are formally the heads of these agencies and departments, with powers of delegation. This choice could potentially contribute to mainstreaming the access to information function, although the possibility also exists that the function will simply be delegated in most cases to a junior official without resources. As for the degree of citizen facilitation, the South African regime is replete with access provisions such as the production of manuals, indexes, and guides.

2.9 Influence of e-government concepts

The impact of electronic technology on access to information law has been significant and is likely to increase.[19] The South African access to information regime, however, makes almost no use of or response to the opportunities and challenges posed by this technology. Electronic technology seems to be seen more as a different speed of medium rather than as a different type. The automatic disclosure exemption for instance does not demonstrate any particular sensitivity to electronic technology.[20] Even where mention is made of electronic records, the Act allows the substitution of printed versions for electronic versions.[21]

2.10 Structure of fees provisions

Consistent with the move towards financial accountability within government, the structure of the fees provisions can provide a revealing angle on the implementation of an access to information regime. Most, but not all, access to information regimes do have some sort of fees structure rather than allowing for free access. The South African regime distinguishes only between personal and non-personal requests. There is no lesser category for non-commercial but non-personal requests. Further, fees are to be charged both at the stage of request and at the stage of access. This dual structure is likely to emphasise the difficulties of request and thus to reduce the accessibility of the access to information regime.

2.11 Structure of enforcement mechanisms
External enforcement may be as important as internal implementation. Decentralised internal appeals are the most usual enforcement mechanism, backed up by judicial review in the ordinary courts. To the extent that a specialised agency (an Information Commission) takes responsibility for either appeals or review, there is probably a greater degree of enforcement capacity. Although an Open Democracy Commission had been mooted in early discussions, the South African regime provides merely for internal appeals and judicial review in the ordinary courts.

3. COMPARING FOREIGN ACCESS TO INFORMATION REGIMES

3.1 The United States

The Freedom of Information Act of the US[22] can lay claim to the status of being a model for most other access to information regimes.

3.1.1 Coverage of private/public bodies
The Freedom of Information Act (FOIA) covers only the agencies of the federal government. It does not extend to state or local governments (which often have their own more extensive access to information regimes) nor does it cover the access by public bodies to information held in the private sector.

3.1.2 Status of underlying right
The FOIA is a statute that has been amended a number of times. Thus, in terms of legal hierarchy, it is ordinary legislation and can be overridden by subsequent statutes (or even treaties). The FOIA has, however, achieved a considerable degree of status within the American statutory hierarchy and cannot be amended lightly or without controversy.

3.1.3 Relationship to administrative justice/procedures, open meetings, whistleblower, and privacy/data protection legislation
The FOIA is codified next to the US Administrative Procedures Act (APA) and can be seen as operating as a supplement to that Act. Its substantive provisions are, however, separate from the APA as well as from the Privacy Act. Administratively, many agencies have a joint FOIA/Privacy unit for implementation of both FOIA and the Privacy Act. The government in the Sunshine Act, mandating open deliberations of multimember federal agencies, was enacted after the FOIA and intended to supplement its provisions. By contrast with these first three subject matters, there is little direct relationship between the FOIA and US whistleblower legislation.

3.1.4 Specialised rights of access to information including environmental information
In the US, the FOIA provides the legal avenue to gain access to environmental information held by government through direct request. Nonetheless, the environmental impact statements required by the National Environmental Policy Act and made public in terms of that Act probably constitute a more significant method by which public monitoring of governmental environmental policy occurs.

3.1.5 Formal structure of the right to know
The FOIA is structured around a right to know rather than a duty to disclose upon request. In one part, this right to know produces rights in requesters. However, there are also legal rights created whereby some information must be published in the governmental register and whereby some information must be available for public inspection and copying. Failure to comply with these latter requirements can furnish a basis for invalidating administrative action, independent of the making of a request. Provision is thus made for the right to know, absent a request.

3.1.6 Breadth of categorical exemption of state bodies
The coverage of the FOIA is fairly extensive. The executive structures of government are included; courts and Congress are excluded. Mere public funding will not bring a corporation within the FOIA. Control is necessary. Neither the President nor his advisers are covered by the FOIA. In general, the categorical exemptions for state bodies are relatively narrow.

3.1.7 Use of mandatory/discretionary exemptions, third-party notification and override provisions
The FOIA exemptions are discretionary not mandatory. Withholding is thus mandatory only where a court has determined that release of

material would be an abuse of discretion. The FOIA does not itself provide for third-party notification procedures. However, Executive Order 12600 (23 June 1987) does set out a scheme of pre-disclosure notification procedures for confidential commercial information. The FOIA does not have a generally applicable public interest override, although such a concept is understood within many of the exemptions themselves.

3.1.8 Degree of centralisation of implementation
The FOIA assigns implementation of its provisions to the various federal agencies. In general, there is an attempt to integrate the provision of information into the mandate of the agency by mainstreaming access to information. Each agency will have different regulations to implement the FOIA. FOIA requests are dealt with both at head offices and at field offices. The provisions for citizen facilitation and assistance vary by agency and are not specified by the FOIA.

3.1.9 Influence of e-government concepts
In 1996, the FOIA was significantly amended to take into account information in electronic formats and to promote the maintenance of information in electronic form. For instance, the FOIA publication requirements were amended to include a mandate for online availability as well as hard copy availability within one year. Even if online availability is impossible, other electronic forms must be used. Moreover, prior-released records which the agency determines will be likely to be the subject of future requests, must also be made available in electronic format. Finally, requests for access in electronic form must also be honoured.

3.1.10 Structure of fees provisions
FOIA fees may vary from agency to agency. There is a growing trend towards requiring requesters to agree in advance to pay fees or even to provide a deposit. However, the general FOIA rule is that agencies may not require advance payment of fees. Fees may be charged not only for search and copy costs, but also for the time to review documents and decide upon a request. Users are considered in three categories: commercial use requester fees, educational or non-commercial scientific institutions, representatives of the news media, and public interest requests (which do not include merely personal requests).

3.1.11 Structure of enforcement mechanisms
The FOIA puts forth several guidelines for a system of internal administrative appeals, a system which will vary agency to agency. In each agency, an internal appeal will be allowed after an initial determination which results in refusal. In most instances, such an appeal must be exhausted before judicial review may be sought. There is no centralised tribunal.

3.2 Canada
3.2.1 Coverage of private/public bodies
The Federal Access to Information Act creates a right of access to "records under the control of a government institution". A list of government institutions covered by the Act is contained in Schedule 1.[23] The phrase "records under the control of . . . government" has been interpreted to mean any record, or information in a record, which happens to be within the custody of government, regardless of the means by which that custody was obtained.[24] The Federal Privacy Act is similarly restricted to personal information held by "a government institution".[25]

3.2.2 Status of underlying right
As a legislative statute, the Federal Access to Information Act provides a right of access to information in accordance, as the Preamble puts it, "with the principles that government information should be available to the public, that necessary exceptions should be limited and specific and that decisions on the disclosure of government information should be reviewed independently". The statute complements existing Canadian laws and procedures for access to information and does not limit existing means and rights of access.[26] This statutory right to government information has been described as being of a "quasi-Constitutional nature" and is a corollary of the constitutional right to freedom of expression.[27] Only Canadian citizens or permanent residents may make use of the Act.[28]

3.2.3 Relationship to administrative justice/procedures, open meetings, whistleblower, and privacy/data protection legislation.
A separate piece of legislation, the Privacy Act,

ensures protection of personal information collected by the federal government. It also allows citizens and people present in Canada access to information about them held by the federal government. It controls how the government may use, collect, store, disclose and dispose of personal information.

3.2.4 Specialised rights of access to information including environmental information

The Canadian legislation may be used for accessing environmental legislation. The results (or part thereof) of product or environmental testing carried out by or on behalf of government institutions must be disclosed unless the tests were carried out for a fee and as a service to a person, group of persons or an organisation other than a government institution.[29] Information relating to the protection of the environment otherwise not to be disclosed can be disclosed under a public interest override subject to certain conditions.[30]

3.2.5 Formal structure of the right to know

A right to know is provided for in Canadian legislation. The right of access is reliant on a request in writing, but now can also be done online.[31] Notice must be given as to whether access will be given or not.[32] The designated minister must disclose a publication on government institutions setting out a description of each government institution, its programmes and functions, classes of records under its control, all its manuals, and contact person for that institution.[33] A bulletin to update the publication must be made twice a year.[34]

3.2.6 Breadth of categorical exemption of state bodies

The exemptions are relatively broad. In particular, the confidences of the Queens' Privy Council (as well as committees thereof, and the Cabinet and committees thereof) are made exceptions to which the Act does not apply.[35] Confidences include memoranda, agenda, records, discussion papers for background, analyses, policy options, draft legislation and briefs.

Confidences that are 20 years old can be disclosed, and discussion papers for presenting background explanations, analyses of problems or policy options can be disclosed if the decisions have been made public, or four years have passed since the decision was made.[36]

3.2.7 Use of mandatory/discretionary exemptions, third-party notification and overrride provisions

Exemptions include responsibilities of government, federal-provincial affairs, international affairs and defence, law enforcement and investigations, security, safety of individuals, economic interests of Canada, personal information, third party information, operations of government, tests, privileges, and statutory prohibitions.[37] Most are discretionary, or (like the responsibilities of government, personal information and third party information exemptions) mandatory subject to a discretionary exemption, except for the mandatory exemptions for policing services (as part of the law enforcement and investigation exemption) and statutory prohibitions. The head of a government institution who intends to disclose any information that might: contain trade secrets, confidential technical, financial, scientific or commercial information supplied by a third party; lead to economic prejudice of a third party; or interfere with the contractual or other negotiations of a third party, must give notice to that third party.[38] A third party must be allowed to oppose the disclosure,[39] and if the head of the institution still decides to disclose, notice must be given to the third party.[40] The Information Commissioner (IC) is entitled during an investigation of a complaint to examine any record.[41] The IC may order disclosure.[42] A requester, refused access, who has complained to the IC, may apply (once the IC has made a finding) for a review by the federal court.[43] The court may order disclosure.[44]

3.2.8 Degree of centralisation of implementation

Implementation is relatively centralised. The head of a government institution (who is thus the person responsible for information disclosure) is usually the member of the Queen's Privy Council for that institution. Every head of a government institution annually has to report to each House of Parliament on the administration of the Act.[45] The Act further establishes the office of the IC with broad responsibility for the Act. A centralised website was created as a main access point for online access (see

below). Nonetheless, most Canadian provinces also have their own access to information acts with their own procedures.

3.2.9 Influence of e-government concepts
In 1997 the *Connecting Canadians* initiative pledged Canada to be the most connected country in the world; in 1999 the Canadian government promised to be the government most connected to its citizens.[46] The aim is to provide on-line access to all federal government information and services by 2004.[47] This is part of an overall plan to create a more efficient government.[48] The Canadian government website provides links to the government departments, agencies and services and provides an excellent understanding of how information can be accessed. It is also possible to fill out request forms online.[49] Useful summaries of the Access to Information Act and Privacy Act are given. A business information website is also available.[50] During 2000, the Canadian Consumer Information Gateway – which is an online portal for access to comprehensive consumer information compiled by more than 25 Government of Canada departments and agencies – was launched.[51]

3.2.10 Structure of fees provisions
An application of $5 is required for each request.[52] Additional copying fees may also be charged.[53] Requesters are notified of these additional costs so that a deposit can be paid.[54] Fees can be waived at the discretion of the head of a government institution.[55] An increase in fees to be paid is being discussed.[56] Experiences in Ontario have shown the detrimental effect that this has had on freedom of information.[57]

3.2.11 Structure of enforcement mechanisms
Complaints are made to the IC who, if he/she believes there is evidence, is able to report offences.[58] The IC can also order disclosure.[59] If this order is not followed, the IC must inform the complainant of his or her right to judicial review.[60] The IC also makes annual reports to Parliament and can at any time make special reports.[61] Offences of the Act are set out extensively.[62] An investigation into compliance with federal freedom of information laws argues that enforcement mechanisms need to be improved.[63] Request time has increased, full disclosure has decreased, exemptions are invoked more often and complaints to the IC are usually successful.[64] Thus monitoring of non-compliance and investigations of avoidance are suggested.[65]

CONCLUSION

While the comparative influences on the drafting of the Access to Information Act were considerable, the result has nonetheless been a South African product. Likewise, the comparative influences in the implementation of the Act will be significant. Drawing upon the significant features of the South African legislation, we have proposed a model that allows for identifying and tracking the comparative influences of access to information regimes with a particular focus on the implementation of legislation. We have briefly demonstrated the model by applying it to the access to information regimes of the US and Canada. We suggest that this model can be of use in monitoring and managing the implementation of the Promotion of Access to Information Act so as to achieve the realisation of the right to access to information and a deepening of South Africa's culture of constitutional democracy.

ANNEXURE
US AND CANADIAN ACCESS TO INFORMATION LAW ON THE WEB

Canada

Department of Justice:
http://canada.justice.gc.ca/en/ps/atip/
An excellent website which provides direction on how to access information from the government. It also has Access to Information and Privacy Act summaries as well as links to the Acts, Canadian and provincial governments, court decisions and other countries and organisations' access to information sites.

Queen's University, School of Policy Studies:
http://qsilver.queensu.ca/~foi/resources/webres.html
In-depth analysis of compliance with the Acts by the federal government, as well as some provincial governments, and recommendations for changes.

Consumer Information Gateway:
http://ConsumerInformation.ca
Canadian Consumer Information Gateway, which is an online portal for access to comprehensive consumer information compiled by more than 25 Government of Canada departments and agencies.

United States

Access Reports:
http://www.accessreports.com
This provides links to US and Canadian (and some other countries) access to information sites. It is user-friendly, and statutes, court proceedings, Bills, news and analyses are easily accessible.

Department of Justice:
http://www.usdoj.gov/04foia/
The US Department of Justice access to information site, setting out how to access information.

ENDNOTES

1) As noted below, at the time of writing the Act was not yet in force.
2) Foreign states with Internet accessible access to information laws are the following: Australia, Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Lithuania, Luxembourg, the Netherlands, New Zealand, Norway, Poland, Portugal, Russia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, United Kingdom, United States.
3) This section is adapted from J Klaaren, A New Look at Access to Information Regulation in South Africa. Unpublished paper presented at the Conference on Law and Transformation, Centre for Applied Legal Studies, 7-8 August 2000.
4) Major elements of the story are presented in L Johannessen, J Klaaren, & J White "A Motivation for Legislation on Access to Information" (1995) 112 *SALJ* 45, J Klaaren "Constitutional Authority to Enforce the Rights of Administrative Justice and Access to Information" (1997) 13 *SAJHR* 549 and J White "Open Democracy: Has the Window of Opportunity Closed?" (1998) 14 *SAJHR* 65. The classic South African work on access to information is A Mathews *The Darker Reaches of Government* (1978).
5) The constitutional right of access to information in the 1996 Constitution was suspended and the more restrictive right in the Interim Constitution was retained while this legislation was to be drafted (item 23 of Schedule 6 to the 1996 Constitution). This suspension was consid-

ered and approved by the Constitutional Court as part of the certification process. *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) para 83.

6) According to General Notice 2555 of 2000 (published in GG 21362 of 7 July 2000), most of the Act was intended to be put into effect on 15 September 2000. The sections that were not intended to be brought into effect are sections 10 (Human Rights Commission guide on how to use Act), 14 (manual of functions and index of records by public body), 15 (reporting of records automatically available), 16 (information in the telephone directory), 19 (duty to assist requesters), 51 (manual for private bodies), and 52 (optional reporting of records automatically available by private bodies). These sections were waiting for regulations to be implemented. A civil society interest group – the Open Democracy Campaign Group – points out that most of these sections already have grace periods in the Act and thus do not need later dates of commencement.
7) The Bill was introduced in Parliament as the Open Democracy Bill 67 of 1998. It was subsequently withdrawn and reintroduced towards the end of 1999 and finally passed, in considerably truncated form, as the Promotion of Access to Information Act 2000.
8) Act 26 of 2000.
9) The Parliamentary Committee decided to let the privacy issues of Part Four of the Open Democracy Bill go as long as there was a transitional clause obliging private bodies to take all reasonable steps to correct information that people do have access to. In the view of the committee, this would be the case until more detailed legislation on privacy and the control and disclosure of personal information held by both governmental and private bodies was produced. Minutes of the Ad Hoc Joint Committee on Open Democracy Bill (4 November 1999). Available at www.pmg.org.za. Currently, section 88 of the Access to Information Act provides: "If no provision for the correction of personal information in a record of a public or private body exists, that public or private body must take reasonable steps to establish adequate and appropriate internal measures providing for such correction until legislation providing for such correction takes effect." However, the Department of Justice legislative programme for 2000 has no entry for legislation governing privacy issues and the area remains essentially unregulated.
10) *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) para 85.
11) Section 9(e) of the Act states as an object: "generally, to promote transparency, accountability and effective governance of all public and private bodies by, including, but not limited to, empowering and educating everyone (i) to understand their rights in terms of this Act in order to exercise their rights in relation to public and private bodies; (ii) to understand the functions and operation of public bodies; and (iii) to effectively scrutinise, and participate in, decision-making by public bodies that affects their rights".
12) J White "Open Democracy: Has the Window of Opportunity Closed?" (1998) 14 *SAJHR* 65,69 (arguing that major differences between the civil society–inspired 1996 draft of the Open Democracy Bill and the Cabinet-approved later version "highlight a fundamental shift in the way that government appears to be approaching the issue of Open Democracy. Whereas the task team's 1996 Draft indicated an ability and a willingness to legislate for transformation in government and the public service, in line with the Constitutional aspirations to development, accountability, and participatory governance, the Cabinet-approved Draft does not. There appears to be a decided move towards providing the bare minimum guaranteed by the Constitution and, in places, not even that.")
13) This concern was voiced by the Open Democracy Advisory Forum (ODAF), a consultative forum active in the early phase of the drafting process. In the final

Act, there is at least ground for this concern. Section 5 provides: "This Act applies to the exclusion of any provision of other legislation that – (a) prohibits or restricts the disclosure of a record of a public body or private body; and (b) is materially inconsistent with an object, or a specific provision, of this Act." This raises the prospect that the procedures of the Access to Information Act (which have been criticised as overly detailed and cumbersome) will need to be followed before any access to information may be granted, even where such access has been allowed in terms of other legislation. This problem is not fully addressed by section 6's reference to the Schedule which lists legislation that is not overridden.

