



**MINISTRY OF POLICE
REPUBLIC OF SOUTH AFRICA**

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Reference number: 25/7/12/1(880)

Mr A Achmat
Ndifuna Ukwazi
Room 203 2nd floor
47 on Strand
CAPE TOWN
8000

2013 -12- 27

Dear Mr Achmat

**SECTION 74 OF THE ACCESS TO INFORMATION ACT, 2000 (ACT NO 2 OF 2000):
NOTICE OF INTERNAL APPEAL: MR A ACHMAT: DIRECTOR OF NDIFUNA
UKWAZI**

Your Notice of Internal Appeal, dated 13 September 2013, has reference to the matter.

After due consideration of the internal appeal against the decision of the Service to refuse access to the payment list or content and build specifications in the contract and addendums, I have decided to uphold the appeal in that I grant access to the tender prize list (not any invoices or payments that had occurred after the tender was awarded) and build specifications in the contract and addendums.

The reasons for the decision are as follows:

The Deputy Information Officer had received the request on 2013-06-03. On 2013-06-24 she notified the third party, Waymark, in terms of section 47 of the Promotion of Access to Information Act, 2000 (Act No 2 of 2000), (hereinafter referred to as the "Act"). The notification was done correctly and within the time period provided for in the Act. From 2013-06-03 till 2013-06-24 is 21 days. The Act provides that the information officer must inform a third party as soon as reasonably possible, but in any event, within 21 days after that request is received.

In terms of section 49 of the Act, the information officer must, as soon as reasonably possible, but in any event within 30 days after every third party is informed as required by section 47, notify the requester of the decision.

The deputy information officer informed the third party in terms of section 47 on 2013-06-24 and the decision on the request was provided to you on 2013-08-19, 26 days later than provided for in the Act (the decision on the request should have been provided by 2013-07-24). The reason for the late notification to you of the decision of the Service, was that Waymark requested an extension till 2013-07-31 to make a decision with regard to access to information relating to Waymark as a third party. Although the Act does not provide for an extension of the 21 days to the third party, it would have been unreasonable not to allow the third party this extra 16 days to make a decision whether access to you to the records relating to their commercial information may be provided or not. However, the deputy information officer should have informed you of the extra 16 days required by the third party and as allowed by the Service.

Section 48(1) of the Act provides as follows (own underlining):

“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.”

Section 49(1) of the Act provides as follows (own underlining):

“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;
- (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; and
- (c) notify the requester of the decision”

Waymark’s response as third party, which was used by the Service to refuse access to the payment list or content and build specifications in the contract and addendums, was as follows:

1. We suggest that you provide them with the letter of Award of SITA.
2. Allow them the contract and addendums but blackout/hide the payment list/content. Do not include Waymark build specifications.
3. Payments are fine but not the invoices. Invoices details Waymark confidential/competitive information.”

The Service notified, in terms of section 76 of the Act, Waymark on 2013-09-19 of the internal appeal and that Waymark may make written representations as to why the

request for access should be refused, or that they may give consent for such access. Waymark, in their representations to the internal appeal lodged, only stated as follows: *“As previously stated, providing information including Waymark build specifications as well as invoices will compromise Waymark competitive position. We are therefore unwilling to share this information.”*

A party relying on section 36(1)(b) (or section 36(1)(c) of the Act) must provide a basis to substantiate its reliance as stated in **President of the RSA and others v M & G Media Ltd 2012 (2) SA 50 (CC)**, (hereinafter referred to as the “**President-case**”), paragraph 15 [also reported at 2012 (2) BCLR 181 (CC)].

The Payment List and the Build Specifications formed part of Waymark’s tender response which was accepted by the Service (ie the Agreement). Waymark refused the disclosure of this information, on the basis that it contains **confidential/competitive** information. The words “compromise Waymark competitive position”, seem that Waymark relies on section 36(1)(b) and section 36(1)(c) of the Act or both and therefore the deputy information officer used section 36(1)(b) for such refusal. However, Waymark did not provide a basis to substantiate its reliance on any section of the Act (ie Waymark did not give detailed reasons for such refusal, or indicated how the disclosure would cause it harm).

Section 36(1)(b) and section 36(c) of the Act provide as follows:

“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.”*

Currie & Klaaren (paragraph 8.41 page 143 of Ian Currie & Jonathan Klaaren “The Resolve - KPMG Commentary on the Promotion of Access to Information Act (2002)”), stated the following regarding section 36(1)(c) of the Act with regard to the consequences to competitive position (own underlining):

“some examples of information disadvantaging a third party’s competitive position can be drawn from the foreign case law and used to illustrate the operation of the ground. It seems clear, for example, that bodies should not disclose information that would reveal the profit margin on a private company’s operations. Likewise, information that the supplier has invested effort or money to obtain should not be disclosed if this will allow a competitor to make use of the information for free. A list of customers may be protected from disclosure in certain circumstances (for example, when it spares competitors from

having to make the effort to search the market for customers themselves), but not necessarily in all cases (when the same information could easily be obtained by competitors by, for example, consulting a telephone directory)."

Currie & Klaaren further referred to **Wells v Canada (Minister of Transport) 1995 ACWSJ LEXIS 24060** (own underlining): "dealing with the 'minimum equipment list' — a technical document recording the ability of an aircraft to fly without certain equipment; airlines expended expertise and expense in developing this information and there would be an obvious financial advantage to a competitor if the record were published, for the competitor would gain all the advantages at no cost).

