



# The limitation of the discovery rules of Court against the right of access to information in South Africa

A LIMITAÇÃO DO DIREITO AO ACESSO À INFORMAÇÃO PELAS REGRAS DE PRÉ-JULGAMENTO (DISCOVERY) NA ÁFRICA DO SUL

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## Abstract

In South Africa, the Promotion of Access to Information Act 2 of 2000 (PAIA) gives effect to the right of access information in Section 32 of the South African Constitution (the Constitution). Section 7 of PAIA provides that PAIA does not apply to records required for criminal or civil proceedings after commencement of proceedings where access to that record is already provided for in any other law. Where records are obtained in contravention of Section 7, they are not admissible as evidence in criminal or civil proceedings. The aim of this paper is to determine whether the discovery rules of Court limit the constitutional right of everyone to access information. Consequently, the methodology employed in this paper involves a legal analysis namely: a limitations analysis utilising Section 36, the limitations clause of the Constitution. This paper further engages in case law analysis interpreting the exercise of the right of access to information before PAIA was passed and after PAIA was passed to highlight the anomaly of the application of Section 7. This paper argues that Section 7 unconstitutionally limits the ambit of the right of access to information and a direct constitutional challenge on this provision is necessary.

## Keywords

Access to information; PAIA; discovery rules; direct challenge; South Africa.

## Resumo

Na África do Sul, a Lei de Promoção da Acesso à Informação nº 2 (PAIA), de 2000, dá efetividade ao direito de acesso na Seção 32 da Constituição da África do Sul (a Constituição). A Seção 7 da PAIA prevê que esta lei não se aplica aos registros necessários para processos criminais ou civis após o início do processo, em que o acesso a esse registro já tenha sido previsto em outra lei. Quando os registros são obtidos por violação à Seção 7, não são admissíveis como prova em processos criminais ou civis. O objetivo deste trabalho é verificar se as regras estabelecidas pela corte para a fase de pré-julgamento (Discovery) limitam o direito constitucional de acesso à informação. A metodologia empregada neste artigo envolve uma análise jurídica, a saber: uma análise de limitações utilizando a Seção 36, a cláusula de limitação da Constituição. Este artigo apresenta ainda análises de jurisprudência que interpretam o exercício do direito de acesso à informação antes e depois da aprovação da PAIA, para destacar a anomalia da aplicação da Seção 7. Este artigo argumenta que a Seção 7 representa uma limitação inconstitucional do direito de acesso à informação, o que enseja um desafio no âmbito constitucional.

## Palavras-chave

Acesso à informação; Lei de Promoção do Acesso à Informação (PAIA); regras de pré-julgamento (Discovery); desafio direto; África do Sul.

## INTRODUCTION

This article discusses the South African law position regarding the limitation of the discovery rules of Court against the right of access to information. Section 32 of South Africa's Constitution recognises that "[e]veryone 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."<sup>1</sup> The Promotion of Access to Information Act 2 of 2000 (PAIA) was promulgated to give effect to the realisation of this right.

According to Section 7<sup>2</sup> of PAIA, it does not apply to records required for criminal or civil proceedings after commencement of proceedings where access to that record is already provided for in any other law.<sup>3</sup> Where records are obtained in contravention of this exception to PAIA, they are not admissible as evidence in criminal or civil proceedings except where the Court determines such exclusions will be detrimental to the interests of justice.<sup>4</sup>

The reason for this exemption is to allow the law of evidence and civil procedure to apply to criminal and civil proceedings. In civil litigation, part of the process after close of pleadings is to request documents for discovery. From the various cases that are discussed extensively in this article, some Courts have suggested that PAIA was never meant to be invoked as a replacement to the discovery procedure.

While the jurisprudence from the Courts have ultimately found that the Uniform Rules of Court is an exception to the scope of PAIA, a minority judgment of the Supreme Court of Appeals (SCA) in the *Unitas v Van Wyk* (*Unitas*) case has suggested that the distinction on when PAIA or the Uniform rules of Court should apply, which are not that clear.<sup>5</sup>

The aim of this paper is to determine whether Section 7 limits the ambit of the constitutional right of everyone to access information. The ambit of this right has been expanded and protected in several cases including where the contents of the record requested would be decisive in determining whether the requester has a cause of action; to identify the right defendant for litigious action; and where the requester shows that there would be a significant

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<sup>1</sup> Section 32 (1) (a)-(b) of the Constitution, 1996.

<sup>2</sup> "(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."

<sup>3</sup> Section 7 (1)(a)-(c) of Promotion of Access to Information Act 2 of 2000.

<sup>4</sup> Section 7 (2) of Promotion of Access to Information Act 2 of 2000.

<sup>5</sup> *Unitas Hospital v Van Wyk and Another* 2006 (4) SA 436 (SCA) at 436.

risk of prejudice or harm should there be no disclosure of the information.<sup>6</sup> The cases decided under the interim Constitution and prior to the passage of PAIA support the position that the right of access to information should not be limited by the application of “other” law such as the discovery rules of Court as Section 7 prescribes, which will be discussed in detail in this article.

In this paper, we will trace the historical source of the Section 7 exemption in PAIA and contextualise the purpose of the exemption, which we assume is to safeguard the integrity of judicial processes. Secondly, we will critically analyse the case law that have dealt with the Section 7 exemption and attempt to identify the irreconcilable differences between these set of case law and other PAIA cases that have upheld access to records where Section 7 exception could legitimately apply. We will conclude this article by determining whether civil procedure remedies such as the discovery rules of Court and the Section 7 exemption in PAIA can co-exist and be applied without a limitation on the constitutional right of access to information.

## I SECTION 7 OF PAIA AND ITS HISTORICAL CONTEXT

An objective of the South African Constitution is the aspiration for a democratic and open society.<sup>7</sup> This requires public participation in State affairs and for such meaningful participation to occur, the right of access to information is central in enabling the public to hold government accountable.

The constitutional legislation that gave effect to Section 32 is PAIA and seeks to promote a culture of transparency and accountability in the public and private sectors.<sup>8</sup> Section 32 offers a very advanced formulation of the protection of the right of access to information because firstly, it extends the right not only to citizens but to everyone, a crucial difference in the other rights of access to information in other constitutions globally.<sup>9</sup> Secondly, it extends the right to non-state actors, private bodies provided that the information requested from another person is required for the exercise or protection of other rights.