14) See J Klaaren "The New Access to Information Regulation in South Africa". Unpublished paper delivered at the Centre for Applied Legal Studies Conference on Law and Transformation, Midrand, 7-8 August 2000. On developments in US law see Cass Sunstein "Informational Regulation and Informational Standing: Akins and Beyond" (1999) 147 *Univ of Pennsylvania LR* 613 (discussing a growing body of "informational regulation" laws that require private industry to disclose information about, for example, toxic releases, the contents of food and drink, workplace injuries, health risks associated with smoking).
15) The Promotion of Administrative Justice Act 3 of 2000. There is only a single cross-reference between these two Acts, albeit a crucial one. Section 1(i)(hh) excludes from the AJA's definition of administrative action "any decision taken, or failure to take a decision, in terms of any provision of the Promotion of Access to Information Act, 2000". While the precise effect is unclear, this exclusion would seem to push the relationship between the regimes away from one of supplementation and towards one of segregation.
16) See section 160(7) of the 1996 Constitution: "A Municipal Council must conduct its business in an open manner, and may close its sittings, or those of its committees, only when it is reasonable to do so having regard to the nature of the business being transacted."
17) Section 6 read with Schedule Part 1 and 2 of the Schedule.
18) Wesley Hohfeld *Fundamental Legal Conceptions* (1919).
19) The table below gives an idea of the possible range of government information and communication services that can be provided electronically.
20) Section 15.
21) Section 29(2).
22) 5 USC § 552. The FOIA was enacted in 1966, with substantial amendments being made in 1974 and by the Anti-Drug Abuse Act of 1986.
23) Section 2. The Schedule lists all Departments and Ministries of State and

A typology of electronic government services

	Information services	*Communication services*	*Transaction services*
Everyday life	Information on work, housing, education, health, culture, transport, environment, etc.	Discussion fora dedicated to questions of everyday life; Jobs or housing bulletin boards	Ticket reservation, course registration
Tele-administration	Public service directory Guide to administrative procedures Public registers and databases	E-mail contact with public servants	Electronic submission of forms
Political participation	Laws, parliamentary papers, political programmes, consultation documents Background information in decision-making processes	Discussion fora dedicated to political issues E-mail contact with politicians	Referenda elections opinion polls petitions

Source: Institute of Technology Assessment (Austria) (1998), reproduced in European Commission Green Paper on Public Sector Information in the Information Society (1999).

contains a lengthy list of "Other Government Institutions" (such as the Bank of Canada, the Canadian Space Agency, the Law Commission of Canada and numerous other agencies and parastatals). Section 77(2) allows the Governor-in-Council to make additions to the Schedule by order.

24) *Ottawa Football Club v Canada (Minister of Fitness and Amateur Sports)* [1989] 2 FC 480 (TD)
25) Section 2.
26) Section 2(2).
27) R Dussault & L Borgeat *Administrative Law – a Treatise* vol 3 (2 ed) 274. The right to freedom of expression is contained in s 2(b) of the Canadian Charter of Rights and Freedoms.
28) Section 4(1).
29) Section 20 (2), Freedom of Information Act. If the testing is disclosed, the method used must also be disclosed. Section 20 (3). Results from preliminary testing are not covered. Section 20 (4).
30) Section 20(6).
31) Sections 4 and 6.
32) Section 7.
33) Section 5(1).
34) Section 5(2).
35) Section 69.
36) Section 69(3).
37) Sections 13-23.
38) Section 27.
39) Section 28(1)(a).
40) Section 28(1)(b).
41) Section 36(2).
42) Section 37(b).
43) Section 41.
44) Section 48.
45) Section 72.
46) http://www.connect.gc.ca/en/
47) Ibid.
48) Ibid.
49) http://infosource.gc.ca/Info_4/atip/
50) See http://strategis.ic.gc.ca
51) http://ConsumerInformation.ca
52) Section 11 sets a maximum amount of $25.
53) Section 11(1) and (2).
54) Section 11(3) and (5).
55) Section 11(6).
56) A Roberts "Retrenchment and freedom of information: recent experience under Federal, Ontario and British Columbia Law', available at http://qsilver.queensu.ca/~roberta/documents/
57) A Roberts "Ontario's freedom of information law: assessing the impact of the Harris government reforms" available at http://qsilver.queensu.ca/~roberta/documents/
58) Section 63 (2).
59) Section 63 (1).
60) Section 37 (5). Anyone refused access to a record has the right of review by a federal court- s 41.
61) Section 39.
62) Section 67.
63) A Roberts "Monitoring Performance by Federal Agencies: A tool for enforcement of the Access to Anformation Act" available at http://qsilver.queensu.ca/ ~roberta/documents/
64) Ibid.
65) Ibid.

Data Protection for South Africa: Expectations Created by the Open Democracy Bill, 1998

Anneliese Roos

INTRODUCTION: PROBLEM IDENTIFIED

We live in what is popularly referred to as the "Information Age" or "Information Society".[1] This era is characterised by the increasing importance of information – information is power.[2] The development of the computer has, of course, played a crucial part in making information such a valuable commodity. Computers are not only able to store vast amounts of information, but also to process such information at incredible speeds. The end result of such processing is often the creation of new information that forms the basis of decision making, not only by humans but often by the computer itself.

The development of new telecommunications technology, linking computers in networks and enabling the transfer of information between computer systems, has lent further impetus to the increasing importance of information, as well as to the increase in the collection and use of information. Technology not only enables humans to collect and store more information, it also enables humans to use information in ways never thought possible before.[3]

Personal information – that is, information that can be connected to a specific individual – has also became a valuable commodity. Such information is typically collected by the state from the day we are born and a registration of our birth has to take place, until the day we die and that fact has to be recorded. In between we have to give out personal information if we want to attend school, register for the voters' roll, pay taxes (whether we want to or not), get married, get divorced, buy property, or go to a state hospital, to name but a few.

The collection of personal information by the private sector has, however, probably overtaken the collection of such information by the state. We have to give out personal information if we want employment or a bank account or a credit card, if we want to buy a car or an airline ticket, apply for insurance, go the doctor or attend a private school or a university.

Apart from us giving out information, our personal information is also collected without us knowing about it, or transferred from institutions to which we have supplied the information to other institutions whose existence we do not even know about.

Advances in information technology, and the fact that our personal computers are increasingly connected to the Internet, makes it possible for other computers to collect information on us and pass it discreetly on to companies eager to learn about our shopping habits and other useful personal information.[4]

From the individual's point of view, one of the biggest problems of the information era is the inroads made into our privacy. The right to privacy in this context can be defined as the right of the individual to determine for him/herself to what extent information about him/her should be communicated to others.[5] One should also recognise that "[w]hat worries people in most cases is not so much the fact of storage [of information or data] itself, or the risk that data will include intimate secrets, but rather their inability to control the correctness of the information and the use made of it....".[6] Hondius points out that "[i]n the information age people should be protected by protecting the information relating to them."[7]

1. DATA PROTECTION: THE LEGAL RESPONSE TO THE PROBLEM

In response to the problem of the invasion of the individual's right to control the flow of information about him or her, many countries adopted "data protection laws".[8] Data protection is a technical term and refers to a "group of policies designed to regulate the collection, storage, use and transmittal of personal information".[9] This term originates from the German term *Datenschutz*.[10]

The first data protection legislation adopted was in 1970 in the German state of Hesse and in 1973 Sweden enacted the first national data protection law, followed by the United States in 1974, West Germany and Canada in 1977, France, Norway, Denmark and Austria in 1978, Luxembourg in 1979, New Zealand in 1982, the United Kingdom in 1984, Finland in 1987, Ireland, Australia, Japan and the Netherlands in 1988. Today almost all western countries have either adopted data protection legislation, or are considering such legislation.[11] In fact, many countries have already revised their first data protection laws or have adopted completely new, second generation data protection laws.[12]

2. DATA PROTECTION: AN INTERNATIONAL ISSUE

By the 1980s, it had been recognised that data protection was a problem at more than the national level.[13] The global market had emerged, leading to an increased need for the exchange of information across national boundaries.[14] International organisations such as the Organisation for Economic Cooperation and Development (OECD), the European Council and the European Economic Community realised, on the one hand, that if multinational corporations were expected to conform to differing standards of data protection in every country in which they transferred, processed or stored data, this would impose an onerous burden on them. On the other hand, they also wanted to avoid the creation of data havens (countries where no data protection regulations exist) which could nullify other countries' efforts to protect their citizens' liberties.[15]

During this period, two significant international documents or sets of rules concerning data protection were issued. The first was issued by the European Council and took the form of a Convention, namely the *Convention for the protection of individuals with regard to the automatic processing of personal data*[16] (the Convention). The second set of rules was a document issued by the Committee of Ministers of the OECD, and entitled *Guidelines governing the protection of privacy and transborder flows of personal data*[17] (the OECD Guidelines). The purpose of these documents was two-fold: namely to set standards for data protection at the national level, and to ensure the free flow of data at the international level.[18] In order to reach these goals, these documents aimed to bring about equivalence between national rules on data protection.[19]

These two documents preceded another very important document, namely the European Union's (EU's) *Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data*[20] (the Directive), which is at present the most prominent document in the data protection arena. The Directive, which is binding on all European Union member states, prescribes that member states must provide in their national legislation that the transfer to a third country of personal information which is to be processed, may only take place if the third country in question provides "adequate" protection for the privacy of the individuals involved.[21]

3. DATA PROTECTION PRINCIPLES

The result of this international cooperation is that all data protection laws or international instruments have certain basic rules or principles in common. These principles are referred to as "data protection principles" or "fair information principles".[22]

Some of the laws and legal instruments explicitly contain a set of fair information principles or data protection principles,[23] whereas others give effect to them without necessarily explicitly spelling them out.[24] The OECD Guidelines,[25] for example, spell out the following data protection principals:

- Principle of openness (or transparency)
- Principle of limitation of collection
- Principle of limitation of use
- Principle of purpose specification
- Data quality principle
- Individual participation principle
- Security safeguards principle
- Accountability principle

The contents of these principles will be explained in the following section.

4. EXPECTATIONS CREATED BY THE OPEN DEMOCRACY BILL

The Promotion of Access to Information Act[26] was preceded by the Open Democracy Bill,[27] which not only contained access to information provisions, but also data privacy or data protection provisions.[28] This Bill created the expectation that South Africa will also soon have data protection legislation. However, apart from giving an individual access to personal information, the Promotion of Access to Information Act does not contain data protection provisions. This was probably due to the time constraints to get the Act published before the Constitutional deadline of 4 February 2000 for an Access to Information Act.[29] Also, the Ad Hoc Committee on the Open Democracy Bill (that introduced the Bill to Parliament) believed that if the Act was to regulate certain aspects of the right to privacy, such as the correction of and control over personal information, it would be dealing with the constitutional right to privacy in "an ad hoc and undesirable manner."[30]

The Committee was of the opinion that South Africa should enact separate privacy legislation, following the international trend.[31] It could therefore be expected that legislation based on these left out provisions will follow.[32] Consequently, the data protection provisions of the Open Democracy Bill remain of interest.

The data protection provisions of the Open Democracy Bill will now be referred to briefly, in the light of the data protection principles identified above. We will evaluate whether they can be considered as providing adequate protection to the individual's right to control the use of his/her personal information.[33]

4.1 Openness (or transparency) principle

This principle requires that there should be a general policy of openness about developments, practices and policies in respect of personal data. Means should be readily available to establish the existence and nature of personal data, the main purposes for which they are used, as well as the identity and usual residence of the data controller.

The Bill strives to comply with the openness principle by providing that governmental bodies must publish an index of records held by them. More precisely, they must publish a manual containing *inter alia* "in sufficient detail to facilitate a request for access to, and for correction of personal information in, a record of the body, a description of the subjects on which the body holds records and the categories of records held on each subject."[34] The manual should also contain a description of every "personal information bank"[35] held by the body.[36] A statement of the standards of retention and disposal that applies to the information in the bank must also be included.[37]

As regards the requirement that the identity and usual residence of the data controller should be easy to establish, the Bill requires the Human Rights Commission to compile a guide containing information on the information officers of every governmental body.[38] Furthermore, in the manual that the head of a governmental body must publish, the address of the information officer of that body must be given. Such information must also be published in public telephone directories.[39]

However, similar provisions do not exist with regard to private bodies, and it is therefore possible that the existence of a personal record-keeping system in the private sector could still be a secret, or the identity of data controllers be unknown. Consequently, the Bill falls short on the openness principle as regards the private sector.

4.2 Purpose specification principle

The purpose specification principle is the linchpin around which two other principles, namely the collection limitation and use limitation principles, centre. It requires that the purpose for which personal data are being collected should be specified not later than at the time of data collection. The subsequent use of such data should be limited to the fulfilment of that purpose, or another that is compatible with it, and should be specified whenever there is a change of purpose. Although the principle allows for changes in the purpose, such changes should not be introduced arbitrarily. The principle also requires that when data no longer serve the purpose for which they were originally collected, they should be erased or given in anonymous form.

When applied to the Bill, we see that the provision regarding the index of records that must be published by governmental departments, also endeavours to comply with the requirement of purpose specification by stating that the description of every personal information

bank held by the body must, apart from identifying the information bank and the categories of individuals to whom the bank relates, also state the purpose for which the information was obtained and indicate for what uses, compatible with this purpose, the information will be used or disclosed.[40] If the information is subsequently used or disclosed for any purpose that is not included in the manual, the head of the governmental body must keep a register of this and attach it to the personal information. Subsequent manuals must include the new uses.[41]

The Bill does not, however, provide that data which no longer serve the purpose for which they were originally collected, should be erased or given in anonymous form. These provisions furthermore do not apply to the private sector and the Bill once more falls short in this regard.

4.3 Principle of limitation of collection

The principle of limitation of collection entails that there should be limits to the collection of personal data and any such data should be obtained by lawful and fair means and, where appropriate, with the knowledge or consent of the data subject. This principle includes the fact that special provisions should be made for information which, because of the manner in which they are to be processed, their nature, the context in which they are to be used or other circumstances, are regarded as especially sensitive. This includes for example information relating to race, gender, sex, health or religion.

The Open Democracy Bill contains provisions regarding the collection of personal information, but only with regard to governmental bodies. The collection of information by private bodies is left unregulated.

In terms of the Bill, a governmental body may not collect information unless such collection is required or permitted in terms of legislation or required for the performance of the functions of the body.[42] The Bill also requires that a governmental body must, if reasonably possible, collect personal information directly from the person involved where such personal information is intended to be or may be used in taking any decision which affects a person's right or determines the content of the right. Two exceptions are made to this rule: where the person has authorised the body to collect the information from someone else, or if the governmental body may get the information from another governmental body in terms of provisions allowing for disclosure of personal information by a governmental body.[43]

When collecting information directly from the person, the person must be informed for what purpose the information is collected, for whom it is collected, by whom it will be held, whether it is collected in terms of legislation permitting the collection, and if so, whether it is compulsory to supply the information or not.[44]

If the collection of information directly from the person would defeat the purpose or prejudice the use for which the information is collected, the requirement does not apply.[45] The Bill also excludes certain types of information from these provisions, such as information already publicly available.[46]

Although the Bill goes a long way to comply with collection limitation, it does not make specific provision for sensitive information and the Bill once more falls short with regard to the private sector.

4.4 Principle of limitation of use

According to the use limitation principle, personal data should not be disclosed, made available or otherwise used for purposes other than those specified in accordance with the purpose specification principle, except with the consent of the data subject or by the authority of law.

The Bill complies with this principle by providing that personal information may in general not be used or disclosed without the consent of the person concerned, except for specific purposes mentioned in the Bill.[47]

The Bill provides that private and governmental bodies may use and disclose personal information for the purpose for which it was originally compiled, or for a purpose consistent with that purpose.[48]

A purpose will be consistent with the original purpose if the person, to whom the information relates and from whom it was originally collected, might reasonably have expected such a use or disclosure.[49]

Personal information may also be used by private and governmental bodies for a purpose for which the information may be disclosed to that body in terms of the Bill.[50]

Private and governmental bodies may disclose personal information on one of several grounds, namely:[51]

- in accordance with the Open Democracy

Bill[52] or any other law that authorises the disclosure
- to comply with a subpoena, warrant, court order or rules of court relating to the production of information
- to avoid prejudice to the maintenance of the law, including the prevention, detection, prosecution and punishment of an offence
- to avert or lessen an imminent and serious threat to the health or safety of an individual or the public
- to perform a contract to which the person to whom the information relates is a party
- for any prescribed purpose which would not pose a threat to privacy of the person to whom or which the information relates and to which the person (on invitation of the body) did not object, or which is necessary for pursuing the legitimate interests of the private or public body.

Public bodies have more extensive grounds for the disclosure of personal information than private bodies. Apart from the grounds already mentioned, governmental bodies may also disclose information on the following grounds:
- to a prosecuting authority for the purposes of criminal proceedings or to a legal practitioner representing the state, the government, any functionary thereof, or a governmental body in civil proceedings for the purposes of those civil proceedings
- to a governmental body, on the written request of that body, for the purposes of enforcing the law or carrying out an investigation in terms of the law, if the request specifies the purposes and describes the information to be disclosed
- in terms of an agreement between the government of South Africa and the government of a foreign state or an international organisation, for the purposes of law enforcement or carrying out an investigation in terms of the law
- to an official of a governmental body for the purpose of an internal audit, or to the Auditor General's office for the purpose of an audit or to a person appointed to carry out an audit in respect of a governmental body
- to an archives repository in accordance with the relevant legislation
- to any person for research or statistical purposes if there are reasonable grounds to believe that the purpose for which the information is disclosed cannot reasonably be accomplished unless the information is provided in a form that would identify the person to whom the information relates, and the information officer obtains an undertaking from the person that no subsequent disclosure of the information will be made in a form that could reasonably be expected to identify the person to whom or which it relates
- to a governmental body for the purposes of locating a person to collect a debt owing to the state or to pay a debt owed by the state.

The Bill once more excludes certain information from the provisions regarding the use and disclosure of personal information.[53]

4.5 Data quality principle

In terms of this principle personal data should be relevant to the purposes for which they are to be used, and, to the extent necessary for those purposes, should be accurate, complete and kept up-to-date.

The Bill contains provisions regarding the retention, accuracy and disposal of personal information, but only with regard to public bodies.

The head of a governmental body is responsible for ensuring that personal information which is used when making a decision that affects a person's right or determines its content, must be accurate, up-to-date and as complete as possible.[54] Once the information has been used, it must be kept for a prescribed period to ensure that the person to whom it relates has a reasonable opportunity to obtain access to the information,[55] and it may only be disposed by the head of the department in a prescribed manner.[56]

The Bill, as before, falls short on this principle with regard to the private sector.

4.6 Individual participation principle

In terms of this principle, individuals should have the right to obtain from a data controller, or in another manner, confirmation of whether or not the data controller has data relating to them, and to have such data communicated to them within a reasonable time, at a charge, if any, that is not excessive, in a reasonable manner and in a form that is readily intelligible to them. Furthermore, individuals should have the right to be given reasons if a request is denied, and to be able to challenge such denial.

Individuals should also have the right to challenge data relating to them and, if the challenge is successful, to have the data erased, rectified, completed or amended. This principle thus entails a right to access, a right to reasons and a right to challenge.

The Bill provides personal requesters with a right of access to personal information kept by both governmental and private bodies, as well as with the right to request correction of inaccurate data. The Bill also provides that if a request for access is denied, reasons must be given for such refusal.[57]

First of all, the right to access: A personal requester must, on request, be given access to a record of a governmental body or private body that contains personal information about that person.[58] The Bill does not provide, as the Promotion of Access to Information Act does, that in the case of private bodies, access need only be given if those records are required for the exercise or protection of any rights.[59]

The form of the request to access is prescribed:[60] In the case of a request for access to personal information held by a governmental body it should be made in writing to the information officer, but if the requester is illiterate the request may be made orally, in which case the information officer must reduce the request to writing.[61]

In the case of a private body, the request should be made to the head of the body, in writing or orally. A fee might be payable for reproduction of the information.[62]

Governmental bodies have a duty to assist requesters, to transfer requests to the most appropriate body, and to preserve records until a final decision has been made on a request for access.[63]

A decision as to whether access will be granted or refused must given within 30 days.[64] Various grounds for refusal of access are given. Both governmental and private bodies must refuse a request for access to a record containing personal information of the requester, if the disclosure would constitute an invasion of privacy of another person, including a person who died less than 20 years previously.[65] Refusal of a request for access is also mandatory where the record contains trade secrets of a third party, or other financial, commercial, scientific or technical information supplied in confidence by a third party, or any other information supplied by the third party the disclosure of which will put that third party at a disadvantage in commercial competition.[66] Exceptions are made to these mandatory prohibitions on disclosure, for example if the records had already been made public, or the relevant parties consented to disclosure.[67]

Apart from these mandatory grounds for refusal, there are also several discretionary grounds for refusal, such as the fact that disclosure will cause serious harm to the health of the requester,[68] would jeopardise the body's capacity to collect information supplied in confidence by a third party where it is in the public interest to collect such information;[69] would endanger the safety of individuals or security of particular buildings;[70] would undermine law enforcement[71] and legal professional privilege;[72] would substantially harm the national defence and security of the Republic of South Africa,[73] or the Republic's capacity to conduct international relations in the best interest of the Republic; would be in contravention of an international obligation imposed on South Africa;[74] would substantially jeopardise the financial or economic welfare of the Republic, or the confidential commercial information of the state (e.g. trade secrets held by the state);[75] would jeopardise the deliberative process in the governmental or private body or other operations of the body.[76] The request for access may also be refused if the request is manifestly frivolous,[77] if the information cannot be found,[78] or is already open to the public or will be open to the public within a short period.[79]

Access should always be given to a part of a record, if that part can be severed from any part that contains information which may not be disclosed.[80] Also, if the public interest in the disclosure of the record outweighs the need for non-disclosure, the record must, in terms of section 45, be disclosed despite the fact that a ground for discretionary or mandatory refusal is present.[81] Where a ground for mandatory refusal is present (i.e. the record contains personal information of a third party, or confidential commercial information of a third party), and access is contemplated in terms of section 45, the third party must receive notice of the request for access and be given an opportunity to explain orally or in writing why access should not be given.[82] If access is given despite the third party's representation, the third party

may lodge an internal appeal against the decision with the head of the governmental body.[83]

The Bill also provides personal requesters with a *right to request correction* of personal information with regard to both the governmental and private bodies.[84] Correction means amending, supplementing or deleting inaccurate information.[85]

The request for correction must be made in the prescribed form or orally, and must specify the requester's contact information. The request must include enough particulars to enable the body to identify the record which contains the information which the requester considers to be inaccurate, and must specify in which respect the information is inaccurate.[86] Public bodies have a duty to assist requesters who are illiterate or have a disability, and must also transfer requests to the correct public body where the request was addressed to the wrong body.[87] Public bodies must also preserve records until a final decision on the request for correction was made.[88]

The head of the private body or the information officer of a governmental body must decide on the request within 30 days.[89] If the information officer of a governmental body fails to do so, it is considered as a refusal of the request.[90]

If the head of a private body or the information officer of a governmental body decides that the information identified in the request for correction is incorrect, he or she must correct the information free of charge and send a copy of the correction to the requester. If the same information is contained in other records of the body, the official must also correct those records.[91] In the case of a governmental body, the information officer must also inform all other governmental bodies or persons to whom the inaccurate information has been supplied of such correction and inform the requester of each notice.[92] The Bill could be improved by imposing a similar obligation on private bodies.

Where an inaccurate part of the information is to be deleted, a copy must first be made of that part and a note must be made on the original document that a part was deleted. The copy must be kept as long as the record is contained.[93]

If the head of the private body or the information officer of the governmental body decides that the information is not inaccurate, and provided the request was not irrelevant, frivolous or vexatious, a notice must be attached to the record indicating that the person disputes the accuracy of the information. The requester must be informed of the decision and be given a copy of the notice.[94] In the case of a governmental body, the requester has another opportunity to make a statement giving reasons why he or she thinks that the information is inaccurate, which must also be attached to the record containing the disputed information. The requester may also lodge an internal appeal against the decision not to correct the information.[95]

Any disclosure or use of a record after it has been corrected, or after a note or statement has been attached to it, must be in its corrected form or must include the note or statement.[96]

To summarise, it can be said that the Bill goes a long way in complying with the individual participation principle.

4.7 Security safeguards principle

This principle states that personal data should be protected by reasonable security safeguards against such risks as loss or unauthorised access, destruction, use, notification or disclosure of data.

In this regard, the Bill provides that the head of a governmental body must take responsibility for the security and confidentiality of personal information kept by the body. Once the information has been used, it may only be disposed by the head of the department in a prescribed manner.[97]

This principle could be improved by specifically requiring that the head of the body must ensure that appropriate technical and physical security measures are in place. The provision should also be extended to the private sector.

4.8 Accountability principle

This principle states that a data controller should be accountable for complying with measures which give effect to the principles stated above.

The Bill pays attention to this principle by appointing the information officer or head of a private body as the persons ultimately responsible for complying with the provisions of the Act. However, no criminal sanctions are imposed for negligent or intentional non-compliance with the Bill, nor are individual's given

specific remedies should their rights under this Bill be infringed.

To summarise, it would seem as if the Bill goes some way in complying with the data protection principles, but unfortunately does not adequately reflect all the principles, especially as regards the collection, use and dissemination of personal data by the private sector.

5. MODERN TRENDS

In conclusion I would also like to point out certain modern trends in data protection legislation, for example in the EU Directive on data protection.[98] If similar provisions are included in this Bill, it would improve the Open Democracy Bill's data protection provisions.

5.1 Oversight body

The EU Directive on data protection requires of its member states to establish an independent supervisory authority with *inter alia* powers of investigation and intervention, and the power to engage in litigation.

The Bill does not establish a data protection authority as such, but uses the Human Rights Commission to fulfil some of the functions of such an authority. However, the Human Rights Commission has no real authority or power over private or public bodies to enforce the provisions of the Act. Its functions are mainly to advise, assist, consult, make recommendations, submit reports, train persons, develop educational programmes, encourage participation or monitor compliance with the Bill.[99]

The fact that the Open Democracy Bill grants no real power to the Human Rights Commission is to my mind a serious shortcoming.

5.2 Special provisions

The Directive requires special treatment of sensitive data, that is "data which are capable by their nature of infringing fundamental freedoms or privacy".[100] Such data includes data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership or data concerning health or sex life.

The Directive also requires that no individual may be subject to a decision which significantly affects him or her (e.g. evaluation of performance at work, or creditworthiness) where such decision is based solely on the automated processing of data.[101] This provision therefore requires human intervention whenever important decision are made about an individual.

The Directive also contains provisions regarding direct marketing: individuals should be given the right to object to the processing of data for direct marketing purposes, at no cost and without having to give reasons.[102]

5.3 Codes of conduct

The Directive encourages its member states to draw up codes of conduct for the various sectors that process data, with a view to contributing to the proper implementation of the national data protection provisions.[103] These codes should be approved by the data protection supervisory authority. The codes flesh out the general principles of a general data protection act with provisions that are specifically tailored for a certain sector. This contributes to the proper implementation of the data protection provisions.

5.4 Provision regarding transfer of data to third countries

The EU Directive requires of its member states to include a provision in their data protection legislation that prohibits the transfer of personal data to countries that do not ensure an adequate level of data protection. South Africa should include a similar provision in its data protection law. If this is not done, South Africa could be considered as a "data haven", because once data has been transferred to South Africa, it could from here be transferred to countries that do not have adequate data protection provisions.

CONCLUSION

Despite its shortcomings as a data protection act, the Open Democracy Bill represents a first step in the right direction. For more than two decades, South African writers have campaigned for data protection legislation.[104] It is to be welcomed that at last the necessity of such legislation is accepted, and all that remains is to implement an effective data protection regime.

ENDNOTES

1) See e.g. Cate *Privacy in the information age* (1997); Martin *Bits, bytes and big brother* (1995) 19.
2) Lloyd *Information technology law* (1997) xxxv. Also see Cate "The EU Data Protection Directive, information privacy, and the public interest"1995 *Iowa L R* 431 439-440; Seipel *The right to know computers and information power* (in Blume *Nordic studies in information technology and law* (1991)) 8.
3) With so-called "knowledge discovery in databases" or "information mining", new information is being discovered in old, existing databases. Existing data bases are analysed or mined by means of new search techniques, revealing previously hidden information – see Gardeniers, Van Kralingen and Schreuders "Knowledge Discovery in Databases; privacyaspecten van informatie-mijnbouw" in Nouwt and Voermans *Privacy in het Informatietijdperk* (1996) 69.
4) Everybody is probably aware of so-called "cookies", i.e. bits of data that are stored on your computer when you visit certain websites. This enables websites to keep a record of users of their sites. It is also common knowledge that Internet service providers have the ability to keep track of the websites that you visit and the software that you download. Now there is even more invasive software available, referred to as "ET software". *Time Magazine* (31 July 2000 36-43) recently discussed this new kind of software, referring to it as "software that commandeers your computer to spy on you" (at 38). According to *Time Magazine*, when you download free software from a specific company, designed to help you with on-line shopping, this software not only does useful things for you like giving recommendations about products while you are shopping on-line, it also does other nasty things: "This software plants itself in the depths of your hard drive and, from that convenient vantage point, starts digging up information. Often it's watching what you do on the Internet. Sometimes it's keeping track of whether you click on ads in software, even when you are not hooked up to the Internet. In Netspeak these programs are known as ET applications because after they have lodged in your computer and learned what they want to know; they do what Steven Spielberg's extraterrestrial did: phone home. That may be the most paranoia-inducing part. ET applications use your Internet connection to deliver espionage briefings on you, often without you realising it is happening."
5) Flaherty *Protecting Privacy in Surveillance Societies* (1989) 8. Also see Philips "Privacy in a 'surveillance society'" 1997 U *New Brunswick LJ* 127 132. Neethling *Persoobnlikheidsreg* (1998) 37 also emphasises that privacy consists of the sum total of information or facts relating to an individual in his or her condition of seclusion and which are thus excluded from the knowledge of outsiders.
6) Hondius "A decade of international data protection" 1983 *Netherlands Int LR* 103.
7) See Hondius endnote 6. People sometimes argue that they do not need laws to protect their privacy because they have nothing to hide. Philips (see endnote 5) 137 answers convincingly: "Of course we have nothing to hide, but that is not the point. Even if someone has nothing to hide, she has a great deal to lose. One's autonomy, sense of anonymity and the right to go about her business unmolested are severely challenged. Even if one has nothing to hide, surveillance will subtly alter a person's behaviour. Take away someone's privacy and you take away their dignity and their control over their life."
8) See Schwartz "Book review" 1991 *Am J of Comp L* 618 619. Hondius endnote 6 103 describes data protection as "the body of law which secures for every individual, whatever his nationality or residence, respect for his rights and fundamental freedoms, and in particular his right to privacy, with regard to automatic processing of personal data relating to him." Also see Gellman "An American Privacy Protection Commissioner: an idea whose time has come ... Again" 1994 *Gov Inf* Q 245

246 according to whom data protection "focuses attention more precisely on laws, policies, and practices that affect the collection, maintenance, and use of personal information about individuals."

9) Bennett *Regulating privacy* (1992) 13. Neethling endnote 5 291describes data protection as the legal protection of a person with regard to the processing of data concerning such person by another person or institution.
10) However, many countries, including the United States, prefer to use the term data or information privacy, rather than data protection, because data protection sounds esoteric and means little to the average citizen – see Bennett endnote 9.
11) Bennett endnote 9 57.
12) E.g., the Netherlands adopted its second generation data protection act in July 2000, and the United Kingdom theirs in 1998.
13) See Hondius *Emerging data protection in Europe* (1975) 55-79; Bennett endnote 9 131-133.
14) See Hondius endnote 6 242; Blume "An EEC Policy for data protection" 1992 *Computer/L J* 399 403.
15) Lloyd endnote 2 44; Walden in Reed *Computer law* (1996) 330.
16) Council of Europe *Convention for the protection of individuals with regard to automatic processing of personal data* 28 Jan 1981 (No 108/1981).
17) OECD *Guidelines on the protection of privacy and transborder flows of personal data* (1981).
18) These two goals are in competition, and sometimes even in conflict, with each other. Data protection entails that an individual's personal information be kept confidential, *inter alia* by restricting the dissemination of such information. However, this can hinder the free flow of information. See also Beling "Transborder data flows: International privacy protection and the free flow of information" 1983 *Boston College Int & Comp L R* 591 594; Bing "The Council of Europe Convention and the OECD Guidelines on data protection" 1984 *Michigan Yb Int L S* 271 273.
19) If different countries provide an equivalent level of data protection, information can be passed between them without impediments, since there is no increase in the threat posed to the privacy of individuals whose personal information is involved in the data transfer.
20) *Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data* (1995) *Official Journal L* 281/31 (hereinafter referred to as "the Directive" and quoted as Dir 95/46/EC).
21) Dir 95/46/EC a 25(1) provides:

    "The Member States shall provide that the transfer to a third country of personal data which are undergoing processing or are intended for processing after transfer may take place only if, without prejudice to compliance with the national provisions adopted pursuant to the other provisions of this Directive, the third country in question ensures an adequate level of protection."

    A significant part of the debate on the Directive has been over the "adequacy" provision in a 25. As Cate endnote 1 437 points out, while most European countries have afforded detailed protection to individual privacy rights, especially in the context of electronically stored and processed information, the United States (US) and many other countries do not have comparable systems of data protection. Cate (438) highlights the fear American businesses with operations in Europe have that they will not be able to move personal data collected, processed or stored in Europe to the US, even though they "own" it. Given the importance of information in the American and global economy, this concern is understandable. Also see Estadella-Yuste "The Draft Directive of the EC regarding the protection of personal data" 1992 *Int & Comp L Q* 170 176.
22) The laws differ in that they do not all use the same policy instrument to enforce these rules or principles. Some countries have adopted a licensing system (e.g. Sweden – see Bennett endnote 9 161 et seq). Others have decided to register all data users (e.g. Britain – see Bennett end-

note 9 185 et seq). In these models, administrative bodies are established to oversee the implementation of the data protection act. Germany, on the other hand, has adopted an Ombudsman who is responsible to see that the German data protection act is complied with (see Bennett endnote 9 179 et seq). In the US, there is no data protection authority and the emphasis is on voluntary compliance by the persons processing personal data, and individual self-help. In other words, individuals have to go to court to exercise their rights under the Privacy Act (see Bennett endnote 9 170 et seq).

23) E.g., the OECD Guidelines, the Council of Europe Convention and the UK Data Protection Act of 1998.
24) The recent EU Directive on data protection does not contain a set of fair information principles, but it does give effect to all of them.
25) The OECD Guidelines' set of data protection principles are chosen because it contains all the essential elements.
26) Act 2 of 2000.
27) B 67-98.
28) Before the Open Democracy Bill was published, a draft Bill was published for comments – GG 18381 of 18-10-1997. The draft Bill was based on policy proposals made by the Task Group on Open Democracy. The recommendations of the Task Group was that the Open Democracy Act should have more than one function, including a freedom of information component, a privacy component, an open meetings component as well as a component protecting whistle blowers – see Williams 1997 *De Rebus* 563 565; Roos 1998 *THRHR* 497. (The policy proposals of the Task Group on Open Democracy can be found on the Internet at the Wits Law site: http://www.law.wits.ac.za/docs/oda4ms.html.) The open meetings component was subsequently left out in the published Bill. The Bill itself was further scaled down and only the access to information component is left over in the Promotion of Access to Information Act 2 of 2000. For a discussion of the history of the Open Democracy Bill, and the differences between the draft Bill and the Bill subsequently approved by Cabinet, see White 1998 *SAJHR* 65.
29) The Constitution (Act 108 of 1996 s 32(1)) provides individuals with a right of access to information held by the state, or by another person where such information is required for the exercise or protection of any rights. The Constitution also provides that national legislation must be enacted to give effect to this right. A time limit was set in a schedule to the Constitution: such legislation must have been enacted within three years from the enactment of the Constitution, in other words before 4 February 2000. On that date, if no legislation had been in place, s 32(1)(a) and (b) of the Constitution would have come into operation until the proposed legislation had been put into operation. This meant that the courts would have had to enforce the right of access to information without any guidelines provided by an act.
30) Report of the Joint Committee on Open Democracy Bill 17.
31) The Committee also requested the Minister for Justice and Constitutional Development to introduce Privacy and Data Protection legislation, "after thorough research on the matter, as soon as reasonably possible" – see Report of the Joint Committee on Open Democracy Bill 17.
32) The Act also contains indications that further legislation is envisaged – see e.g. Act 2 of 2000 s 86 and s 88.
33) It would appear that the Open Democracy Bill protects natural persons and juristic persons, since "personal information" is defined as information about an identifiable person – B 67-98 s 1(1). This is different from the draft Bill and the Promotion of Access to Information Act, since their definitions refer to an "individual" instead of a "person".
34) B 67-98 s 6(2)(d)(i).
35) A "personal information bank" is defined as "a collection or compilation of personal information that is organised or capable of being retrieved by using a person's name or identifying number or another particular assigned to the person" – B 67-98 s 1(1).
36) B 67-98 s 6(2)(d)(ii)(aa).
37) B 67-98 s 6(2)(d).
38) B 67-98 s 5(2)(b).