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<sup>6</sup> *Keylite Chemicals v Harmony Gold Mining Company Limited* 2007 ZAGPHC 258; *Pienaar v Jordaan* 2006 ZAGPHC 173; *Unitas Hospital v Van Wyk and Another* 2006 SA (SCA) 436.

<sup>7</sup> Preamble, Constitution, 1996.

<sup>8</sup> Section 9 (e) of Promotion of Access to Information Act 2 of 2000. See also: FLORINI, A. Introduction: The Battle Over Transparency. In: \_\_\_\_\_. (Ed.) *The right to know transparency for an open world*. New York: Columbia University Press, 2007. See also: ADELEKE, F. The Case for Corporate Transparency in Africa. Conference paper. Available at: <[https://spaa.newark.rutgers.edu/sites/default/files/files/Transparency\\_Research\\_Conference/Papers/Adeleke\\_Fola.pdf](https://spaa.newark.rutgers.edu/sites/default/files/files/Transparency_Research_Conference/Papers/Adeleke_Fola.pdf)>, and SAHA. PAIA unpacked, 2013.

<sup>9</sup> Section 32, Constitution, 1996.

The body of case law that has dealt with the constitutional provision of the right of access to information has far reaching implications for transparency<sup>10</sup> in South Africa and the procedure of Courts. The application of the right in these cases articulates a potentially different legal and political paradigm from the one on which the foundation of a secretive pre-democratic South Africa was built and to begin a new democratic dispensation founded on openness and accountability.<sup>11</sup> Consequently, it is necessary for us to explore the implication of these cases over the period of the existing of this right.

It does not appear that there are any comparable provisions to Section 7 in terms of other existing freedom of information laws across the world. In a detailed search across 99 laws relating to the right to access records under the freedom of information laws, there is no single provision that matches the exemption in Section 7.<sup>12</sup> It appears that Section 7 emerged as a direct response to the developments in jurisprudence during the period of the interim Constitution, which suggested that the exercise of the right of access to information could be utilised alongside traditional Court procedures governing discovery of documents. This will be seen from the jurisprudence prior to the passage of the 1996 Constitution and PAIA, which sort to accommodate a strong and inflexible sense within the judicial polity to protect the rigorous administration of South Africa's judicial processes.

## 2 CASE LAW BEFORE THE PASSAGE OF PAIA

Before PAIA was passed in 2000, there had been direct reliance on the provisions of Section 23 of the interim Constitution, which also recognised the right of access to information and subsequently, Section 32 of the 1996 Constitution. The cases that emerged prior to the passage of the PAIA provided that despite the right to discovery in terms of Court rule 35, an applicant could still seek relief in terms of Section 23 and later, Section 32. The cases discussed below were adaptable to the changing rule of law in South Africa and were accommodating enough to recognise the importance of not restricting the scope of the constitutional right to information because of the application of the discovery rules of Court.

In the case of *Khala v Minister of Safety and Security*<sup>13</sup> the Court held that it was appropriate to use Section 23 to obtain discovery of documents from the State. This was affirmed

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<sup>10</sup> Section 9 (e) of Promotion of Access to Information Act 2 of 2000.

<sup>11</sup> KLAAREN, J. Chapter eighteen: The right of Access to Information at Age ten. In: SOUTH AFRICAN HUMAN RIGHTS COMMISSION. *Reflections on democracy and human rights: a decade of the South African Constitution* (Act 108 of 1996). Johannesburg: 2006. p. 167-171. See also FLORINI, op. cit., p. 167-171.

<sup>12</sup> [www.freedominfo.org](http://www.freedominfo.org).

<sup>13</sup> 1994 (4) SA 218 (W).

in the case of *Phato v Attorney-General Eastern Cape*,<sup>14</sup> where the Court held that the constitutional right of access to information in the interim Constitution applied to both civil and criminal litigation. These decisions were supported in the case of *Van Niekerk v Pretoria City Council*<sup>15</sup> (*Van Niekerk*) that was litigated under the interim 1993 Constitution. In this case, the applicant needed information to decide whether to institute action against the Council and wanted access to a report relied on by the council, which exonerated the council from liability. The right of access to information under the interim Constitution had the condition that state information could only be released if required for the exercise or protection of rights. The Court in rejecting the argument that Section 23 of the interim Constitution did not apply where rules of discovery applied because this would constitute an inappropriate restriction for the exercise of Section 23. The Court held that

S[ection] 23 entails that public authorities are no longer permitted to “play possum” with members of the public where the rights of the latter are at stake. Discovery procedures and common-law claims of privilege do not entitle them to roll over and play dead when a right is at issue and a claim for information is consequently made.<sup>16</sup>

When the 1996 Constitution was adopted, it removed the condition that access to information from public bodies needed to be justified by showing it was required for the exercise or protection of a right. This condition now only applied to information requests from private bodies.

The *Swissborough Diamond Mines (Pty) Ltd and others v Government of the Republic of South Africa*<sup>17</sup> case was one of the first cases decided under Section 32 of the Constitution. The case dealt with the rules of discovery after the close of pleadings. The Court in this case held that “a litigant who engages the state as referred to in Section 32(1) has the right to utilise Section 32(1) and/or rule 35 in order to obtain access to documentation in the possession of the state.”<sup>18</sup> This suggested that both the constitutional right and Rule 35 were regarded by the Court as complementing each other.

The decision of the Courts through these line of cases did not hold for long when other Courts began to question the decisions in the cases above. The High Courts in *Alliance Cash*

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<sup>14</sup> 1995 (5) SA 799 (E).

<sup>15</sup> 1997 (3) SA 839 (T).

<sup>16</sup> *Van Niekerk v Pretoria City Council* 1997 (3) SA 839 (T) at paragraph 850A-C.

<sup>17</sup> 1999 (2) SA 279 (T).

<sup>18</sup> *Swissborough Diamond Mines (Pty) Ltd and others v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 282.