39) B 67-98 s 7(1).
40) B 67-98 s 6(2)(d)(ii)(bb).
41) B 67-98 s 60.
42) B 67-98 s 61(1).
43) I.e. in terms of B 67-98 s 56 – see B 67-98 s 61(2).
44) The person must also be informed about his or her right of access to information held by the body and of the right to ask for correction of personal information in terms of B 67-98 s 9 & 52 – see B 67-98 s 61(3).
45) B 67-98 s 61(4).
46) The Bill excludes from the provisions regarding the collection of personal information, the following personal information: personal information already publicly available, or created or acquired and preserved solely for public reference or exhibition purposes in a library or museum, or placed by a person other than the government in an archives repository or a library or museum controlled by a governmental body, or about an individual who is or was an official of a governmental body if the information relates to the position of functions of the official – see B 67-98 s 48.
47) B 67-98 s 53, s 54, s 55 & s 56.The person's consent must be obtained in a prescribed manner and form and may be withdrawn at a later stage – B 67-98 s 58.
48) B 67-98 s 53(a) & (b); s 54(a) & (b).
49) B 67-98 s 57.
50) I.e. in terms of B 67-98 s 55 or 56 – see B 67-98 s 53(c) & 54(c).
51) B 67-89 s 55 & 56.
52) I.e. B 67-89 s 50 & Part 3.
53) Namely information already publicly available, or created or acquired and preserved solely for public reference or exhibition purposes in a library or museum, or placed by a person other than the government in an archives repository or a library or museum controlled by a governmental body, or about an individual who is or was an official of a governmental body if the information relates to the position of functions of the official – B 67-98 s 48. The sections relating to the use and disclosure of records will not immediately apply to records held before the commencement of the Bill, but a period will be specified by regulation in which the governmental or private body will get an opportunity to obtain the consent of the persons to whom the personal information relates – B 67-98 s 59. The consent need not in actual fact be given. If the prescribed steps have been taken to get the consent, the person will be considered to have consented whether or not that person in fact gave consent – B 67- 98 s 59(2). However, such consent may be withdrawn as prescribed – B 67-98 s 59(3).
54) B 67-98 s 62(2).
55) B 67-98 s 62(1).
56) B 67-98 s 62(3).The Bill once more excludes from the above mentioned provisions, personal information already publicly available, or created or acquired and preserved solely for public reference or exhibition purposes in a library or museum, or placed by a person other than the government in an archives repository or a library or museum controlled by a governmental body, or about an individual who is or was an official of a governmental body if the information relates to the position of functions of the official – B 67-98 s 48.
57) B 67-98 s 19(3) & s (50)(6)(c).
58) B 67-98 s 9 & s 50(1). A request for access to personal information may be made by the person to whom the information relates, or his or her authorised representative, or where the individual is under the age of 16, incapable of managing his or her affairs, or deceased, by the person with parental authority, the court appointed person or the executor of the estate, as the case may be – B 67-98 s 13(5) & s 50(3). However, no request of access to a record containing personal information kept by either a governmental or a private body may be made for the purpose of criminal or civil discovery provided for by any other law (s 10 & s 49).
59) Act 2 of 2000 s 50(1)(a). Arguably, the right to privacy will of be one of the rights envisaged by the Act. A question that is still unsure at this early stage, is whether the mere possession of personal information will implicate the privacy right and entitle an individual to access under the Promotion of Access to Information Act – see Pimstone 1999 *SAJHR* 2 18.
60) B 67-98 s 13(1)-(4) & 50(2).
61) B 67-98 s 13(1), (2), (4)(a)&(b).

62) B 67-98 s 24(3) & 50(5)(b).
63) B 67-98 s 14, 15 & 16.
64) B 67-98 s 19(1) & s 50(4). Provision is made for urgent requests in the case of governmental bodies – see s 20.
65) B 67-98 s 29(1) & s 50(6)(a).
66) B 67-98 s 31(1) & s 50(6)(a).
67) See further B 67-98 s 31(2).
68) B 67-98 s 30(1) & s 50(6)(a).
69) B 67-98 s 32(1) & 50(6)(a).
70) B 67-98 s 33 & 50(6)(a).
71) B 67-98 s 34(1) & 50(6)(a).
72) B 67-98 s 35 & 50(6)(a).
73) B 67-98 s 36 & 50(6)(a).
74) B 67-98 s 37 & 50(6)(a).
75) B 67-98 s 38 & 50(6)(a).
76) B 67-98 s 39 & s 50(6)(a).
77) B 67-98 s 40 & s 50(6)(a).
78) B 67-98 s 41 & s 50(6)(a).
79) B 67-98 s 42, 43 & s 50(6)(a).
80) B 67-98 s 23(1).
81) B 67-98 s 44.
82) B 67-98 s 45 & s 46.
83) B 67-98 s 47(3)(c).
84) B 67-98 s 51(2) & 52(2).
85) B 67-98 s 51(1) & 52(1).
86) B 67-98 s 51(5) & 52(5).
87) B 67-98 s 52(6) read with s 13(4), s 14 & s 15.
88) B 67-98 s 52(6) read with s 16.
89) B 67-98 s 51(6) & 52(7).
90) B 67-98 s 52(8).
91) B 67-98 s 51(7) & 52(9).
92) B 67-98 s 52(9)(c) & (d). The governmental body that has been supplied with inaccurate information must correct the information and notify the requester that it has been corrected, or if it does not accept that the information is inaccurate, make a note on the record to that effect and inform the requester of its decision. The requester may then lodge an internal appeal to decide the issue – see B 67-98 s 52(11).
93) B 67-98 s 51(8) & 52(10).
94) B 67-98 s 51(11) & 52(12).
95) B 67-98 s 52(12).
96) B 67-98 s 51(10) & (11) & s 52(13) & (14).
97) B 67-98 s 62(3).
98) See endnote 20. These trends are also evident in the Dutch Personal Data Protection Act of 2000 and the UK's Data Protection Act of 1998.
99) B 67-98 s 83.
100) Dir 95/46/EC recital 33.
101) Dir 95/46/EC a 15.
102) Dir 95/46/EC a 14(b).
103) Dir 95/46/EC a 27(1).
104) See Neethling *Die reg op privaatheid* (1976) 406; Neethling "Die krediet-burowese en databeskerming"1980 *THRHR* 141 155; Neethling J *Databeskerming: Motivering en riglyne vir wetgewing in Suid-Afrika* (in Strauss SA (red) *Huldigingsbundel vir WA Joubert* (1988)) 105 et seq; McQuoid-Mason *The Law of Privacy in SA* (1978) 195 et seq; Roos "Data privacy: the American experience"1990 *TSAR* 264 265; Schulze "The LOA life register - a snap survey of possible legal pitfalls" 1994 *THRHR* 75 85-86.

Annexure
Republic of South Africa
Promotion of Access to Information Act No. 2, 2000

Assented to: 2 February 2000

ACT

To give effect to the constitutional right of access to any information held by the State and any information that is held by another person and that is required for the exercise or protection of any rights; and to provide for matters connected therewith.

PREAMBLE

RECOGNISING THAT–

- the system of government in South Africa before 27 April 1994, amongst others, resulted in a secretive and unresponsive culture in public and private bodies which often led to an abuse of power and human rights violations;
- section 8 of the Constitution provides for the horizontal application of the rights in the Bill of Rights to juristic persons to the extent required by the nature of the rights and the nature of those juristic persons;
- section 32(1)(a) of the Constitution provides that everyone has the right of access to any information held by the State;
- section 32(1)(b) of the Constitution provides for the horizontal application of the right of access to information held by another person to everyone when that information is required for the exercise or protection of any rights;
- and national legislation must be enacted to give effect to this right in section 32 of the Constitution;

AND BEARING IN MIND THAT–

- the State must respect, protect, promote and fulfil, at least, all the rights in the Bill of Rights which is the cornerstone of democracy in South Africa;
- the right of access to any information held by a public or private body may be limited to the extent that the limitations are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom as contemplated in section 36 of the Constitution;
- reasonable legislative measures may, in terms of section 32(2) of the Constitution, be provided to alleviate the administrative and financial burden on the State in giving effect to its obligation to promote and fulfil the right of access to information;

AND IN ORDER TO–

- foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information;
- actively promote a society in which the people of South Africa have effective access to information to enable them to more fully exercise and protect all of their rights,

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

CONTENTS OF ACT

Section

SCHEDULE

PART 1
INTRODUCTORY PROVISIONS
CHAPTER 1
DEFINITIONS AND INTERPRETATION

Definitions

1. In this Act, unless the context otherwise indicates–

''access fee'' means a fee prescribed for the purposes of section 22(6) or 54(6), as the case may be;

''application'' means an application to a court in terms of section 78;

''Constitution'' means the Constitution of the Republic of South Africa, 1996 (Act No.108 of 1996);

''court'' means–

(a) the Constitutional Court acting in terms of section 167(6)(a) of the Constitution; or

(b) (i) a High Court or another court of similar status; or

(ii) a Magistrate's Court, either generally or in respect of a specified class of decisions in terms of this Act, designated by the Minister, by notice in the *Gazette*, and presided over by a magistrate designated in writing by the Minister, after consultation with the Magistrates Commission,

within whose area of jurisdiction–

(aa) the decision of the information officer or relevant authority of a public body or the head of a private body has been taken;

(bb) the public body or private body concerned has its principal place of administration or business; or

(cc) the requester or third party concerned is domiciled or ordinarily resident;

''evaluative material'' means an evaluation or opinion prepared for the purpose of determining–

(a) the suitability, eligibility or qualifications of the person to whom or which the evaluation or opinion relates–

(i) for employment or for appointment to office;

(ii) for promotion in employment or office or for continuance in employment or office;

(iii) for removal from employment or office; or

(iv) for the awarding of a scholarship, award, bursary, honour or similar benefit; or

(b) whether any scholarship, award, bursary, honour or similar benefit should be continued, modified, cancelled or renewed;

''head'' of, or in relation to, a private body means–

(a) in the case of a natural person, that natural person or any person duly authorised by that natural person;

(b) in the case of a partnership, any partner of the partnership or any person duly authorised by the partnership;

(c) in the case of a juristic person–

(i) the chief executive officer or equivalent officer of the juristic person or any person duly authorised by that officer; or

(ii) the person who is acting as such or any person duly authorised by such acting person;

''health practitioner'' means an individual who carries on, and is registered in terms of legislation to carry on, an occupation which involves the provision of care or treatment for the physical or mental health or for the well-being of individuals;

''Human Rights Commission'' means the South African Human Rights Commission referred to in section 181(1)(b) of the Constitution;

''individual's next of kin'' means–

(a) an individual to whom the individual was married immediately before the individual's death;

(b) an individual with whom the individual lived as if they were married immediately before the individual's death;

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

(d) if–

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

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

but was unsuccessful, an individual who is related to the individual in the second degree of affinity or consanguinity;

''information officer'' of, or in relation to, a public body–

(a) in the case of a national department, provincial administration or organisational component–

(i) mentioned in Column 1 of Schedule 1 or 3 to the Public Service Act, 1994 (Proclamation No. 103 of 1994), means the officer who is the incumbent of the post bearing the designation mentioned in Column 2 of the said Schedule 1 or 3 opposite the name of the relevant national department, provincial administration or organisational component or the person who is acting as such; or

(ii) not so mentioned, means the Director-General, head, executive director or equivalent officer, respectively, of that national department, provincial administration or organisational component, respectively;

(b) in the case of a municipality, means the municipal manager appointed in terms of section 82 of the Local Government: Municipal Structures Act, 1998 (Act No.117 of 1998), or the person who is acting as such; or

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

''internal appeal'' means an internal appeal to the relevant authority in terms of section 74;

''international organisation'' means an international organisation–

(a) of states; or

(b) established by the governments of states;

''Minister'' means the Cabinet member responsible for the administration of justice;

''notice'' means notice in writing, and ''notify'' and ''notified'' have corresponding meanings;

''objects of this Act'' means the objects of this Act referred to in section 9;

''official'', in relation to a public or private body, means–

(a) any person in the employ (permanently or temporarily and full-time or part-time) of the public or private body, as the case may be, including the head of the body, in his or her capacity as such; or

(b) a member of the public or private body, in his or her capacity as such;

''person'' means a natural person or a juristic person;

''personal information'' means information about an identifiable individual, including, but 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;

''personal requester'' means a requester seeking access to a record containing

personal information about the requester;

''prescribed'' means prescribed by regulation in terms of section 92;

''private body'' means–

(a) a natural person who carries or has carried on any trade, business or profession, but only in such capacity;

(b) a partnership which carries or has carried on any trade, business or profession; or

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

''public safety or environmental risk'' means harm or risk to the environment or the public (including individuals in their workplace) associated with–

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

(b) a substance released into the environment, including, but not limited to, the workplace;

(c) a substance intended for human or animal consumption;

(d) a means of public transport; or

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

''public body'' means–

(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;

''record'' of, or in relation to, a public or private body, means any recorded information–

(a) regardless of form or medium;

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

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

''relevant authority'', in relation to–

(a) a public body referred to in paragraph *(a)* of the definition of ''public body'' in the national sphere of government, means–

(i) in the case of the Office of the Presidency, the person designated in writing by the President; or

(ii) in any other case, the Minister responsible for that public body or the person designated in writing by that Minister;

(b) a public body referred to in paragraph *(a)* of the definition of ''public body'' in the provincial sphere of government, means–

(i) in the case of the Office of a Premier, the person designated in writing by the Premier; or

(ii) in any other case, the member of the Executive Council responsible for that public body or the person designated in writing by that member; or

(c) a municipality, means–

(i) the mayor;

(ii) the speaker; or

(iii) any other person,

designated in writing by the Municipal Council of that municipality;

''request for access'', in relation to–

(a) a public body, means a request for access to a record of a public body in terms of section 11; or

(b) a private body, means a request for access to a record of a private body in terms of section 50;

''requester'', in relation to–

(a) a public body, means–

(i) any person (other than a public body contemplated in paragraph *(a)* or *(b)*(i) of the definition of ''public body'', or an official thereof) making a request for access to a record of that public body; or

(ii) a person acting on behalf of the person referred to in subparagraph (i);

(b) a private body, means–

(i) any person, including, but not limited to, a public body or an official thereof, making a request for access to a record of that private body; or

(ii) a person acting on behalf of the person contemplated in subparagraph (i);

''subversive or hostile activities'' means–

(a) aggression against the Republic;

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

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

(d) a foreign or hostile intelligence operation;

''third party'', in relation to a request for access to–

(a) a record of a public body, means any person (including, but not limited to, the government of a foreign state, an international organisation or an organ of that government or organisation) other than–

(i) the requester concerned; and

(ii) a public body; or

(b) a record of a private body, means any person (including, but not limited to, a public body) other than the requester,

but, for the purposes of sections 34 and 63, the reference to ''person'' in paragraphs *(a)* and *(b)* must be construed as a reference to ''natural person'';

''this Act'' includes any regulation made and in force in terms of section 92;

''transfer'', in relation to a record, means transfer in terms of section 20(1) or (2), and ''transferred'' has a corresponding meaning;

''working days'' means any days other than Saturdays, Sundays or public holidays, as defined in section 1 of the Public Holidays Act, 1994 (Act No. 36 of 1994).

Interpretation of Act

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

(2) Section 12 must not be construed as excluding–

(a) the Cabinet and its committees; or

(b) an individual member of Parliament or of a provincial legislature,

from the operation of the definition of ''requester'' in relation to a private body in section 1, section 49 and all other provisions of this Act related thereto.

(3) For the purposes of this Act, the South African Revenue Service, established by section 2 of the South African Revenue Service Act, 1997 (Act No. 34 of 1997), and referred to in section 35(1), is a public body.

CHAPTER 2
GENERAL APPLICATION PROVISIONS

Act applies to record whenever it came into existence

3. This Act applies to–

(a) a record of a public body; and

(b) a record of a private body,

regardless of when the record came into existence.

Records held by official or independent contractor of public or private body

4. For the purposes of this Act, but subject to section 12, a record in the possession or under the control of–

(a) an official of a public body or private body in his or her capacity as such; or

(b) an independent contractor engaged by a public body or private body in the capacity as such contractor,

is regarded as being a record of that public body or private body, respectively.

Application of other legislation prohibiting or restricting disclosure

5. This Act applies to the exclusion of any provision of other legislation that–

(a) prohibits or restricts the disclosure of a record of a public body or private body; and

(b) is materially inconsistent with an object, or a specific provision, of this Act.

Application of other legislation providing for access

6. Nothing in this Act prevents the giving of access to–

(a) a record of a public body in terms of any legislation referred to in Part 1 of the Schedule; or

(b) a record of a private body in terms of any legislation referred to in Part 2 of the Schedule.

Act not applying to records required for criminal or civil proceedings after commencement of proceedings

7. (1) This Act does not apply to a record of a public body or a private body if–

(a) that record is requested for the purpose of criminal or civil proceedings;

(b) so requested after the commencement of such criminal or civil proceedings, as the case may be; and

(c) the production of or access to that record

for the purpose referred to in paragraph *(a)* is provided for in any other law.

(2) Any record obtained in a manner that contravenes subsection (1) is not admissible as evidence in the criminal or civil proceedings referred to in that subsection unless the exclusion of such record by the court in question would, in its opinion, be detrimental to the interests of justice.

Part applicable when performing functions as public or private body

8. (1) For the purposes of this Act, a public body referred to in paragraph *(b)*(ii) of the definition of ''public body'' in section 1, or a private body–

(a) may be either a public body or a private body in relation to a record of that body; and

(b) may in one instance be a public body and in another instance be a private body, depending on whether that record relates to the exercise of a power or performance of a function as a public body or as a private body.

(2) A request for access to a record held for the purpose or with regard to the exercise of a power or the performance of a function–

(a) as a public body, must be made in terms of section 11; or

(b) as a private body, must be made in terms of section 50.

(3) The provisions of Parts 1, 2, 4, 5, 6 and 7 apply to a request for access to a record that relates to a power or function exercised or performed as a public body.

(4) The provisions of Parts 1, 3, 4, 5, 6 and 7 apply to a request for access to a record that relates to a power or function exercised or performed as a private body.

CHAPTER 3
GENERAL INTRODUCTORY PROVISIONS

Objects of Act

9. The objects of this Act are–

(a) to give effect to the constitutional right of access to–

(i) any information held by the State; and

(ii) any information that is held by another person and that is required for the exercise or protection of any rights;

(b) to give effect to that right–

(i) subject to justifiable limitations, including, but not limited to, limitations aimed at the reasonable protection of privacy, commercial confidentiality and effective, efficient and good governance; and

(ii) in a manner which balances that right with any other rights, including the rights in the Bill of Rights in Chapter 2 of the Constitution;

(c) to give effect to the constitutional obligations of the State of promoting a human rights culture and social justice, by including public bodies in the definition of ''requester'', allowing them, amongst others, to access information from private bodies upon compliance with the four requirements in this Act, including an additional obligation for certain public bodies in certain instances to act in the public interest;

(d) to establish voluntary and mandatory mechanisms or procedures to give effect to that right in a manner which enables persons to obtain access to records of public and private bodies as swiftly, inexpensively and effortlessly as reasonably possible; and

(e) generally, to promote transparency, accountability and effective governance of all public and private bodies by, including, but not limited to, empowering and educating everyone–

(i) to understand their rights in terms of this Act in order to exercise their rights in relation to public and private bodies;

(ii) to understand the functions and operation of public bodies; and

(iii) to effectively scrutinise, and participate in, decision-making by public bodies that affects their rights.

Guide on how to use Act

10. (1) The Human Rights Commission must, within 18 months after the commencement of this section, compile in each official language a guide containing such information, in an easily comprehensible form and manner, as may reasonably be required by a person who wishes to exercise any right contemplated in this Act.

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

(a) the objects of this Act;
(b) the postal and street address, phone and fax number and, if available, electronic mail address of–
(i) the information officer of every public body; and
(ii) every deputy information officer of every public body appointed in terms of section 17(1);
(c) such particulars of every private body as are practicable;
(d) the manner and form of a request for–
(i) access to a record of a public body contemplated in section 11; and
(ii) access to a record of a private body contemplated in section 50;
(e) the assistance available from the information officer of a public body in terms of this Act;
(f) the assistance available from the Human Rights Commission in terms of this Act;
(g) all remedies in law available regarding an act or failure to act in respect of a right or duty conferred or imposed by this Act, including the manner of lodging–
(i) an internal appeal; and
(ii) an application with a court against a decision by the information officer of a public body, a decision on internal appeal or a decision of the head of a private body;
(h) the provisions of sections 14 and 51 requiring a public body and private body, respectively, to compile a manual, and how to obtain access to a manual;
(i) the provisions of sections 15 and 52 providing for the voluntary disclosure of categories of records by a public body and private body, respectively;
(j) the notices issued in terms of sections 22 and 54 regarding fees to be paid in relation to requests for access; and
(k) the regulations made in terms of section 92.

(3) The Human Rights Commission must, if necessary, update and publish the guide at intervals of not more than two years.
(4) The guide must be made available as prescribed.

PART 2
ACCESS TO RECORDS OF PUBLIC BODIES

CHAPTER 1
RIGHT OF ACCESS, AND SPECIFIC APPLICATION PROVISIONS

Right of access to records of public bodies

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

(2) A request contemplated in subsection (1) includes a request for access to a record containing personal information about the requester.

(3) A requester's right of access contemplated in subsection (1) is, subject to this Act, not affected by–
(a) any reasons the requester gives for requesting access; or
(b) the information officer's belief as to what the requester's reasons are for requesting access.

Act not applying to certain public bodies or officials thereof

12. This Act does not apply to a record of–
(a) the Cabinet and its committees;
(b) the judicial functions of–
(i) a court referred to in section 166 of the Constitution;
(ii) a Special Tribunal established in terms of section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act No. 74 of 1996); or
(iii) a judicial officer of such court or Special Tribunal; or
(c) an individual member of Parliament or of a provincial legislature in that capacity.

Body determined to be part of another public body

13. For the purpose of this Act, the Minister may, on his or her own accord or on the request of the relevant public body or bodies or a body referred to in paragraph (c), in the prescribed manner and by notice in the *Gazette*–
(a) determine that a public body is to be regarded as part of another public body;
(b) determine that a category of public bod-

ies is to be regarded as one public body with such information officer as the Minister designates; and

(c) if there is doubt as to whether a body is a separate public body or forms part of a public body, determine that the body–

(i) is a separate public body; or

(ii) forms part of a public body.

CHAPTER 2
PUBLICATION AND AVAILABILITY OF CERTAIN RECORDS

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

14. (1) Within six months after the commencement of this section or the coming into existence of a public body, the information officer of the public body concerned must compile in at least three official languages a manual containing–

(a) a description of its structure and functions;

(b) the postal and street address, phone and fax number and, if available, electronic mail address of the information officer of the body and of every deputy information officer of the body appointed in terms of section 17(1);

(c) a description of the guide referred to in section 10, if available, and how to obtain access to it;

(d) sufficient detail to facilitate a request for access to a record of the body, a description of the subjects on which the body holds records and the categories of records held on each subject;

(e) the latest notice, in terms of section 15(2), if any, regarding the categories of records of the body which are available without a person having to request access in terms of this Act;

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

(g) a description of any arrangement or provision for a person (other than a public body referred to in paragraph *(a)* or *(b)*(i) of the definition of ''public body'' in section 1) by consultation, making representations or otherwise, to participate in or influence–

(i) the formulation of policy; or

(ii) the exercise of powers or performance of duties, by the body;

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

(i) such other information as may be prescribed.

(2) A public body must, if necessary, update and publish its manual referred to in subsection (1) at intervals of not more than one year.

(3) Each manual must be made available as prescribed.

(4) *(a)* If the functions of two or more public bodies are closely connected, the Minister may on request or of his or her own accord determine that the two or more bodies compile one manual only.

(b) The public bodies in question must share the cost of the compilation and making available of such manual as the Minister determines.

(5) For security, administrative or financial reasons, the Minister may, on request or of his or her own accord by notice in the *Gazette*, exempt any public body or category of public bodies from any provision of this section for such period as the Minister thinks fit.

Voluntary disclosure and automatic availability of certain records

15. (1) The information officer of a public body, referred to in paragraph *(a)* or *(b)*(i) of the definition of ''public body'' in section 1, must, on a periodic basis not less frequently than once each year, submit to the Minister a description of–

(a) the categories of records of the public body that are automatically available without a person having to request access in terms of this Act, including such categories available–

(i) for inspection in terms of legislation other than this Act;

(ii) for purchase or copying from the body; and

(iii) from the body free of charge; and

(b) how to obtain access to such records.

(2) On a periodic basis not less frequently than once each year and at the cost of the relevant public body, the Minister must, by notice in the *Gazette*–

(a) publish every description submitted in

terms of subsection (1); or

(b) update every description so published,

as the case may be.

(3) The only fee payable (if any) for access to a record included in a notice in terms of subsection (2) is a prescribed fee for reproduction.

(4) The information officer of a public body may delete any part of a record contemplated in subsection (1)*(a)* which, on a request for access, may or must be refused in terms of Chapter 4 of this Part.

(5) Section 11 and any other provisions in this Act related to that section do not apply to any category of records included in a notice in terms of subsection (2).

Information in telephone directory

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

CHAPTER 3
MANNER OF ACCESS

Designation of deputy information officers, and delegation

17. (1) For the purposes of this Act, each public body must, subject to legislation governing the employment of personnel of the public body concerned, designate such number of persons as deputy information officers as are necessary to render the public body as accessible as reasonably possible for requesters of its records.

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

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

(4) In deciding whether to delegate a power or duty in terms of subsection (3), the information officer must give due consideration to the need to render the public body as accessible as reasonably possible for requesters of its records.

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

(6) Any delegation in terms of subsection (3)–

(a) must be in writing;

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

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

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

Form of requests

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

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

(a) to provide sufficient particulars to enable an official of the public body concerned to identify–

(i) the record or records requested; and

(ii) the requester;

(b) to indicate which applicable form of access referred to in section 29(2) is required;

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

(d) to specify a postal address or fax number of the requester in the Republic;

(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 information officer.

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

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

Duty to assist requesters

19. (1) If a requester informs the information officer of–

(a) a public body that he or she wishes to make a request for access to a record of that public body; or

(b) a public body (other than a public body referred to in paragraph *(a)* or *(b)*(i) of the definition of ''public body'' in section 1) that he or she wishes to make a request for access to a record of another public body,

the information officer must render such reasonable assistance, free of charge, as is necessary to enable that requester to comply with section 18(1).

(2) If a requester has made a request for access that does not comply with section 18(1), the information officer concerned may not refuse the request because of that non-compliance unless the information officer has–

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

(i) the reasons for the contemplated refusal; and

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

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

(c) as far as reasonably possible, furnished the requester with any information (including information about the records, other than information on the basis of which a request for access may or must be refused in terms of any provision of Chapter 4 of this Part, held by the body which are relevant to the request) that would assist the making of the request in that form; and

(d) given the requester a reasonable opportunity to confirm the request or alter it to comply with section 18(1).

(3) When computing any period referred to in section 25(1), the period commencing on the date on which notice is given in terms of subsection (2) and ending on the date on which the person confirms or alters the request for access concerned must be disregarded.

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

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

(b) transfer the request in accordance with section 20 to the last-mentioned information officer,

whichever will result in the request being dealt with earlier.

Transfer of requests

20. (1) If a request for access is made to the information officer of a public body in respect of which–

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

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

(c) the record contains commercial information contemplated in section 42 in which any other public body has a greater commercial interest,

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

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

(ii) if the public body of the information officer to whom the request is made is in possession of the record and considers it helpful to do so to enable the information

officer of the other public body to deal with the request, send the record or a copy of the record to that information officer.

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

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

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

and

(c) the record–

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

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

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

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

(4) If a request for access is transferred, any period referred to in section 25(1) must be computed from the date the request is received by the information officer to whom the request is transferred.

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

(a) the transfer;

(b) the reasons for the transfer; and

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

Preservation of records until final decision on request

21. If the information officer of a public body has received a request for access to a record of the body, that information officer must take the steps that are reasonably necessary to preserve the record, without deleting any information contained in it, until the information officer has notified the requester concerned of his or her decision in terms of section 25 and–

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

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

whichever is the later.

Fees

22. (1) The information officer of a public body to whom a request for access is made, must by notice require the requester, other than a personal requester, to pay the prescribed request fee (if any), before further processing the request.

(2) If–

(a) the search for a record of a public body in respect of which a request for access by a requester, other than a personal requester, has been made; and

(b) the preparation of the record for disclosure (including any arrangements contemplated in section 29(2)*(a)* and *(b)*(i) and (ii)(aa)),

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

(3) The notice referred to in subsection (1) or (2) must state–

(a) the amount of the deposit payable in terms of subsection (2), if applicable;

(b) that the requester may lodge an internal appeal or an application with a court, as the case may be, against the tender or payment

of the request fee in terms of subsection (1), or the tender or payment of a deposit in terms of subsection (2), as the case may be; and

(c) the procedure (including the period) for lodging the internal appeal or application, as the case may be.

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

(5) The information officer of a public body must withhold a record until the requester concerned has paid the applicable fees (if any).

(6) A requester whose request for access to a record of a public body has been granted must pay an access fee for reproduction and for search and preparation contemplated in subsection (7)*(a)* and *(b)*, respectively, for any time reasonably required in excess of the prescribed hours to search for and prepare (including making any arrangements contemplated in section 29(2)*(a)* and *(b)*(i) and (ii)(aa)) the record for disclosure.

(7) Access fees prescribed for the purposes of subsection (6) must provide for a reasonable access fee for–

(a) the cost of making a copy of a record, or of a transcription of the content of a record, as contemplated in section 29(2)*(a)* and *(b)*(i), (ii)(bb), (iii) and *(v)* and, if applicable, the postal fee; and

(b) the time reasonably required to search for the record and prepare (including making any arrangements contemplated in section 29(2)*(a)* and *(b)*(i) and (ii)(aa) the record for disclosure to the requester.

(8) The Minister may, by notice in the *Gazette*–

(a) exempt any person or category of persons from paying any fee referred to in this section;

(b) determine that any fee referred to in this section is not to exceed a certain maximum amount;

(c) determine the manner in which any fee referred to in this section is to be calculated;

(d) determine that any fee referred to in this section does not apply to a category of records;

(e) exempt any person or record or category of persons or records for a stipulated period from any fee referred to in subsection (6); and

(f) determine that where the cost of collecting any fee referred to in this section exceeds the amount charged, such fee does not apply.

Records that cannot be found or do not exist

23. (1) If–

(a) all reasonable steps have been taken to find a record requested; and

(b) there are reasonable grounds for believing that the record–

(i) is in the public body's possession but cannot be found; or

(ii) does not exist,

the information officer of a public body must, by way of affidavit or affirmation, notify the requester that it is not possible to give access to that record.

(2) The affidavit or affirmation referred to in subsection (1) must give a full account of all steps taken to find the record in question or to determine whether the record exists, as the case may be, including all communications with every person who conducted the search on behalf of the information officer.

(3) For the purposes of this Act, the notice in terms of subsection (1) is to be regarded as a decision to refuse a request for access to the record.

(4) If, after notice is given in terms of subsection (1), the record in question is found, the requester concerned must be given access to the record unless access is refused on a ground for refusal contemplated in Chapter 4 of this Part.

Deferral of access

24. (1) If the information officer of a public body decides to grant a request for access to a record, but that record–

(a) is to be published within 90 days after the receipt or transfer of the request or such further period as is reasonably necessary for printing and translating the record for the purpose of publishing it;

(b) is required by law to be published but is yet to be published; or

(c) has been prepared for submission to any legislature or a particular person but is yet to be submitted,

the information officer may defer giving

access to the record for a reasonable period.

(2) If access to a record is deferred in terms of subsection (1), the information officer must notify the requester concerned–

(a) that the requester may, within 30 days after that notice is given, make representations to the information officer why the record is required before such publication or submission; and

(b) of the likely period for which access is to be deferred.

(3) If a requester makes representations in terms of subsection (2)*(a)*, the information officer must, after due consideration of those representations, grant the request for access only if there are reasonable grounds for believing that the requester will suffer substantial prejudice if access to the record is deferred for the likely period referred to in subsection (2)*(b)*.

Decision on request and notice thereof

25. (1) The information officer to whom a request for access is made or transferred, must, subject to section 26 and Chapter 5 of this Part, as soon as reasonably possible, but in any event within 30 days, after the request is received–

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

(b) notify the requester of the decision and, if the requester stated, as contemplated in section 18(2)*(e)*, that he or she wishes to be informed of the decision in any other manner, inform him or her in that manner if it is reasonably possible.

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

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

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

(c) that the requester may lodge an internal appeal or an application with a court, as the case may be, against the access fee to be paid or the form of access granted, and the procedure (including the period) for lodging the internal appeal or application, as the case may be.

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

(a) state adequate reasons for the refusal, including the provisions of this Act relied upon;

(b) exclude, from such reasons, any reference to the content of the record; and

(c) state that the requester may lodge an internal appeal or an application with a court, as the case may be, against the refusal of the request, and the procedure (including the period) for lodging the internal appeal or application, as the case may be.

Extension of period to deal with request

26. (1) The information officer to whom a request for access has been made or transferred, may extend the period of 30 days referred to in section 25(1) (in this section referred to as the ''original period'') once for a further period of not more than 30 days, if–

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

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

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

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

(e) the requester consents in writing to such extension.

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

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

(a) the period of the extension;

(b) adequate reasons for the extension, including the provisions of this Act relied upon; and

(c) that the requester may lodge an internal appeal or an application with a court, as the case may be, against the extension, and the procedure (including the period) for lodging the internal appeal or application, as the case may be.

Deemed refusal of request

27. If an information officer fails to give the decision on a request for access to the requester concerned within the period contemplated in section 25(1), the information officer is, for the purposes of this Act, regarded as having refused the request.

Severability

28. (1) If a request for access is made to a record of a public body containing information which may or must be refused in terms of any provision of Chapter 4 of this Part, every part of the record which–

(a) does not contain; and

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

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

(2) If a request for access to–

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

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

as contemplated in subsection (1), the provisions of section 25(2), apply to paragraph *(a)* of this section and the provisions of section 25(3) to paragraph *(b)* of this section.

Access and forms of access

29. (1) If a requester has been given notice in terms of section 25(1) that his or her request for access has been granted, that requester must, subject to subsections (3) and (9) and section 31–

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

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

be given access in the applicable forms referred to in subsection (2) as the requester indicated in the request, and in the language contemplated in section 31.

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

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

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

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

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

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

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

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

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

(bb) information derived from the record,

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

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

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

(3) If a requester has requested access in a particular form, access must, subject to section 28, be given in that form, unless to do so would–

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

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

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

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

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

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

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

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

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

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

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

(9) If an internal appeal or an application to a court, as the case may be, is lodged against the granting of a request for access to a record, access to the record may be given only when the decision to grant the request is finally confirmed.