*& Carry (Pty) Ltd v Commissioner, South African Revenue Service*,<sup>19</sup> as well as *Inkatha Freedom Party v Truth and Reconciliation Commission*,<sup>20</sup> held that once litigation commences, the rules of Court strictly governed disclosure.

The Constitutional Court however delivered an important judgment in *Ingledew v Financial Services Board*<sup>21</sup> with regard to the right of access to information and its relationship with the rules of discovery of Courts. The applicant, Mr. Ingledew, had been sued by the Financial Services Board for insider trading.<sup>22</sup> In order to defend the suit, Mr. Ingledew asked for the production of the full record of the Board's investigation.<sup>23</sup> This request was refused and he consequently approached the High Court for an order compelling the Board to provide the requested records.<sup>24</sup> He was unsuccessful at the High Court and he subsequently approached the Constitutional Court for leave to appeal against the order of the High Court.<sup>25</sup>

The Court found that the central constitutional question raised is whether during the course of litigation, it is possible to obtain information directly under Section 32(1) (a) of the Constitution granting the right of access to information without challenging the constitutionality of Rule 35(14) of the Rules of Court.<sup>26</sup> The Court found it unnecessary to decide the constitutional question raised by the application. The Court held that

[...] while there is much to be said for the view that once litigation has commenced discovery should be regulated by the rules of court, such a view may give rise to certain anomalies. Under the wording of section 32(1)(a), the applicant would prima facie have been entitled to all the documents he now seeks until the day before summons were served on him.<sup>27</sup>

While the Court opted not to decide the issue, the Court raised an important point, which is particularly significant as we proceed in an historical analysis on the line of cases

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<sup>19</sup> 2002 (1) SA 789 (TPD).

<sup>20</sup> 2000 (5) BCLR 534 (C).

<sup>21</sup> 2003 (4) SA 584 (CC).

<sup>22</sup> *Ingledew v Financial Services Board* 2003 (4) SA 584 (CC) at paragraph 2.

<sup>23</sup> *Ingledew v Financial Services Board* 2003 (4) SA 584 (CC) at paragraph 4.

<sup>24</sup> *Ingledew v Financial Services Board* 2003 (4) SA 584 (CC) at paragraph 4.

<sup>25</sup> *Ingledew v Financial Services Board* 2003 (4) SA 584 (CC) at paragraph 7.

<sup>26</sup> *Ingledew v Financial Services Board* 2003 (4) SA 584 (CC) at paragraph 15.

<sup>27</sup> *Ingledew v Financial Services Board* 2003 (4) SA 584 (CC) at paragraph 29.

relating to this issue. At the heart of the Court's obiter statement is the restriction that the application of Rule 35 places on the exercise of the right of access to information.

While Section 32 of the Constitution guarantees an unfettered right to access information subject to the legislative exemptions in PAIA, Rule 35 (14) of the discovery rules of Court provide for a qualified right. According to the Court,

[...] there is no reasonable construction of the rule that could broaden such purpose to accommodate construction of it, contended for by the applicant. Accordingly, the subrule grants a right to information that is narrower, to that extent, than the right in section 32 (1) (a).<sup>28</sup>

The statement by the Court here raises the point about the potential unconstitutionality of Section 7 because it refers to the application of rules of disclosure that are significantly narrower than the constitutional right of access to information. However, the Court did not grant the leave to appeal because it concluded that the applicant would not suffer any prejudice. In reaching this conclusion, the Court relied on the specific context of the case that: "(a) the applicant will be able to plead even if he did not get the information required; and (b) the applicant can utilize the pre-trial discovery procedures to obtain this information later."<sup>29</sup>

The introduction of Section 7 of PAIA was potentially a legislative attempt to remedy the anomaly pointed out by the Constitutional Court. However, Section 7 effectively interrupts the exercise of the right of access to information for a time period and affects not only the litigants in a case, but also other requesters of information interested in the record applicable to ongoing litigation. The significance of this potentially unconstitutional limitation is discussed through the lens of the Courts in the post PAIA era.

### 3 THE POST PAIA ERA

Section 7 of PAIA prohibits (a) access to a record sought for the purpose of criminal or civil proceedings; (b) requested after the commencement of such proceedings; and (c) where the production or access to that record is provided for in any other law.

In *MEC for Roads & Public Works, Eastern Cape & Another v Intertrade (Pty) Ltd*,<sup>30</sup> Intertrade, had approached the Court in terms of uniform Rule 53 to review the tender process of the

28 *Ingledew v Financial Services Board* 2003 (4) SA 584 (CC) at paragraph 29.

29 *Ingledew v Financial Services Board* 2003 (4) SA 584 (CC) at paragraph 15.

30 2006 (5) SA 1 (SCA).

Department of Public Works on the grounds of irregular conduct. Intertrade also sought the release of records relating to the tender process which were not covered by Rule 53.<sup>31</sup> The Department argued that the exemption in s 7(1) of PAIA applied. The Court held that

The discovery procedure is, even when interpreted purposively by its nature an extraordinary procedure in application proceedings, allowed only in exceptional circumstances, and does not create an unqualified obligation for a party from whom discovery is sought to produce the documents. The appellants could possibly resist discovery successfully, for example on grounds of privilege or relevance. If some of the documents sought by Intertrade cannot be obtained in terms of rules 53 and 35, this would mean that without resorting to PAIA, Intertrade would not be able to gain access to such documents. In my view, that may effectively place such documents outside the ambit of s 7(1)(c).<sup>32</sup>

The Court declined to rule on whether civil procedure rules and PAIA could be applied at the same time in cases where the requested records do not fall under the civil procedure rules. The Court held that given the purpose of PAIA, which is “to make information held by the state (and private bodies) accessible to the public to promote accountability, [...] the civil procedure rules should be interpreted in such a way as to advance, and not reduce, the scope of an entrenched constitutional right.”<sup>33</sup>

The Supreme Court of Appeal (SCA) held that the provisions of Section 7(1) did not apply because Intertrade had requested the documents from the Department through two letters before it launched the application.<sup>34</sup> The SCA held it did not have a firm view on whether Intertrade could access the records through the Uniform Rule 35 discovery procedure as suggested by the Department and did not decide the issue because it had found Section 7 inapplicable.<sup>35</sup> In granting the request for documents, the Court criticised “technical” objections to disclosure of information.<sup>36</sup>

On a second occasion, the Court again avoided the opportunity to settle the law on the contemporaneous application of PAIA and the rules of Court and rather opted for a literal and

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31 *MEC for Roads & Public Works, Eastern Cape & Another v Intertrade (Pty) Ltd* 2006 (5) SA 1 (SCA) at paragraph 2.

32 *MEC for Roads & Public Works, Eastern Cape & Another v Intertrade (Pty) Ltd* 2006 (5) SA 1 (SCA) at paragraph 16.

33 *MEC for Roads & Public Works, Eastern Cape & Another v Intertrade (Pty) Ltd* 2006 (5) SA 1 (SCA) at paragraph 18.

34 *MEC for Roads & Public Works, Eastern Cape & Another v Intertrade (Pty) Ltd* 2006 (5) SA 1 (SCA) at paragraph 13.

35 *MEC for Roads & Public Works, Eastern Cape & Another v Intertrade (Pty) Ltd* 2006 (5) SA 1 (SCA) at paragraph 16.

36 *MEC for Roads & Public Works, Eastern Cape & Another v Intertrade (Pty) Ltd* 2006 (5) SA 1 (SCA) at paragraph 20.



strict interpretation of the law, a position keenly followed in subsequent Court judgments. But yet again, the Court all but recognised and confirmed the anomaly of Rule 35 and its restrictiveness in comparison to the constitutional right of access to information.

In *Industrial Development Corporation of South Africa Ltd v PFE International and others*<sup>37</sup> (PFE case), the respondents sought access to records from the appellant relating to a dispute over the purchase of shares. The Court stated that for the requirements of Section 7(1) to be met, all three requirements under Section 7 must be met to render PAIA inapplicable to a request for records.<sup>38</sup> These are for the requested record to be for civil/criminal proceedings, requested after the commencement of proceedings and for access to be provided under any other law. In this particular case, the question the Court had to deal with related to whether access to the requested record is provided for in any other law. The Court remarked in relation to the purpose of Section 7 of PAIA:

[...] the purpose of s 7 is to prevent PAIA from having any impact on the law relating to discovery or compulsion of evidence in civil and criminal proceedings. In the event that “the production of or access to” the record “is provided for in any other law” then the exemption takes effect.<sup>39</sup>

The Court endorsed the view in the case of *National Director of Public Prosecutions v King*,<sup>40</sup> where the Court held that the reference to “any other law,” in Section 7, include the rules of discovery, disclosure and privilege.<sup>41</sup> The Court in this case further held that

[...] PAIA is not intended to have any impact on the discovery procedure in civil cases. Once court proceedings between the parties have commenced, the rules of discovery take over. In that event, access to documents in possession of the litigating parties is governed by these rules. The provisions of PAIA no longer apply as between the parties.<sup>42</sup>

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<sup>37</sup> 2012 (2) SA 269 (SCA).

<sup>38</sup> *Industrial Development Corporation of South Africa Ltd v PFE International and others* 2012 (2) SA 269 (SCA) at paragraph 8.

<sup>39</sup> *Industrial Development Corporation of South Africa Ltd v PFE International and others* 2012 (2) SA 269 (SCA) at paragraph 9.

<sup>40</sup> [2010] 3 All SA 304 (SCA).

<sup>41</sup> *National Director of Public Prosecutions v King* [2010] 3 All SA 304 (SCA) at paragraph 39.

<sup>42</sup> *National Director of Public Prosecutions v King* [2010] 3 All SA 304 (SCA) at paragraph 39.

A similar position was also taken in the *Unitas* case, where it was held that “PAIA was not intended to have any impact on the discovery procedure in civil cases.”<sup>43</sup>

With this position settled, the Court in *PFE* case held further, referring to the anomaly that Section 7 creates,

[...] an applicant may be entitled to information the day before the commencement of proceedings but not the day thereafter, [this] must be seen as a necessary consequence of the intention, on the part of the Legislature, to protect the process of the court. Once proceedings are instituted then the parties should be governed by the applicable rules of court.<sup>44</sup>

The Court was reluctant to the idea of creating what it termed “a dual system of access to information in terms of both PAIA and the particular Court rules”<sup>45</sup> because of the potential in disrupting Court proceedings.

This was the clearest expression given by the Courts to what they perceived as the intention behind Section 7 and their desire to promote a unilateral body of law for the Courts to govern disclosures. While the disruption of Court proceedings is indeed a consideration that must be taken seriously by the Courts, this has been done through the suspension of the application of a constitutional right. This has led to the Courts preserving its own conservatism and rigidity above the protection of a human right.

The decision in the *PFE* case related to access to documents through a subpoena after the close of pleadings and based on allegations made in the plea. The High Court held that because a trial date had not been fixed, and the proceedings had not commenced, PAIA was applicable.<sup>46</sup> The SCA overturned this decision on the technical basis that the applicable rule for access to documents through a subpoena (Rule 38 (1)) could be used at any stage of the proceedings.<sup>47</sup> In an appeal against the decision of the SCA, the Constitutional Court upheld the decision of the SCA.

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<sup>43</sup> 2006 (4) SA 436 (SCA) at paragraph 19.

<sup>44</sup> *Industrial Development Corporation of South Africa Ltd v PFE International and others* 2012 (2) SA 269 (SCA) at paragraph 10.

<sup>45</sup> *Industrial Development Corporation of South Africa Ltd v PFE International and others* 2012 (2) SA 269 (SCA) at paragraph 15.

<sup>46</sup> *PFE International Inc. and others v Industrial Development Corporation of South Africa Ltd* 2011 (4) SA 24 (KZD) 24 at paragraph 26.

<sup>47</sup> *Industrial Development Corporation of South Africa Ltd v PFE International and others* 2012 (2) SA 269 (SCA) at paragraph 13.