Access to health or other records

30. (1) If the information officer who grants, in terms of section 11, a request for access to a record provided by a health practitioner in his or her capacity as such about the physical or mental health, or well-being–

(a) of the requester; or

(b) if the request has been made on behalf of the person to whom the record relates, of that person,

(in this section, the requester and person referred to paragraphs *(a)* and *(b)*, respectively, are referred to as the ''relevant person''), is of the opinion that the disclosure of the record to the relevant person might cause serious harm to his or her physical or mental health, or well-being, the information officer may, before giving access in terms of section 29, consult with a health practitioner who, subject to subsection (2), has been nominated by the relevant person.

(2) If the relevant person is–

(a) under the age of 16 years, a person having parental responsibilities for the relevant person must make the nomination contemplated in subsection (1); or

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

(3)*(a)* If, after being given access to the record concerned, the health practitioner consulted in terms of subsection (1) is of the opinion that the disclosure of the record to the relevant person would be likely to cause serious harm to his or her physical or mental health, or well-being, the information officer may only give access to the record if the requester proves to the satisfaction of the information officer that adequate provision is made for such counselling or arrangements as are reasonably practicable before, during or after the disclosure of the record to limit, alleviate or avoid such harm to the relevant person.

(b) Before access to the record is so given to the requester, the person responsible for such counselling or arrangements must be given access to the record.

Language of access

31. A requester whose request for access to a record of a public body has been granted must, if the record–

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

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

Reports to Human Rights Commission

32. The information officer of each public body must annually submit to the Human Rights Commission a report stating in relation to the public body–

(a) the number of requests for access received;

(b) the number of requests for access granted in full;

(c) the number of requests for access granted in terms of section 46;

(d) the number of requests for access refused in full and refused partially and the number of times each provision of this Act was relied on to refuse access in full or partial;

(e) the number of cases in which the periods stipulated in section 25(1) were extended in terms of section 26(1);

(g) the number of internal appeals lodged with the relevant authority and the number of cases in which, as a result of an internal appeal, access was given to a record;

(h) the number of internal appeals which were lodged on the ground that a request for access was regarded as having been refused in terms of section 27;

(i) the number of applications to a court which were lodged on the ground that an internal appeal was regarded as having been dismissed in terms of section 77(7); and

(j) such other matters as may be prescribed.

CHAPTER 4
GROUNDS FOR REFUSAL OF ACCESS TO RECORDS

Interpretation

33. (1) The information officer of a public body–

(a) must refuse a request for access to a record contemplated in section 34(1), 35(1), 36(1), 37(1)*(a)*,38*(a)*, 39(1)*(a)*, 40 or 43(1); or

(b) may refuse a request for access to a record contemplated in section 37(1)*(b)*, 38*(b)*, 39(1)*(b)*, 41(1)*(a)* or *(b)*, 42(1) or (3), 43(2), 44(1) or (2) or 45,

unless the provisions of section 46 apply.

(2) A provision of this Chapter in terms of which a request for access to a record must or may or may not be refused, may not be construed as–

(a) limited in its application in any way by any other provision of this Chapter in terms of which a request for access to a record must or may or may not be refused; and

(b) not applying to a particular record by reason that another provision of this Chapter in terms of which a request for access to a record must or may or may not be refused, also applies to that record.

Mandatory protection of privacy of third party who is natural person

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

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

(a) about an individual who has consented in terms of section 48 or otherwise in writing to its disclosure to the requester concerned;

(b) that was given to the public body by the individual to whom it relates and the individual was informed by or on behalf of the public body, before it is given, that the information belongs to a class of information that would or might be made available to the public;

(c) already publicly available;

(d) about an individual's physical or mental health, or well-being, who is under the care of the requester and who is–

(i) under the age of 18 years; or

(ii) incapable of understanding the nature of the request,

and if giving access would be in the individual's best interests;

(e) about an individual who is deceased and the requester is–

(i) the individual's next of kin; or

(ii) making the request with the written consent of the individual's next of kin; or

(f) about an individual who is or was an official of a public body and which relates to the position or functions of the individual, including, but not limited to–

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

(ii) the title, work address, work phone number and other similar particulars of the individual;
(iii) the classification, salary scale or remuneration and responsibilities of the position held or services performed by the individual; and
(iv) the name of the individual on a record prepared by the individual in the course of employment.

Mandatory protection of certain records of South African Revenue Service

35. (1) Subject to subsection (2), the information officer of the South African Revenue Service, referred to in section 2(3), must refuse a request for access to a record of that Service if it contains information which was obtained or is held by that Service for the purposes of enforcing legislation concerning the collection of revenue as defined in section 1 of the South African Revenue Service Act, 1997 (Act No. 34 of 1997).
(2) A record may not be refused in terms of subsection (1) insofar as it consists of information about the requester or the person on whose behalf the request is made.

Mandatory protection of commercial information of third party

36. (1) Subject to subsection (2), the information officer of a public body must refuse a request for access to a record of the body if the record contains–
(a) trade secrets of a third party;
(b) financial, commercial, scientific or technical information, other than trade secrets, of a third party, the disclosure of which would be likely to cause harm to the commercial or financial interests of that third party; or
(c) information supplied in confidence by a third party the disclosure of which could reasonably be expected–
(i) to put that third party at a disadvantage in contractual or other negotiations; or
(ii) to prejudice that third party in commercial competition.
(2) A record may not be refused in terms of subsection (1) insofar as it consists of information–
(a) already publicly available;
(b) about a third party who has consented in terms of section 48 or otherwise in writing to its disclosure to the requester concerned; or
(c) about the results of any product or environmental testing or other investigation supplied by, carried out by or on behalf of a third party and its disclosure would reveal a serious public safety or environmental risk.
(3) For the purposes of subsection (2)(c), the results of any product or environmental testing or other investigation do not include the results of preliminary testing or other investigation conducted for the purpose of developing methods of testing or other investigation.

Mandatory protection of certain confidential information, and protection of certain other confidential information, of third party

37. (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; or
(b) may refuse a request for access to a record of the body if the record consists of information that was supplied in confidence by a third party–
(i) the disclosure of which could reasonably be expected to prejudice the future supply of similar information, or information from the same source; and
(ii) if it is in the public interest that similar information, or information from the same source, should continue to be supplied.
(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.

Mandatory protection of safety of individuals, and protection of property

38. The information officer of a public body–
(a) must refuse a request for access to a record of the body if its disclosure could reasonably be expected to endanger the life or physical safety of an individual; or

(b) may refuse a request for access to a record of the body if its disclosure would be likely to prejudice or impair–

(i) the security of–

(aa) a building, structure or system, including, but not limited to, a computer or communication system;

(bb) a means of transport; or

(cc) any other property; or

(ii) methods, systems, plans or procedures for the protection of–

(aa) an individual in accordance with a witness protection scheme;

(bb) the safety of the public, or any part of the public; or

(cc) the security of property contemplated in subparagraph (i)*(aa)*, *(bb)* or *(cc)*.

Mandatory protection of police dockets in bail proceedings, and protection of law enforcement and legal proceedings

39. (1) The information officer of a public body–

(a) must refuse a request for access to a record of the body if access to that record is prohibited in terms of section 60(14) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977); or

(b) may refuse a request for access to a record of the body if–

(i) the record contains methods, techniques, procedures or guidelines for–

(aa) the prevention, detection, curtailment or investigation of a contravention or possible contravention of the law; or

(bb) the prosecution of alleged offenders, and the disclosure of those methods, techniques, procedures or guidelines could reasonably be expected to prejudice the effectiveness of those methods, techniques, procedures or guidelines or lead to the circumvention of the law or facilitate the commission of an offence;

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

(aa) to impede that prosecution; or

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

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

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

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

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

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

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

(2) A record may not be refused in terms of subsection (1)*(b)*(iii)*(dd)* insofar as it consists of information about the general conditions of detention of persons in custody.

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

(b) If the information officer so refuses to confirm or deny the existence or non-existence of the record, the notice referred to in section 25(3) must–

(i) state that fact;

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

(iii) state adequate reasons for the refusal, as required by section 25(3), insofar as they can be given without causing the harm contemplated in any provision of subsection (1)*(a)* or *(b)*; and

(iv) state that the requester concerned may lodge an internal appeal or an application with a court, as the case may be, against the refusal as required by section 25(3).

Mandatory protection of records privileged from production in legal proceedings

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

Defence, security and international relations of Republic

41. (1) The information officer of a public body may refuse a request for access to a record of the body if its disclosure–

(a) could reasonably be expected to cause prejudice to–

(i) the defence of the Republic;

(ii) the security of the Republic; or

(iii) subject to subsection (3), the international relations of the Republic; or

(b) would reveal information–

(i) supplied in confidence by or on behalf of another state or an international organisation;

(ii) supplied by or on behalf of the Republic to another state or an international organisation in terms of an arrangement or international agreement, contemplated in section 231 of the Constitution, with that state or organisation which requires the information to be held in confidence; or

(iii) required to be held in confidence by an international agreement or customary international law contemplated in section 231 or 232, respectively, of the Constitution.

(2) A record contemplated in subsection (1), without limiting the generality of that subsection, includes a record containing information–

(a) relating to military tactics or strategy or military exercises or operations undertaken in preparation of hostilities or in connection with the detection, prevention, suppression or curtailment of subversive or hostile activities;

(b) relating to the quantity, characteristics, capabilities, vulnerabilities or deployment of–

(i) weapons or any other equipment used for the detection, prevention, suppression or curtailment of subversive or hostile activities; or

(ii) anything being designed, developed, produced or considered for use as weapons or such other equipment;

(c) relating to the characteristics, capabilities, vulnerabilities, performance, potential, deployment or functions of–

(i) any military force, unit or personnel; or

(ii) any body or person responsible for the detection, prevention, suppression or curtailment of subversive or hostile activities;

(d) held for the purpose of intelligence relating to–

(i) the defence of the Republic;

(ii) the detection, prevention, suppression or curtailment of subversive or hostile activities; or

(iii) another state or an international organisation used by or on behalf of the Republic in the process of deliberation and consultation in the conduct of international affairs;

(e) on methods of, and scientific or technical equipment for, collecting, assessing or handling information referred to in paragraph *(d)*;

(f) on the identity of a confidential source and any other source of information referred to in paragraph *(d)*;

(g) on the positions adopted or to be adopted by the Republic, another state or an international organisation for the purpose of present or future international negotiations; or

(h) that constitutes diplomatic correspondence exchanged with another state or an international organisation or official correspondence exchanged with diplomatic missions or consular posts of the Republic.

(3) A record may not be refused in terms of subsection (1)*(a)*(iii) if it came into existence more than 20 years before the request.

(4)*(a)* If a request for access to a record of a public body may be refused in terms of subsection (1), or could, if it existed, be so

refused, and the disclosure of the existence or non-existence of the record would be likely to cause the harm contemplated in any provision of subsection (1), the information officer concerned may refuse to confirm or deny the existence or non-existence of the record.

(b) If the information officer so refuses to confirm or deny the existence or non-existence of the record, the notice referred to in section 25(3) must–

(i) state that fact;

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

(iii) state adequate reasons for the refusal, as required by section 25(3), insofar as they can be given without causing the harm contemplated in subsection (1); and

(iv) state that the requester may lodge an internal appeal or an application with a court, as the case may be, against the refusal as required by section 25(3).

Economic interests and financial welfare of Republic and commercial activities of public bodies

42. (1) The information officer of a public body may refuse a request for access to a record of the body if its disclosure would be likely to materially jeopardise the economic interests or financial welfare of the Republic or the ability of the government to manage the economy of the Republic effectively in the best interests of the Republic.

(2) The information referred to in subsection (1) includes, without limiting the generality of that subsection, information about–

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

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

(i) credit or interest rates;

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

(iii) the regulation or supervision of financial institutions;

(iv) government borrowing; or

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

(c) a contemplated–

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

(ii) international trade agreement.

(3) Subject to subsection (5), the information officer of a public body may refuse a request for access to a record of the body if the record–

(a) contains trade secrets of the State or a public body;

(b) contains financial, commercial, scientific or technical information, other than trade secrets, the disclosure of which would be likely to cause harm to the commercial or financial interests of the State or a public body;

(c) contains information, the disclosure of which could reasonably be expected–

(i) to put a public body at a disadvantage in contractual or other negotiations; or

(ii) to prejudice a public body in commercial competition; or

(d) is a computer program, as defined in section 1(1) of the Copyright Act, 1978 (Act No. 98 of 1978), owned by the State or a public body, except insofar as it is required to give access to a record to which access is granted in terms of this Act.

(4) The information referred to in subsection (2)*(c)*(i) includes, without limiting the generality of that subsection, information about an agreement, or contemplated agreement, to transfer any interest in or right to shares in the capital of a public body to any person which is not a public body referred to in paragraph *(a)* or *(b)*(i) of the definition of ''public body''.

(5) A record may not be refused in terms of subsection (3) insofar as it consists of information–

(a) already publicly available;

(b) about or owned by a public body, other than the public body to which the request is made, which has consented in writing to its disclosure to the requester concerned; or

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

(6) For the purposes of subsection (5)*(c)*, the results of any product or environmental testing or other investigation do not include the

results of preliminary testing or other investigation conducted for the purpose of developing methods of testing or other investigation.

(7) If a request for access to a record contemplated in subsection (5)(c) is granted and the testing or other investigation was carried out by or on behalf of the public body from which the record is requested, the information officer must at the same time as access to the record is given, provide the requester with a written explanation of the methods used in conducting the testing or other investigation.

Mandatory protection of research information of third party, and protection of research information of public body

43. (1) The information officer of a public body must refuse a request for access to a record of the body if the record contains information about research being or to be carried out by or on behalf of a third party, the disclosure of which would be likely to expose–

(a) the third party;

(b) a person that is or will be carrying out the research on behalf of the third party; or

(c) the subject matter of the research,

to serious disadvantage.

(2) The information officer of a public body may refuse a request for access to a record of the body if the record contains information about research being or to be carried out by or on behalf of a public body, the disclosure of which would be likely to expose–

(a) the public body;

(b) a person that is or will be carrying out the research on behalf of the public body; or

(c) the subject matter of the research,

to serious disadvantage.

Operations of public bodies

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

(a) if the record contains–

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

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

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

(b) if–

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

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

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

(ii) the disclosure of the record could, by premature disclosure of a policy or contemplated policy, reasonably be expected to frustrate the success of that policy.

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

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

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

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

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

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

(3) A record may not be refused in terms of subsection (1) if the record came into existence more than 20 years before the request concerned.

(4) A record may not be refused in terms of subsection (1) or (2) insofar as it consists of an account of, or a statement of reasons required to be given in accordance with section 5 of the Promotion of Administrative Justice Act, 2000.

Manifestly frivolous or vexatious requests, or substantial and unreasonable diversion of resources

45. The information officer of a public body may refuse a request for access to a record of

the body if–

(a) the request is manifestly frivolous or vexatious; or

(b) the work involved in processing the request would substantially and unreasonably divert the resources of the public body.

Mandatory disclosure in public interest

46. Despite any other provision of this Chapter, the information officer of a public body must grant a request for access to a record of the body contemplated in section 34(1), 36(1), 37(1)*(a)* or *(b)*,38*(a)* or *(b)*, 39(1)*(a)* or *(b)*, 40, 41(1)*(a)* or *(b)*, 42(1) or (3), 43(1) or (2), 44(1) or (2) or 45, 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.

CHAPTER 5
THIRD PARTY NOTIFICATION AND INTERVENTION

Notice to third parties

47. (1) 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.

(2) The information officer must inform a third party in terms of subsection (1)–

(a) as soon as reasonably possible, but in any event, within 21 days after that request is received or transferred; and

(b) by the fastest means reasonably possible.

(3) When informing a third party in terms of subsection (1), the information officer must–

(a) state that he or she is considering a request for access to a record that might be a record contemplated in section 34(1), 35(1), 36(1), 37(1) or 43(1), as the case may be, and describe the content of the record;

(b) furnish the name of the requester;

(c) describe the provisions of section 34(1), 35(1), 36(1), 37(1) or 43(1), as the case may be;

(d) in any case where the information officer believes that the provisions of section 46 might apply, describe those provisions, specify which of the circumstances referred to in section 46*(a)* in the opinion of the information officer might apply and state the reasons why he or she is of the opinion that section 46 might apply; and

(e) state that the third party may, within 21 days after the third party is informed–

(i) make written or oral representations to the information officer why the request for access should be refused; or

(ii) give written consent for the disclosure of the record to the requester.

(4) If a third party is not informed orally of a request for access in terms of subsection (1), the information officer must give a written notice stating the matters referred to in subsection (3) to the third party.

Representations and consent by third parties

48. (1) A third party that is informed in terms of section 47(1) of a request for access, may, within 21 days after the third party has been informed–

(a) make written or oral representations to the information officer concerned why the request should be refused; or

(b) give written consent for the disclosure of the record to the requester concerned.

(2) A third party that obtains knowledge about a request for access other than in terms of section 47(1) may–

(a) make written or oral representations to the information officer concerned why the request should be refused; or

(b) give written consent for the disclosure of the record to the requester concerned.

Decision on representations for refusal and notice thereof

49. (1) The information officer of a public body must, as soon as reasonably possible, but in any event within 30 days after every third party is informed as required by section 47–

(a) decide, after giving due regard to any representations made by a third party in terms of section 48, whether to grant the request for access; and

(b) notify the third party so informed and a third party not informed in terms of section 47(1), but that made representations in terms of section 48 or is located before the decision is taken, of the decision.

(2) If, after all reasonable steps have been taken as required by section 47(1), a third party is not informed of the request in question and the third party did not make any representations in terms of section 48, any decision whether to grant the request for access must be made with due regard to the fact that the third party did not have the opportunity to make representations in terms of section 48 why the request should be refused.

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

(a) adequate reasons for granting the request, including the provisions of this Act relied upon;

(b) that the third party may lodge an internal appeal or an application, as the case may be, against the decision within 30 days after notice is given, and the procedure for lodging the internal appeal or application, as the case may be; and

(c) that the requester will be given access to the record after the expiry of the applicable period contemplated in paragraph (b), unless such internal appeal or application with a court is lodged within that period.

(4) If the information officer of a public body decides in terms of subsection (1) to grant the request for access concerned, he or she must give the requester access to the record concerned after the expiry of 30 days after notice is given in terms of subsection (1)*(b)*, unless an internal appeal or an application with a court, as the case may be, is lodged against the decision within that period.