The Constitutional Court suggested a restrictive interpretation of Section 7 given that the purpose of PAIA is to give effect to the right of access to information.<sup>48</sup> The Court confirmed that all three conditions in Section 7 must be met if the application of PAIA is to be denied. In this case, it held that the first two requirements that access to information was sought for the purpose of civil or criminal proceedings and secondly, the request had been made after the commencement of proceedings had been met.<sup>49</sup> However, the third requirement was the subject of dispute on whether access to the record was provided in another law.<sup>50</sup>

In making this determination, the Court emphasised the importance of Section 39, which requires an interpretation that promoted the spirit, purport, and objects of the Bill of Rights. The Court felt strongly that the dispute was not about the denial of the right of access to information because in applying a flexible interpretation, the Court held that the Court rules allowed the applicants to access the requested records.

We believe that if the Court went further and conducted an analysis in terms of Section 36 of the Constitution (the limitations clause) on the extent to which Section 7 justifiably limited the application of a constitutional right, the outcome of the Court may have been different. While the Court was quick to apply a flexible interpretation to Court rules in order to reach the conclusion that access to a record was possible, it failed to also apply the flexibility of interpretation that would have seen that the objectives of PAIA are sacrosanct, and a failure to uphold the objectives of PAIA meant an infringement on the constitutional right of access to information. The Court's decision to preserve judicial procedures, while noble, denies litigants a broader enjoyment of their constitutional rights.

The anomaly that Section 7 creates has significant implications beyond the effect on litigants. Section 7 creates the fragmentation of the application of PAIA due to the interruption of its application during Court proceedings. Section 7 also assumes that requests for information are made only by people who are involved in Court proceedings, and by implication, it disenfranchises other requesters of information who may have an interest in the same set of records that are the subject of Court proceedings. This is especially applicable to requests for access from public bodies where there is no requirement for a requester of information to give a reason why the information requested is needed. As a result, Section 7 gives an information holder the opportunity to infer and draw adverse conclusions on

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<sup>48</sup> *PFE International Inc. and others v Industrial Development Corporation of South Africa Ltd* 2013 (1) SA 1 (CC) at paragraph 18.

<sup>49</sup> *PFE International Inc. and others v Industrial Development Corporation of South Africa Ltd* 2013 (1) SA 1 (CC) at paragraph 22.

<sup>50</sup> *PFE International Inc. and others v Industrial Development Corporation of South Africa Ltd* 2013 (1) SA 1 (CC) at paragraph 22.

why a request for information has been made. This is an impermissible conduct under the exercise of the right of access to information because it goes against a fundamental principle of the right of access to information, which provides that requesters of information do not need to give a reason for a request from a public body.

Section 7 forces a disclosure of the reasons for a record to rebut and appeal a denial by a public body where the assertion is made that a record cannot be disclosed because Section 7 applies and the information must have been sought for the purpose of civil and criminal proceedings. For private bodies, while information requested can only be released if the requester has demonstrated that the information is necessary for the exercise or protection of a right, Section 7 actually offers an in-built justification for the condition to be met. A core constitutional right is the recognition of access to justice, which embodies a fair civil and criminal proceedings process. By seeking information for the purpose of civil or criminal proceedings, this goes to the heart of access to justice that satisfies the conditionality in Section 32. A few cases are instructive to highlight this argument.

In *Clutchco v Davis*<sup>51</sup> (*Clutchco* case), the appellant was a family company and the respondent owned 30 percent of the shares in the company. After a family fall out, the respondent tried to sell its shares but the true value of the shares could not be established. The respondent was furnished with the audited financial statements. He requested additional access to the company's accounting and invoice books. When the request was denied, the respondent submitted a formal request for the records in terms of PAIA. In dealing with the denial of the PAIA request which had been upheld by the high Court, the SCA held that a basis for the request had not been made.<sup>52</sup> It held further that "the mere whiff of impropriety was not enough" and, such a request could only be granted through a test of "substantial advantage or element of need" that is dependent on the facts.<sup>53</sup>

The test of substantial advantage or element of need has now become the test applied by the Courts in relation to whether the record of a private body can be released, namely, whether the request for a record from a private body is necessary for the exercise or protection of a right. In the *Unitas* case the applicant's husband had died while he was a patient at the hospital.<sup>54</sup> The applicant believed that her husband's death was caused as a result of the negligence of the hospital staff.<sup>55</sup> One of the doctors who cared for the applicant's husband

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<sup>51</sup> 2005 (3) SA 486 (SCA).

<sup>52</sup> *Clutchco v Davis* 2005 (3) SA 486 (SCA) at paragraph 18.

<sup>53</sup> *Clutchco v Davis* 2005 (3) SA 486 (SCA) at paragraph 17.

<sup>54</sup> *Unitas Hospital v Van Wyk and Another* 2006 (4) SA 436 (SCA) at paragraph 1.

<sup>55</sup> *Unitas Hospital v Van Wyk and Another* 2006 (4) SA 436 (SCA) at paragraph 1.

had written a report on the nursing conditions at the hospital.<sup>56</sup> This was done in his position as the director of the multi-intensive care unit and as chairperson of the hospital board.<sup>57</sup> The applicant wanted access to the report because she believed that the report could help her to establish negligence by the hospital staff.<sup>58</sup> The applicant approached the Court for an order directing the hospital to make the report available to her in terms of PAIA.<sup>59</sup>

The High Court held that PAIA afforded Ms van Wyk a right to pre-action discovery because “the report could possibly assist her in establishing the merits of her case, which would in turn enable her to decide whether she should embark on the risky venture of litigation at all.”<sup>60</sup> The High Court further held that access to these records could lead to the “avoidance of speculative litigation and early determination of disputes”<sup>61</sup> where the information requested could possibly be of assistance in establishing the merits of the case. The Court found this consistent with the “philosophical approach to dispute resolution in an open and democratic society.”<sup>62</sup>

On appeal to the SCA, the Court held that open and democratic societies would not encourage “fishing expeditions” which could well arise if PAIA is used to facilitate pre-action discovery as a general practice.<sup>63</sup> The Court held that the deference shown by Section 7 of PAIA is not without reason because

[...] documents are only discoverable if they are relevant to the litigation while relevance is determined by the issues on the pleadings. The deference shown to discovery rules is a clear indication ... that the legislature had no intention to allow prospective litigants to avoid these measures of control by compelling pre-action discovery under s 50 of PAIA as a matter of course.<sup>64</sup>

While the Court’s ruling applied to a private body, the SCA failed to appreciate that the revised right of access to information in the 1996 Constitution removed the condition to

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<sup>56</sup> *Unitas Hospital v Van Wyk and Another* 2006 (4) SA 436 (SCA) at paragraph 1.

<sup>57</sup> *Unitas Hospital v Van Wyk and Another* 2006 (4) SA 436 (SCA) at paragraph 1.

<sup>58</sup> *Unitas Hospital v Van Wyk and Another* 2006 (4) SA 436 (SCA) at paragraph 1.

<sup>59</sup> *Unitas Hospital v Van Wyk and Another* 2006 (4) SA 436 (SCA) at paragraph 1.

<sup>60</sup> *Unitas Hospital v Van Wyk and Another* 2006 (4) SA 436 (SCA) at paragraph 20.

<sup>61</sup> *Unitas Hospital v Van Wyk and Another* 2006 (4) SA 436 (SCA) at paragraph 20.

<sup>62</sup> *Unitas Hospital v Van Wyk and Another* 2006 (4) SA 436 (SCA) at paragraph 14.

<sup>63</sup> *Unitas Hospital v Van Wyk and Another* 2006 (4) SA 436 (SCA) at paragraph 21.

<sup>64</sup> *Unitas Hospital v Van Wyk and Another* 2006 (4) SA 436 (SCA) at paragraph 21.



provide reasons for a request in relation to public bodies that the interim Constitution had required. This revision in effect created a blanket and unfettered right of access to information subject only to the applicable grounds for refusals in PAIA. The broad construction of the right to access information from public bodies is an indication that there is in fact a constitutional right to “fishing expeditions” if a requester chooses to do so. The conditionality applies to private bodies, probably because not all private institutions conduct business that have a relevant public interest element that often applies to public bodies. However, the suggestion that a requester who is in a legal dispute with a private entity cannot access the document to determine the merits of their case because it is not in the public interest, which will be absurd.

While the *Unitas* case applies to a request made to a private body, the sole consideration that should have been relevant for the Court was whether the requester established that the information sought was required for the exercise or protection of a right. The majority of the SCA held that pre-action discovery under Section 50 of PAIA must remain the exception rather than the rule and “must only be available to a requester who has shown the ‘element of need’ or ‘substantial advantage’ of access to the requested information.”<sup>65</sup> This was where the Court’s inquiry should have stopped.

The Court distinguished the facts of this case from the *Van Niekerk* case that was decided under the pre-PAIA era by holding that while access to records may be permissible to identify the right defendant in a case, the same cannot extend to information which will assist a requester in evaluating “prospects of success against the only potential defendant” because that would mean a requester would always be entitled to full pre-action discovery.<sup>66</sup>

In a minority judgment of the Court, Judge Cameron stated that pre-discovery disclosure helps both parties to determine whether litigation should commence at all and “PAIA recognises the importance of post-commencement access procedures.” However, “its novel dimension lies in the fact that it creates pre-commencement access. We should not stifle this.”<sup>67</sup> The judge believed that such disclosure will count as an advantage or need in terms of fulfilling the conditionality for access to records from private bodies.<sup>68</sup> The judge stated further that PAIA does not offer untrammelled pre-action disclosure and would not arise to any fishing expeditions.<sup>69</sup>

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<sup>65</sup> *Unitas Hospital v Van Wyk and Another* 2006 (4) SA 436 (SCA) at paragraph 22.

<sup>66</sup> *Van Niekerk v Pretoria City Council* 1997 (3) SA 839 (T) at paragraph 31.

<sup>67</sup> *Van Niekerk v Pretoria City Council* 1997 (3) SA 839 (T) at paragraph 31.

<sup>68</sup> *Van Niekerk v Pretoria City Council* 1997 (3) SA 839 (T) at paragraph 47.

<sup>69</sup> *Van Niekerk v Pretoria City Council* 1997 (3) SA 839 (T) at paragraph 44.

The approach taken in the minority judgment is indeed one that takes a holistic interpretation to PAIA and recognises the importance of the objectives of PAIA and particularly, the fact that it gives effect to a constitutional right.

In *Mahaeane v AngloGold*<sup>70</sup> the appellants brought an application requesting information from a private body to formulate their claim and to request damages in terms of a class action suit. In dismissing the appeal, the majority held that all the records requested by the appellants can be disclosed during the discovery stage of the civil proceedings and consequently, “the records requested are not reasonably required to exercise the right of the appellants to claim damages from the respondent.”<sup>71</sup> The decision of the Court in this case was consistent with the principle established in the *UNITAS* case that PAIA should not be held as a tool or mechanism for pre-action discovery. According to the Court:

It is necessary to avoid the unwelcome spectre of applications under the PAIA being brought to obtain premature discovery. It seems to me that a rule of thumb which will avoid this is to enquire whether, in the context of future litigation to exercise the right relied on, the records requested are reasonably required to formulate a claim. This seems to me to have been the implicit test applied in *Unitas Hospital*. If needed to formulate a claim, it can be said that they are reasonably required under s 50(1) of the PAIA. As I have said, the appellants do not need the requested records to formulate their claim.<sup>72</sup>

In a dissent to the decision of the majority in the *Mahaeane* case, Mbatha AJA argued that the appellant’s attempt to secure a certification order for a class action did not constitute commencement of civil proceedings, hence the requirement for Section 7 of PAIA had not been satisfied.<sup>73</sup> The minority judgment went further to suggest that access to the requested records sought by the appellants would have enabled them to revise their pleadings or alternatively, opt out of the civil proceedings if the released records showed that the civil litigation was not worth pursuing.<sup>74</sup>

Given the dogged nature the Courts have sought to protect their right to write their rules on how Court proceedings should be governed. It will be useful to explore the balance between the independence of Court administration and its limitation on the right of

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<sup>70</sup> (85/2016) [2017] ZASCA 090 (07 June 2017).

<sup>71</sup> *Mahaeane v AngloGold* (85/2016) [2017] ZASCA 090 (07 June 2017) at paragraph 21.