PART 3
ACCESS TO RECORDS OF PRIVATE BODIES

CHAPTER 1
RIGHT OF ACCESS

Right of access to records of private bodies

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

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

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

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

(2) In addition to the requirements referred to in subsection (1), when a public body, referred to in paragraph *(a)* or *(b)*(i) of the definition of ''public body'' in section 1, requests access to a record of a private body for the exercise or protection of any rights, other than its rights, it must be acting in the public interest.

(3) A request contemplated in subsection (1) includes a request for access to a record containing personal information about the requester or the person on whose behalf the request is made.

CHAPTER 2
PUBLICATION AND AVAILABILITY OF CERTAIN RECORDS

Manual

51. (1) Within six months after the commencement of this section or the coming into existence of the private body concerned, the head of a private body must compile a manual containing–

(a) the postal and street address, phone and fax number and, if available, electronic mail address of the head of the body;

(b) a description of the guide referred to in section 10, if available, and how to obtain access to it;

(c) the latest notice in terms of section 52(2), if any, regarding the categories of record of the body which are available without a person having to request access in terms of this Act;

(d) a description of the records of the body which are available in accordance with any other legislation;

(e) sufficient detail to facilitate a request for access to a record of the body, a description of the subjects on which the body holds records and the categories of records held on each subject; and

(f) such other information as may be prescribed.

(2) The head of a private body must on a regular basis update the manual referred to in subsection (1).
(3) Each manual must be made available as prescribed.
(4) For security, administrative or financial reasons, the Minister may, on request or of his or her own accord, by notice in the *Gazette*, exempt any private body or category of private bodies from any provision of this section for such period as the Minister thinks fit.

Voluntary disclosure and automatic availability of certain records

52. (1) The head of a private body may, on a voluntary and periodic basis, submit to the Minister a description of–
(a) the categories of records of the private body that are automatically available without a person having to request access in terms of this Act, including such categories available–
(i) for inspection in terms of legislation other than this Act;
(ii) for purchase or copying from the private body;
(iii) from the private body free of charge; and
(b) how to obtain access to such records.
(2) If appropriate the Minister must, on a periodic basis and by notice in the *Gazette*–
(a) publish any description so submitted; and
(b) update any description so published.
(3) The only fee payable (if any) for access to a record described in a list so published is a prescribed fee for reproduction.
(4) The head of a private body may delete any part of a record contemplated in subsection (1)*(a)* which, on a request for access, may or must be refused in terms of Chapter 4 of this Part.
(5) Section 50 and any other provisions in this Act related to that section do not apply to any category of records included in a notice in terms of subsection (2).

CHAPTER 3
MANNER OF ACCESS

Form of request

53. (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;
(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.

Fees

54. (1) The head of a private body to whom a request for access is made must by notice require the requester, other than a personal requester, to pay the prescribed request fee (if any), before further processing the request.
(2) If–
(a) the search for a record of a private body in respect of which a request for access by a requester, other than a personal requester, has been made; and
(b) the preparation of the record for disclosure (including any arrangements contemplated in section 29(2)*(a)* and *(b)*(i) and (ii)*(aa)*),
would, in the opinion of the head of the private body concerned, require more than the hours prescribed for this purpose for requesters, the head must by notice require the requester, other than a personal requester, to pay as a deposit the prescribed portion (being not more than one third) of the access

fee which would be payable if the request is granted.

(3) The notice referred to in subsection (1) or (2) must state–

(a) the amount of the deposit payable in terms of subsection (2), if applicable;

(b) that the requester may lodge an application with a court against the tender or payment of the request fee in terms of subsection (1), or the tender or payment of a deposit in terms of subsection (2), as the case may be; and

(c) the procedure (including the period) for lodging the application.

(4) If a deposit has been paid in respect of a request for access which is refused, the head of the private body concerned must repay the deposit to the requester.

(5) The head of a private body may withhold a record until the requester concerned has paid the applicable fees (if any).

(6) A requester whose request for access to a record of a private body has been granted must pay an access fee for reproduction and for search and preparation contemplated in subsection (7)*(a)* and *(b)*, respectively, for any time reasonably required in excess of the prescribed hours to search for and prepare (including making any arrangements contemplated in section 29(2)*(a)* and *(b)*(i) and (ii)*(aa)*) the record for disclosure.

(7) Access fees prescribed for the purposes of subsection (6) must provide for a reasonable access fee for–

(a) the cost of making a copy of a record, or of a transcription of the content of a record, as contemplated in section 29(2)*(a)* and *(b)*(i), (ii)*(bb)*, (iii) and (v) and, if applicable, the postal fee; and

(b) the time reasonably required to search for the record and prepare (including making any arrangements contemplated in section 29(2)*(a)* and *(b)*(i) and (ii)*(aa)*) the record for disclosure to the requester.

(8) The Minister may, by notice in the *Gazette*–

(a) exempt any person or category of persons from paying any fee referred to in this section;

(b) determine that any fee referred to in this section is not to exceed a certain maximum amount;

(c) determine the manner in which any fee referred to in this section is to be calculated;

(d) determine that any fee referred to in this section does not apply to a category of records;

(e) exempt any person or record or category of persons or records for a stipulated period from any fee referred to in subsection (6); and

(f) determine that where the cost of collecting any fee referred to in this section exceeds the amount charged, such fee does not apply.

Records that cannot be found or do not exist

55. (1) If–

(a) all reasonable steps have been taken to find a record requested; and

(b) there are reasonable grounds for believing that the record–

(i) is in the private body's possession but cannot be found; or

(ii) does not exist,

the head of a private body must, by way of affidavit or affirmation, notify the requester that it is not possible to give access to that record.

(2) The affidavit or affirmation referred to in subsection (1) must give a full account of all steps taken to find the record in question or to determine whether the record exists, as the case may be, including all communications with every person who conducted the search on behalf of the head.

(3) For the purposes of this Act, the notice in terms of subsection (1) is to be regarded as a decision to refuse a request for access to the record concerned.

(4) If, after notice is given in terms of subsection (1), the record in question is found, the requester concerned must be given access to the record unless access is refused on a ground for refusal contemplated in Chapter 4 of this Part.

Decision on request and notice thereof

56. (1) Subject to Chapter 5 of this Part, the head of the private body to whom the request is made must, as soon as reasonably possible, but in any event within 30 days, after the request has been received or after the particulars required in terms of section 53(2) have been received–

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

(b) notify the requester of the decision and, if the requester stated, as contemplated in section 53(2)*(e)*, that he or she wishes to be informed of the decision in any other manner, inform him or her in that manner if it is reasonably possible.

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

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

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

(c) that the requester may lodge an application with a court against the access fee to be paid or the form of access granted, and the procedure for lodging the application.

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

(a) state adequate reasons for the refusal, including the provisions of this Act relied on;

(b) exclude, from any such reasons, any reference to the content of the record; and

(c) state that the requester may lodge an application with a court against the refusal of the request, and the procedure (including the period) for lodging the application.

Extension of period to deal with request

57. (1) The head of a private body to whom a request for access has been made, may extend the period of 30 days referred to in section 56(1) (in this section referred to as the ''original period'') once for a further period of not more than 30 days, if–

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

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

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

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

(e) the requester consents in writing to such extension.

(2) If a period is extended in terms of subsection (1), the head of the private body must, as soon as reasonably possible, but in any event within 30 days, after the request is received, notify the requester of that extension, the period of the extension and the reasons for the extension.

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

(a) the period of the extension;

(b) adequate reasons for the extension, including the provisions of this Act relied upon; and

(c) that the requester may lodge an application with a court against the extension, and the procedure (including the period) for lodging the application.

Deemed refusal of request

58. If the head of a private body fails to give the decision on a request for access to the requester concerned within the period contemplated in section 56(1), the head of the private body is, for the purposes of this Act, regarded as having refused the request.

Severability

59. (1) If a request for access is made to a record of a private body containing information which may or must be refused in terms of any provision of Chapter 4 of this Part, every part of the record which–

(a) does not contain; and

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

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

(2) If a request for access to–

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

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

as contemplated in subsection (1), the provisions of section 56(2) apply to paragraph *(a)* of this section and the provisions of section 56(3) to paragraph *(b)* of this section.

Form of access

60. If access is granted to a record of a private

body, the head of that body must, as soon as reasonably possible after notification in terms of section 56, but subject to section 57, give access in–

(a) such form as the requester reasonably requires; or

(b) if no specific form of access is required by the requester, such form as the head reasonably determines.

Access to health or other records

61. (1) If the head of a private body who grants, in terms of section 50, a request for access to a record provided by a health practitioner in his or her capacity as such about the physical or mental health, or well-being–

(a) of the requester; or

(b) if the request has been made on behalf of the person to whom the record relates, of that person,

(in this section, the requester and person referred to paragraphs (a) and (b), respectively, are referred to as the ''relevant person''), is of the opinion that the disclosure of the record to the relevant person might cause serious harm to his or her physical or mental health, or well-being, the information officer may, before giving access in terms of section 60, consult with a health practitioner who, subject to subsection (2), has been nominated by the relevant person.

(2) If the relevant person is–

(a) under the age of 16 years, a person having parental responsibilities for the relevant person must make the nomination contemplated in subsection (1); or

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

(3)*(a)* If, after being given access to the record concerned, the health practitioner consulted in terms of subsection (1) is of the opinion that the disclosure of the record to the relevant person, would be likely to cause serious harm to his or her physical or mental health, or well-being, the head may only give access to the record if the requester proves to the satisfaction of the head that adequate provision is made for such counselling or arrangements as are reasonably practicable before, during or after the disclosure of the record to limit, alleviate or avoid such harm to the relevant person.

(b) Before access to the record is so given to the requester, the person responsible for such counselling or arrangements must be given access to the record.

CHAPTER 4
GROUNDS FOR REFUSAL OF ACCESS TO RECORDS

Interpretation

62. A provision of this Chapter in terms of which a request for access to a record must or may or may not be refused, must not be construed as–

(a) limited in its application in any way by any other provision of this Chapter in terms of which a request for access to a record must or may or may not be refused; and

(b) not applying to a particular record by reason that another provision of this Chapter in terms of which a request for access to a record must or may or may not be refused, also applies to that record.

Mandatory protection of privacy of third party who is natural person

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

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

(a) about an individual who has consented in terms of section 72 or otherwise in writing to its disclosure to the requester concerned;

(b) already publicly available;

(c) that was given to the private body by the individual to whom it relates and the individual was informed by or on behalf of the private body, before it is given, that the information belongs to a class of information that would or might be made available to the public;

(d) about an individual's physical or mental health, or well-being, who is under the care of the requester and who is–

(i) under the age of 18 years; or

(ii) incapable of understanding the nature

of the request, and if giving access would be in the individual's best interests;

(e) about an individual who is deceased and the requester is–

(i) the individual's next of kin; or

(ii) making the request with the written consent of the individual's next of kin; or

(f) about an individual who is or was an official of a private body and which relates to the position or functions of the individual, including, but not limited to–

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

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

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

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

Mandatory protection of commercial information of third party

64. (1) Subject to subsection (2), the head of a private body must refuse a request for access to a record of the body if the record contains–

(a) trade secrets of a third party;

(b) financial, commercial, scientific or technical information, other than trade secrets, of a third party, the disclosure of which would be likely to cause harm to the commercial or financial interests of that third party; or

(c) information supplied in confidence by a third party, the disclosure of which could reasonably be expected–

(i) to put that third party at a disadvantage in contractual or other negotiations; or

(ii) to prejudice that third party in commercial competition.

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

(a) a third party who has consented in terms of section 72 or otherwise in writing to its disclosure to the requester concerned;

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

(3) For the purposes of subsection (2)*(b)*, the results of any product or environmental testing or other investigation do not include the results of preliminary testing or other investigation conducted for the purpose of developing methods of testing or other investigation.

Mandatory protection of certain confidential information of third party

65. The head of a private body must refuse a request for access to a record of the body if its disclosure would constitute an action for breach of a duty of confidence owed to a third party in terms of an agreement.

Mandatory protection of safety of individuals, and protection of property

66. The head of a private body–

(a) must refuse a request for access to a record of the body if its disclosure could reasonably be expected to endanger the life or physical safety of an individual; or

(b) may refuse a request for access to a record of the body if its disclosure would be likely to prejudice or impair–

(i) the security of–

(aa) a building, structure or system, including, but not limited to, a computer or communication system;

(bb) a means of transport; or

(cc) any other property; or

(ii) methods, systems, plans or procedures for the protection of–

(aa) an individual in accordance with a witness protection scheme;

(bb) the safety of the public, or any part of the public; or

(cc) the security of property contemplated in subparagraph (i)*(aa)*, *(bb)* or *(cc)*.

Mandatory protection of records privileged from production in legal proceedings

67. The head of a private body must refuse a request for access to a record of the body if the record is privileged from production in legal proceedings unless the person entitled to the privilege has waived the privilege.

Commercial information of private body

68. (1) Subject to subsection (2), the head of a private body may refuse a request for access

to a record of the body if the record–

(a) contains trade secrets of the private body;

(b) contains financial, commercial, scientific or technical information, other than trade secrets, of the private body, the disclosure of which would be likely to cause harm to the commercial or financial interests of the body;

(c) contains information, the disclosure of which could reasonably be expected–

(i) to put the private body at a disadvantage in contractual or other negotiations; or

(ii) to prejudice the body in commercial competition; or

(d) is a computer program, as defined in section 1(1) of the Copyright Act, 1978 (Act No. 98 of 1978), owned by the private body, except insofar as it is required to give access to a record to which access is granted in terms of this Act.

(2) A record may not be refused in terms of subsection (1) insofar as it consists of information about the results of any product or environmental testing or other investigation supplied by, carried out by or on behalf of the private body and its disclosure would reveal a serious public safety or environmental risk.

(3) For the purposes of subsection (2), the results of any product or environmental testing or other investigation do not include the results of preliminary testing or other investigation conducted for the purpose of developing methods of testing or other investigation.

Mandatory protection of research information of third party, and protection of research information of private body

69. (1) The head of a private body must refuse a request for access to a record of the body if the record contains information about research being or to be carried out by or on behalf of a third party, the disclosure of which would be likely to expose–

(a) the third party;

(b) a person that is or will be carrying out the research on behalf of the third party; or

(c) the subject matter of the research,

to serious disadvantage.

(2) The head of a private body may refuse a request for access to a record of the body if the record contains information about research being or to be carried out by or on behalf of the private body, the disclosure of which would be likely to expose–

(a) the private body;

(b) a person that is or will be carrying out the research on behalf of the private body; or

(c) the subject matter of the research,

to serious disadvantage.

Mandatory disclosure in public interest

70. Despite any other provision of this Chapter, the head of a private body must grant a request for access to a record of the body contemplated in section 63(1), 64(1), 65, 66*(a)* or *(b)*, 67, 68(1) or 69(1) or (2) 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) 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.

CHAPTER 5
THIRD PARTY NOTIFICATION AND INTERVENTION

Notice to third parties

71. (1) The head of a private body considering a request for access to a record that might be a record contemplated in section 63(1), 64(1), 65 or 69(1), must take all reasonable steps to inform a third party to whom or which the record relates of the request.

(2) The head must inform a third party in terms of subsection (1)–

(a) as soon as reasonably possible, but in any event within 21 days after that request is received; and

(b) by the fastest means reasonably possible.

(3) When informing a third party in terms of subsection (1), the head must–

(a) state that he or she is considering a request for access to a record that might be a record contemplated in section 63(1), 64(1), 65 or 69(1), as the case may be, and describe the content of the record;

(b) furnish the name of the requester;

(c) describe the provisions of section 63(1), 64(1), 65 or 69(1), as the case may be;
(d) in any case where the head believes that the provisions of section 70 might apply, describe those provisions, specify which of the circumstances referred to in section 70*(a)* in the opinion of the head might apply and state the reasons why he or she is of the opinion that section 70 might apply; and
(e) state that the third party may, within 21 days after the third party is informed–
(i) make written or oral representations to the head why the request for access should be refused; or
(ii) give written consent for the disclosure of the record to the requester.

(4) If a third party is informed orally of a request for access in terms of subsection (1), the head must give a written notice stating the matters referred to in subsection (3) to the third party.

Representations and consent by third parties

72. (1) A third party that is informed in terms of section 71(1) of a request for access, may, within 21 days after being so informed–
(a) make written or oral representations to the head concerned why the request should be refused; or
(b) give written consent for the disclosure of the record to the requester concerned.

(2) A third party that obtains knowledge about a request for access other than in terms of section 71(1) may–
(a) make written or oral representations to the head concerned why the request should be refused; or
(b) give written consent for the disclosure of the record to the requester concerned.

Decision on representations for refusal and notice thereof

73. (1) The head of a private body must, as soon as reasonably possible, but in any event within 30 days after every third party is informed as required by section 71–
(a) decide, after giving due regard to any representations made by a third party in terms of section 72, whether to grant the request for access; and
(b) notify the third party so informed and a third party not informed in terms of section 71, but that made representations in terms of section 72 or is located before the decision is taken, of the decision.

(2) If, after all reasonable steps have been taken as required by section 71, a third party is not informed of a request, any decision whether to grant the request for access must be made with due regard to the fact that the third party did not have the opportunity to make representations in terms of section 72 why the request should be refused.

(3) If the request is granted, the notice in terms of subsection (1)*(b)* must state–
(a) adequate reasons for granting the request, including the provisions of this Act relied upon to justify the granting;
(b) that the third party may lodge an application with a court against the decision of the head within 30 days after notice is given, and the procedure for lodging the application; and
(c) that the requester will be given access to the record after the expiry of the applicable period contemplated in paragraph *(b)*, unless an application with a court is lodged within that period.

(4) If the head of the private body decides in terms of subsection (1) to grant the request for access concerned, he or she must give the requester access to the record concerned after the expiry of 30 days after notice is given in terms of subsection (1)(b), unless an application with a court is lodged against the decision within that period.

PART 4
APPEALS AGAINST DECISIONS

CHAPTER 1
INTERNAL APPEALS AGAINST DECISIONS OF INFORMATION OFFICERS OF CERTAIN PUBLIC BODIES

Right of internal appeal to relevant authority

74. (1) A requester may lodge an internal appeal against a decision of the information officer of a public body referred to in paragraph *(a)* of the definition of ''public body'' in section 1–
(a) to refuse a request for access; or
(b) taken in terms of section 22, 26(1) or 29(3),

in relation to that requester with the relevant authority.