<sup>72</sup> *Mahaeane v AngloGold* (85/2016) [2017] ZASCA 090 (07 June 2017) at paragraph 20.

<sup>73</sup> *Mahaeane v AngloGold* (85/2016) [2017] ZASCA 090 (07 June 2017) at paragraphs 64-66.

<sup>74</sup> *Mahaeane v AngloGold* (85/2016) [2017] ZASCA 090 (07 June 2017) at paragraphs 69-73.

access to information, through an analysis of the justifiability of the limitation in terms of Section 36 of the Constitution.

#### 4 A SECTION 36 INQUIRY

To determine whether Section 7 justifiably limits the right of access to information, various considerations come into play.

First, any limitation of a constitutional right must be subject to a law of general application that is also reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. PAIA is a law of general application which finds its origins in the Constitution and the Bill of Rights. As a result, it is ascertainable, sound in law and satisfies a legitimate expectation which is the realisation of a human right.

For a law to be reasonable and justifiable, it should not arbitrarily deprive a group or class of persons. Section 7 unquestionably does just that. Litigants are excluded from exercising their full right of access to information as a result of another substantive rule which significantly limits their ability to access information.

Is this limitation justifiable? A proportionality inquiry in terms of the Constitution helps to determine whether the limitation is for a “purpose that is reasonable and necessary in a democratic society, which involves a weighing up of competing values.”<sup>75</sup> The factors to be taken into account are systematically discussed below.<sup>76</sup>

##### 4.1 THE NATURE OF THE RIGHT

The right of access to information underpins the very foundations of the Constitution, with its preamble seeking to achieve an open and democratic society. The right of access to information is often regarded as a right that unlocks other constitutional rights. For socio-economic rights, access to information helps in the understanding of the availability and allocation of resources for the delivery of social goods. In the exercise of civil and political rights, the right of access to information also plays a significant role. In the Constitutional Court case of *My vote counts v The Speaker of the National Assembly and others*,<sup>77</sup> the applicant, an NGO, had argued that for the exercise of the right to vote, access to the sources of private funding of political parties was necessary. While the majority of the Court dismissed this application, there was recognition by the minority that the right to vote

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<sup>75</sup> I Currie & J de Waal, *The Bill of Rights handbook* (2008) at 163-188 Juta.

<sup>76</sup> I Currie & J de Waal, *The Bill of Rights handbook* (2008) at 163-188 Juta.

<sup>77</sup> [2015] ZACC 31.

requires casting an informed vote, and that right loses its value if it is based on insufficient information or misinformation.<sup>78</sup>

It is not only in the case of exercising the right to vote that the Courts have affirmed the centrality of the right of access to information. In the case of *Nova Property Group Holdings v Cobbett*,<sup>79</sup> a media company attempted to use Section 26 of the Companies Act 71 of 2008 to access the register of securities of some companies. Section 26 recognises the right of access to information to support the articulation of the right in Section 32 of the Constitution and PAIA. The Court in this case took an approach where other rules of access to information were rightly seen as complementing PAIA and not a substitution. According to the Court:

Journalists must be able to have speedy access to information such as the securities register [...] Interference with the ability to access information impedes the freedom of the press. The right to freedom of expression is not limited to the right to speak, but includes the right to receive information and ideas. Preventing the press from reporting fully and accurately, does not only violate the rights of the journalist, but it also violates the rights of all the people who rely on the media to provide them with “information and ideas”.<sup>80</sup>

Therefore, the value of the right of access to information is significant for a constitutional democracy which should not be subject to the limitation of an ill-conceived exemption within the enabling law.

#### 4.2 THE IMPORTANCE OF THE PURPOSE OF THE LIMITATION

One of the limitations of the rules of discovery is that it can only be used for litigation, and publication is not allowed.<sup>81</sup> The rule also applies to all third parties who receive the discovered documents though the Court and the party making discovery may authorise their dissemination, publication or distribution.<sup>82</sup>

78 *The Speaker of the National Assembly and Others* [2015] ZACC 31 at paragraphs 38-39.

79 *Nova Property Group Holdings Ltd and Others v Cobbett and another [ManG Centre for Investigative Journalism NPC as amicus curiae]* [2016] 3 All SA 32 (SCA).

80 *Nova Property Group Holdings Ltd and Others v Cobbett and another [ManG Centre for Investigative Journalism NPC as amicus curiae]* [2016] 3 All SA 32 (SCA) at paragraph 37.

81 *City of Cape Town v South African National Roads Authority Limited (Sanral) & others* (20786/14) [2015] ZASCA 58 at paragraph 37.

82 *City of Cape Town v South African National Roads Authority Limited (Sanral) & others* (20786/14) [2015] ZASCA 58 at paragraph 23.

The discovery of documents only happens after the pleadings have closed with the aim of allowing the parties to have access to all documentary materials to assess the strength of each other's case. If a party does not use a discovered document in Court, then the discovered documents do not form part of the Court's record. As a result, documents obtained through rules of discovery are not publicly accessible. As argued by Judge Ponnann in the *Sanral* case,

Discovery impinges upon the right to privacy of the party required to make discovery. The purpose of the rule [rule 53] therefore is to protect, insofar as may be consistent with the proper conduct of the action, the confidentiality of the disclosure [...] those considerations can hardly apply in respect of documents disclosed by a public body in rule 53 proceedings. And, as rule 53 will only ever apply to the disclosure of documents by public bodies, I entertain some doubt as to whether such body can invoke the right to privacy to protect from disclosure documents relied upon by it to make its decisions. That does not mean that public bodies never have a claim to keep their documents confidential. But any claim of confidentiality arises from other interests such as security or perhaps even the privacy rights of persons mentioned in the documents, but not from its right to privacy.<sup>83</sup>

The decision of the SCA in this case recognises the limitations of discovery rules for openness, hence, the admonition for the Court to exercise their powers of regulation in a manner consistent with the Constitution. As a result, the deference to Court rules over the right of access to information in the face of the limitations of the rules, significantly weakens the broad articulation of this right subject only to the grounds of refusals listed under PAIA.