(2) A third party may lodge an internal appeal against a decision of the information officer of a public body referred to in paragraph *(a)* of the definition of ''public body'' in section 1 to grant a request for access.

Manner of internal appeal, and appeal fees

75. (1) An internal appeal–

(a) must be lodged in the prescribed form–

(i) within 60 days;

(ii) if notice to a third party is required by section 49(1)*(b)*, within 30 days after notice is given to the appellant of the decision appealed against or, if notice to the appellant is not required, after the decision was taken;

(b) must be delivered or sent to the information officer of the public body concerned at his or her address, fax number or electronic mail address;

(c) must identify the subject of the internal appeal and state the reasons for the internal appeal and may include any other relevant information known to the appellant;

(d) if, in addition to a written reply, the appellant wishes to be informed of the decision on the internal appeal in any other manner, must state that manner and provide the necessary particulars to be so informed;

(e) if applicable, must be accompanied by the prescribed appeal fee referred to in subsection (3); and

(f) must specify a postal address or fax number.

(2)*(a)* If an internal appeal is lodged after the expiry of the period referred to in subsection (1)*(a)*, the relevant authority must, upon good cause shown, allow the late lodging of the internal appeal.

(b) If that relevant authority disallows the late lodging of the internal appeal, he or she must give notice of that decision to the person that lodged the internal appeal.

(3)*(a)* A requester lodging an internal appeal against the refusal of his or her request for access must pay the prescribed appeal fee (if any).

(b) If the prescribed appeal fee is payable in respect of an internal appeal, the decision on the internal appeal may be deferred until the fee is paid.

(4) As soon as reasonably possible, but in any event within 10 working days after receipt of an internal appeal in accordance with subsection (1), the information officer of the public body concerned must submit to the relevant authority–

(a) the internal appeal together with his or her reasons for the decision concerned; and

(b) if the internal appeal is against the refusal or granting of a request for access, the name, postal address, phone and fax number and electronic mail address, whichever is available, of any third party that must be notified in terms of section 47(1) of the request.

Notice to and representations by other interested persons

76. (1) If a relevant authority is considering an internal appeal against the refusal of a request for access to a record contemplated in section 34(1), 35(1), 36(1), 37(1) or 43(1), the authority must inform the third party to whom or which the record relates of the internal appeal, unless all necessary steps to locate the third party have been unsuccessful.

(2) The relevant authority must inform a third party in terms of subsection (1)–

(a) as soon as reasonably possible, but in any event within 30 days after the receipt of the internal appeal; and

(b) by the fastest means reasonably possible.

(3) When informing a third party in terms of subsection (1), the relevant authority must–

(a) state that he or she is considering an internal appeal against the refusal of a request for access to a record contemplated in section 34(1), 35(1), 36(1), 37(1) or 43(1), as the case may be, and describe the content of the record and the provisions of section 34(1), 35(1), 36(1), 37(1) or 43(1), as the case may be;

(b) furnish the name of the appellant;

(c) in any case where that authority believes that the provisions of section 46 might apply, describe those provisions, specify which of the circumstances referred to in section 46*(a)* in the opinion of the head might apply and state the reasons why he or she is of the opinion that section 46 might apply; and

(d) state that the third party may, within 21

days after the third party is informed, make written representations to that authority why the request for access should not be granted.

(4) If a third party is informed orally of an internal appeal in terms of subsection (1), the relevant authority must, on request, give a written notice stating the matters referred to in subsection (3) to the third party.

(5) A third party that is informed of an internal appeal in terms of subsection (1), may within 21 days after the third party has been informed, make written representations to the relevant authority why the request for access should not be granted.

(6) A third party that obtains knowledge about an internal appeal other than in terms of subsection (1) may–

(a) make written or oral representations to the relevant authority why the request for access should be refused; or

(b) give written consent for the disclosure of the record to the requester concerned.

(7) If the relevant authority is considering an internal appeal against the granting of a request for access, the authority must give notice of the internal appeal to the requester concerned.

(8) The relevant authority must–

(a) notify the requester concerned in terms of subsection (7) as soon as reasonably possible, but in any event within 30 days after the receipt of the internal appeal; and

(b) state in that notice that the third party may within 21 days after notice is given, make written representations to that authority why that request should be granted.

(9) A requester to whom or which notice is given in terms of subsection (7) may within 21 days after that notice is given, make written representations to the relevant authority why the request for access should be granted.

Decision on internal appeal and notice thereof

77. (1) The decision on an internal appeal must be made with due regard to–

(a) the particulars stated in the internal appeal in terms of section 75(1)*(c)*;

(b) any reasons submitted by the information officer in terms of section 75(4)*(a)*;

(c) any representations made in terms of section 76(5), (6) or (9); and

(d) if a third party cannot be located as contemplated in section 76(1), the fact that the third party did not have the opportunity to make representations in terms of section 76(5) why the internal appeal should be dismissed.

(2) When deciding on the internal appeal the relevant authority may confirm the decision appealed against or substitute a new decision for it.

(3) The relevant authority must decide on the internal appeal–

(a) as soon as reasonably possible, but in any event within 30 days after the internal appeal is received by the information officer of the body;

(b) if a third party is informed in terms of section 76(1), as soon as reasonably possible, but in any event within 30 days; or

(c) if notice is given in terms of section 76(7)–

(i) within five working days after the requester concerned has made written representations in terms of section 76(9); or

(ii) in any other case within 30 days after notice is so given.

(4) The relevant authority must, immediately after the decision on an internal appeal–

(a) give notice of the decision to–

(i) the appellant;

(ii) every third party informed as required by section 76(1); and

(iii) the requester notified as required by section 76(7); and

(b) if reasonably possible, inform the appellant about the decision in any other manner stated in terms of section 75(1)*(d)*.

(5) The notice in terms of subsection (4)*(a)* must–

(a) state adequate reasons for the decision, including the provision of this Act relied upon;

(b) exclude, from such reasons, any reference to the content of the record;

(c) state that the appellant, third party or requester, as the case may be, may lodge an application with a court against the decision on internal appeal–

(i) within 60 days; or

(ii) if notice to a third party is required by subsection (4)(a)(ii), within 30 days,

after notice is given, and the procedure for lodging the application; and

(d) if the relevant authority decides on inter-

nal appeal to grant a request for access and notice to a third party–

(i) is not required by subsection (4)*(a)*(ii), that access to the record will forthwith be given; or

(ii) is so required, that access to the record will be given after the expiry of the applicable period for lodging an application with a court against the decision on internal appeal referred to in paragraph (c), unless that application is lodged before the end of that applicable period.

(6) If the relevant authority decides on internal appeal to grant a request for access and notice to a third party–

(a) is not required by subsection (4)*(a)*(ii), the information officer of the body must forthwith give the requester concerned access to the record concerned; or

(b) is so required, the information officer must, after the expiry of 30 days after the notice is given to every third party concerned, give the requester access to the record concerned, unless an application with a court is lodged against the decision on internal appeal before the end of the period contemplated in subsection (5)*(c)*(ii) for lodging that application.

(7) 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.

CHAPTER 2
APPLICATIONS TO COURT

Applications regarding decisions of information officers or relevant authorities of public bodies or heads of private bodies

78. (1) A requester or third party referred to in section 74 may only apply to a court for appropriate relief in terms of section 82 after that requester or third party has exhausted the internal appeal procedure against a decision of the information officer of a public body provided for in section 74.

(2) A requester–

(a) that has been unsuccessful in an internal appeal to the relevant authority of a public body;

(b) aggrieved by a decision of the relevant authority of a public body to disallow the late lodging of an internal appeal in terms of section 75(2);

(c) aggrieved by a decision of the information officer of a public body referred to in paragraph (b) of the definition of ''public body'' in section 1–

(i) to refuse a request for access; or

(ii) taken in terms of section 22, 26(1) or 29(3);

or

(d) aggrieved by a decision of the head of a private body–

(i) to refuse a request for access; or

(ii) taken in terms of section 54, 57(1) or 60,

may, by way of an application, within 30 days apply to a court for appropriate relief in terms of section 82.

(3) A third party–

(a) that has been unsuccessful in an internal appeal to the relevant authority of a public body;

(b) aggrieved by a decision of the information officer of a public body referred to in paragraph (b) of the definition of ''public body'' in section 1 to grant a request for access; or

(c) aggrieved by a decision of the head of a private body in relation to a request for access to a record of that body,

may, by way of an application, within 30 days apply to a court for appropriate relief in terms of section 82.

Procedure

79. (1) The Rules Board for Courts of Law, established by section 2 of the Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985), must within 12 months after the commencement of this section, make and implement rules of procedure for–

(a) a court in respect of applications in terms of section 78; and

(b) a court to receive representations *ex parte* referred to in section 80(3)*(a)*.

(2) Before the implementation of the rules of procedure in terms of subsection (1)*(a)*, an application in terms of section 78 may only be lodged with a High Court or another court of similar status.

(3) Any rule made in terms of subsection (1)

must, before publication in the *Gazette*, be approved by Parliament.

Disclosure of records to, and non-disclosure by, court

80. (1) Despite this Act and any other law, any court hearing an application, or an appeal against a decision on that application, may examine any record of a public or private body to which this Act applies, and no such record may be withheld from the court on any grounds.

(2) Any court contemplated in subsection (1) may not disclose to any person, including the parties to the proceedings concerned, other than the public or private body referred to in subsection (1)–

(a) any record of a public or private body which, on a request for access, may or must be refused in terms of this Act; or

(b) if the information officer of a public body, or the relevant authority of that body on internal appeal, in refusing to grant access to a record in terms of section 39(3) or 41(4), refuses to confirm or deny the existence or non-existence of the record, any information as to whether the record exists.

(3) Any court contemplated in subsection (1) may–

(a) receive representations *ex parte*;

(b) conduct hearings in camera; and

(c) prohibit the publication of such information in relation to the proceedings as the court determines, including information in relation to the parties to the proceedings and the contents of orders made by the court in the proceedings.

Proceedings are civil

81. (1) For the purposes of this Chapter proceedings on application in terms of section 78 are civil proceedings.

(2) The rules of evidence applicable in civil proceedings apply to proceedings on application in terms of section 78.

(3) 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.

Decision on application

82. 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.

PART 5
HUMAN RIGHTS COMMISSION

Additional functions of Human Rights Commission

83. (1) The Human Rights Commission must–

(a) compile and make available a guide on how to use this Act as contemplated in section 10; and

(b) submit reports to the National Assembly as contemplated in section 84.

(2) The Human Rights Commission must, to the extent that financial and other resources are available–

(a) develop and conduct educational programmes to advance the understanding of the public, in particular of disadvantaged communities, of this Act and of how to exercise the rights contemplated in this Act;

(b) encourage public and private bodies to participate in the development and conduct of programmes referred to in paragraph *(a)* and to undertake such programmes themselves; and

(c) promote timely and effective dissemination of accurate information by public bodies about their activities.

(3) The Human Rights Commission may–

(a) make recommendations for–

(i) the development, improvement, modernisation, reform or amendment of this Act or other legislation or common law having a bearing on access to information

held by public and private bodies, respectively; and

(ii) procedures in terms of which public and private bodies make information electronically available;

(b) monitor the implementation of this Act;

(c) if reasonably possible, on request, assist any person wishing to exercise a right contemplated in this Act;

(d) recommend to a public or private body that the body make such changes in the manner in which it administers this Act as the Commission considers advisable;

(e) train information officers of public bodies;

(f) consult with and receive reports from public and private bodies on the problems encountered in complying with this Act;

(g) obtain advice from, consult with, or receive and consider proposals or recommendations from, any public or private body, official of such a body or member of the public in connection with the Commission's functions in terms of this Act;

(h) for the purposes of section 84*(b)*(x), request the Public Protector to submit to the Commission information with respect to–

(i) the number of complaints lodged with the Public Protector in respect of a right conferred or duty imposed by this Act;

(ii) the nature and outcome of those complaints; and

(i) generally, inquire into any matter, including any legislation, the common law and any practice and procedure, connected with the objects of this Act.

(4) For the purpose of the annual report referred to in section 84 and if so requested by the Human Rights Commission, the head of a private body may furnish to that Commission information about requests for access to records of the body.

(5) If appropriate, and if financial and other resources are available, an official of a public body must afford the Human Rights Commission reasonable assistance for the effective performance of its functions in terms of this Act.

Report to National Assembly by Human Rights Commission

84. The Human Rights Commission must include in its annual report to the National Assembly referred to in section 181(5) of the Constitution–

(a) any recommendation in terms of section 83(3)*(a)*; and

(b) in relation to each public body, particulars of–

(i) the number of requests for access received;

(ii) the number of requests for access granted in full;

(iii) the number of requests for access granted in terms of section 46;

(iv) the number of requests for access refused in full and refused partially and the number of times each provision of this Act was relied on to refuse access in full or partially;

(v) the number of cases in which the periods stipulated in section 25(1) were extended in terms of section 26(1);

(vi) the number of internal appeals lodged with the relevant authority and the number of cases in which, as a result of an internal appeal, access was given to a record or a part thereof;

(vii) the number of internal appeals which were lodged on the ground that a request for access was regarded as having been refused in terms of section 27;

(viii) the number of applications made to every court and the outcome thereof and the number of decisions of every court appealed against and the outcome thereof;

(ix) the number of applications to every court which were lodged on the ground that an internal appeal was regarded as having been dismissed in terms of section 77(7);

(x) the number of complaints lodged with the Public Protector in respect of a right conferred or duty imposed by this Act and the nature and outcome thereof; and

(xi) such other matters as may be prescribed.

Expenditure of Human Rights Commission in terms of Act

85. Any expenditure in connection with the performance of the Human Rights Commission's functions in terms of this Act must be defrayed from moneys appropriated by Parliament to that Commission for that purpose.

PART 6
TRANSITIONAL PROVISIONS

Application of other legislation providing for access

86. (1) The Minister must, within 12 months after the commencement of section 6, introduce a Bill in Parliament proposing the amendment of–

(a) Part 1 of the Schedule to include the provisions of legislation which provide for or promote access to a record of a public body; and

(b) Part 2 of the Schedule to include the provisions of legislation which provide for or promote access to a record of a private body.

(2) Until the amendment of this Act contemplated in subsection (1) takes effect, any other legislation not referred to in the Schedule which provides for access to a record of a public body or a private body in a manner which, including, but not limited to, the payment of fees, is not materially more onerous than the manner in which access may be obtained in terms of Part 2 or 3 of this Act, respectively, access may be given in terms of that legislation.

Extended periods for dealing with requests during first two years

87. (1) For–

(a) 12 months from the date that Part 2 takes effect in respect of a public body, the reference to–

(i) 30 days in section 25(1) and any other reference to that period in other provisions of this Act;

(ii) 30 days in section 49(1) and any other reference to that period in other provisions of this Act,

must be construed as a reference to 90 days in respect of that public body; and

(b) 12 months following the 12 months referred to in paragraph (a), the reference to–

(i) 30 days in section 25(1) and any other reference to that period in other provisions of this Act;

(ii) 30 days in section 49(1) and any other reference to that period in other provisions of this Act,

must be construed as a reference to 60 days in respect of the public body concerned.

(2) The periods of 90 days and 60 days referred to in subsection (1)*(a)* and *(b)*, respectively, may not be extended in terms of section 26.

(3) Parliament must, after a period of 12 months, but within a period of 18 months, after the commencement of this section, review the operation of this section.

Correction of personal information

88. If no provision for the correction of personal information in a record of a public or private body exists, that public or private body must take reasonable steps to establish adequate and appropriate internal measures providing for such correction until legislation providing for such correction takes effect.

PART 7
GENERAL PROVISIONS

Liability

89. No person is criminally or civilly liable for anything done in good faith in the exercise or performance or purported exercise or performance of any power or duty in terms of this Act.

Offences

90. A person who with intent to deny a right of access in terms of this Act–

(a) destroys, damages or alters a record;

(b) conceals a record; or

(c) falsifies a record or makes a false record,

commits an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding two years.

Amendment of Public Protector Act 23 of 1994

91. Section 6 of the Public Protector Act, 1994 (Act No. 23 of 1994), is hereby amended–

(a) by the substitution in paragraph (c) of subsection (4) for the expression ''authority.'' of the expression ''authority; and''; and

(b) by the addition to subsection (4) of the following paragraph:

''*(d)* on his or her own initiative, on receipt of a complaint or on request relating to the operation or administration of the Promo-

tion of Access to Information Act, 2000, endeavour, in his or her sole discretion, to resolve any dispute by–

(i) mediation, conciliation or negotiation;

(ii) advising, where necessary, any complainant regarding appropriate remedies; or

(iii) any other means that may be expedient in the circumstances.

Regulations

92. (1) The Minister may, by notice in the *Gazette*, make regulations regarding–

(a) any matter which is required or permitted by this Act to be prescribed;

(b) any matter relating to the fees contemplated in sections 22 and 54;

(c) any notice required by this Act;

(d) uniform criteria to be applied by the information officer of a public body when deciding which categories of records are to be made available in terms of section 15; and

(e) any administrative or procedural matter necessary to give effect to the provisions of this Act.

(2) Any regulation in terms of subsection (1) must, before publication in the *Gazette*, be submitted to Parliament.

(3) Any regulation in terms of subsection (1) which–

(a) relates to fees; or

(b) may result in financial expenditure for the State,

must be made by the Minister acting in consultation with the Minister of Finance.

Short title and commencement

93. (1) This Act is the Promotion of Access to Information Act, 2000, and takes effect on a date determined by the President by proclamation in the *Gazette*.

(2) Different dates may be so determined in respect of–

(a) different provisions of this Act;

(b) different categories of public bodies, including, but not limited to, different public bodies contemplated in–

(i) paragraph *(a)*;

(ii) paragraph *(b)*(i); and

(iii) paragraph *(b)*(ii),

of the definition of ''public body'' in section 1; and

(c) different categories of private bodies.

SCHEDULE

Part 1

(Section 6(a))

Number and year of law	*Short title*	*Section*
Act 107 of 1998	National Environmental Management Act, 1998	Section 31(1)

Part 2

(Section 6(b))

Number and year of law	*Short title*	*Section*
Act 107 of 1998	National Environmental Management Act, 1998	Section 31(2)