The importance and purpose of the limitation of the right of access to information is safeguard established judicial processes that ensures fairness and equity for disputing parties. While this is worthy of protection, it should not be done by limiting the exercise of another constitutional right. Disputing parties should be able to access records that they would otherwise have been able to access had Section 7 not become applicable. To safeguard judicial processes when disputing parties exercise their right of access to information, the interests of justice should come into play and discussed further below.

#### 4.3 THE NATURE AND EXTENT OF THE LIMITATION

The rules of discovery seek to protect the administration of justice and ensure the procedural process of the Court vests within the inherent powers of the Court. The inherent power of

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<sup>83</sup> *City of Cape Town v South African National Roads Authority Limited (Sanral) & others* (20786/14) [2015] ZASCA 58 at paragraph 37.



the Court to regulate its own processes comes from Section 173 of the Constitution. In *SABC v NDPP*,<sup>84</sup> the Constitutional Court stated that Section 173

[...] is a key tool for Courts to ensure their own independence and impartiality [...] A primary purpose for the exercise of that power must be to ensure that proceedings before Courts are fair. It is therefore fitting that the only qualification on the exercise of that power contained in section 173 is that Courts in exercising this power must take into account the interests of justice in a manner consistent with the Constitution.<sup>85</sup>

Further analysis below suggests that the interests of justice have not taken into account the important broad constitutional right of access to information.

#### 4.4 THE RELATION BETWEEN THE LIMITATION AND ITS PURPOSE

Another rule of discovery is Rule 53, which came under scrutiny in *Sanral*.<sup>86</sup> In this case, *Sanral* is responsible for the maintenance and rehabilitation of national roads. In the execution of this mandate, South African National Roads Authority Limited (SANRAL) awarded a tender to a company in respect of the N1/N2 Winelands Paarl Highway Toll Project. The City of Cape Town wanted this award reviewed in terms of Rule 53 of the Uniform Rules of Court. A part of the record was released to the City of Cape Town, however, the “confidential records” were not released and became the cause of dispute between the City of Cape Town and SANRAL. The High Court prohibited the publication of all information from the Rule 53 record submitted to the Court which included the “non-confidential record.”<sup>87</sup> According to the High Court, “public access to the content of the Court file in litigious proceedings is permissible only after the matter has been called in open Court.”<sup>88</sup>

On appeal to the SCA for the documents submitted to be released, it was held that the “foundational constitutional values of accountability, responsiveness and openness apply to the functioning of the judiciary as much as to other branches of government.”<sup>89</sup> The SCA

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<sup>84</sup> 2007 (1) SA 523 (CC).

<sup>85</sup> *SABC v NDPP* 2007(1) SA 523 (CC).

<sup>86</sup> *City of Cape Town v South African National Roads Authority Limited (Sanral) & others* (20786/14) [2015] ZASCA 58.

<sup>87</sup> *City of Cape Town v South African National Roads Authority Limited (Sanral) & others* (20786/14) [2015] ZASCA 58 at paragraph 9.

<sup>88</sup> *City of Cape Town v South African National Roads Authority Limited (Sanral) & others* (20786/14) [2015] ZASCA 58 at paragraph 9.

<sup>89</sup> *City of Cape Town v South African National Roads Authority Limited (Sanral) & others* (20786/14) [2015] ZASCA 58 at paragraph 16.

stated that “the glare of public scrutiny makes it far less likely that the Courts will act unfairly” and as a result:

[...] it will be a dangerous thing for all litigants in both civil and criminal matters, for court documents, as a general rule to be inaccessible and unpublishable. For, it may be said that the right to public courts, which is one of long standing, does not belong only to the litigants in any given matter, but to the public at large.<sup>90</sup>

The Court considered the right of open justice to include the right to have access to papers and written arguments as element of participation in the Court proceedings.

Also, in the case of *Arcelormittal v Competition Commission and Others*<sup>91</sup> the Court dealt with a request for documentation in terms of Uniform Rule 35(12), where the Competition Commission alleged that the record was subject to confidentiality, and the matter was remitted to the Competition Tribunal to determine the confidentiality of the matter. The Court held that access to the documents was allowed in terms of the Uniform rules as the affidavit made reference to the document, which Arcelormittal was allowed to request.<sup>92</sup> This confirms the limited nature of rules of discovery which is subject to legal privilege and confidentiality.

Both cases point to the limited scope of access in Section 7. The purpose of Section 7 is to safeguard the independence of the administration of justice from interference. While Section 7 achieves that purpose, there are certainly less restrictive means to achieve the purpose.

#### 4.5 LESS RESTRICTIVE MEANS TO ACHIEVE THE PURPOSE

An effective way of achieving the purpose of Section 7 is to allow the right of access to information in cases where civil or criminal proceedings have commenced but introduce a ground of refusal where the request can be denied if the disclosed record will adversely affect the fair representation of another litigant in a civil or criminal proceeding. This ensures that the public and other litigants are able to exercise their right of access to information and the ground of refusal safeguards the interests of justice that the Courts are diligently aiming to protect.

## CONCLUSION

Several courts have recognised the anomaly of Section 7. Perhaps, the lack of a direct court challenge against the constitutionality of Section 7 of PAIA has led to the continued application

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<sup>90</sup> *City of Cape Town v South African National Roads Authority Limited (Sanral) & others* (20786/14) [2015] ZASCA 58 at paragraph 18.

<sup>91</sup> [2013] JOL 30105 (CAC).

<sup>92</sup> *Arcelormittal v Competition Commission and Others* [2013] JOL 30105 (CAC) at paragraphs 55-57.

of Section 7 though several cases that have been considered in this paper have illustrated the oddity of this provision. Section 7 attempts to protect a sound principle of law which is the independence and integrity of Court procedures and ensuring the interests of justice prevail. However, we have sought to show that the objective of Section 7 can be achieved through the introduction of a ground of refusal in PAIA that prevents interference with Court procedures and processes when the release of a record unduly advantages or disadvantages another litigant rather than a blanket exclusion of records in judicial processes from the operation of PAIA.

It remains to be seen whether the constitutionality of Section 7 will eventually become the subject of a legal challenge in the future. There are certainly several reasons as shown in this article to challenge the status quo.

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