If the third party, Waymark does not substantiate its reliance on a specific section of the Act for their refusal to the "payment list/content and build specifications", the Service can clearly not explain, substantiate or provide the reasons on behalf of such third party for such reliance on such a section for such refusal.

Without an explanation or reasons provided by the third party, the Service is not in the position to decide whether certain information of the third party qualifies as "*expended expertise and expense in developing this information and there would be an obvious financial advantage to a competitor if the record were published, for the competitor would gain all the advantages at no cost*" or as "*information that the supplier has invested effort or money to obtain should not be disclosed if this will allow a competitor to make use of the information for free*".

Clause 12 of the Agreement concluded with Waymark, contains a confidentiality clause placing an obligation on the Service not to disclose confidential information.

Clause 12 of the Agreement reads as follows:

"12. CONFIDENTIALITY

- (1) For purposes of this Contract, Confidential Information means:
 - (a) the details of the Deliverables and System;
 - (b) price information of the Deliverables ;
 - (c) the terms and conditions of this Contract;
 - (d) information of material proprietary to or deemed to be proprietary to a Party;
 - (e) information designated as confidential by a party;
 - (f) information acquired by the other party solely by virtue of provision of the System; or
 - (g) trade secrets of a Party,
 and extends to all forms of storage or representation of the Confidential Information including, but not limited to, loose notes, diaries, memoranda, drawings, photographs, electronic storage and computer print-outs.
- (2) Confidential Information excludes any information, or any portion thereof, which, from the date from which any of the information becomes publicly available —

- (a) *is disclosed to any of the Parties by a third party and such party reasonably believes the third party is legally entitled to disclose such information;*
 - (b) *was known to any Party prior to its receipt from the other Party;*
 - (c) *is developed by any Party independently of any disclosures previously made by the other Party;*
 - (d) *is disclosed with any of the Parties' prior written consent; or*
 - (e) *is required to be disclosed by any of Party by order of the court, other legal process or other professional standard.*
- (3) *The Parties agree that Confidential Information disclosed by one Party to the other Party shall be used by the other Party solely in connection with the provision of the services and the supply of the System. The Parties shall prevent disclosure of Confidential Information, except as required by law.*
- (4) *The Parties shall carry out their obligations hereunder using the same degree of care used in protecting their own proprietary information, but always at least a reasonable degree of care. Provided that the Parties shall have met the foregoing standard of care, none of the Parties shall be liable or responsible for any inadvertent or accidental disclosure by the other Party of Confidential Information.*
- (5) *None of the Parties shall use the Confidential Information or data of the other Party without prior authorisation for any purpose other than the lawful carrying out of its obligations under this Contract."*

In the case of **Transnet Ltd and Another v SA Metal Machinery Co (Pty) Ltd 2006 (4) BCLR 473 (SCA)**, (hereinafter referred to as the "Transnet-case"), the Appellant, Transnet, invited tenders for the removal of waste from ships berthing in Table Bay Harbour. The contract was awarded to Inter Waste for a period of two years. The Respondent requested the Appellant to disclose the monetary rate which Inter Waste was charging for each item of the contract work. The Appellant refused to disclose the information and the Respondent obtained an order from the Cape High Court granting it access to the requested information. The Appellant appealed to the Supreme Court of Appeal against the order of the High Court.

The decision of the Cape High Court was upheld. The Supreme Court of Appeal held that the Appellant's reliance on Inter Waste to claim privacy and confidentiality was misplaced. Disclosure could not reasonably be expected to cause Inter Waste commercial harm nor would it breach a confidentiality clause to which tenders had been subject.

Once the contract had been awarded, Inter Waste's tender price and its composition could not be protected by the confidentiality clause. Accordingly, the appeal was dismissed.

In this case it was stated that:

“the Appellant, as an organ of the State was bound by a constitutional obligation to conduct its operations transparently and accountably. Once it entered into a commercial agreement of a public character, the imperative of transparency and accountability entitled members of the public to know what expenditure such an agreement entailed. The confidentiality clause could not protect the successful tenderer’s price from disclosure after the contract had been awarded.”

“Moreover, the agreement, in incorporating the tender documentation also incorporates the schedule of prices and quantities. The agreement is not Inter Waste’s document. It is a contract document to which the appellant, a public body, is a party. What applies to public entitlement to know the contract price applies equally, on the facts of this case, to the agreement itself. What is more the tender documentation included the agreement in draft. Inter Waste must have known in advance that its schedule of prices and quantities would, if it secured the contract, become part of the agreement and therefore exposed to public scrutiny. Accordingly even if “tender price” in the notice included the schedule the parties’ intention could never have been to maintain confidentiality in respect of the rates after the award. Parties cannot circumvent the terms of the Act by resorting to a confidentiality clause.”

The **Supreme Court of Appeal in BHP Billiton PLC Incorporated and another v De Lange and others [2013] 2 All SA 523 (SCA)**, (hereinafter referred to as the “**Billiton-case**”), in paragraph [29] judge Mthiyane stated as follows (own underlining):

“As to whether the information is protected from disclosure under section 36(1)(c), it is my view that the stance adopted by Billiton is without merit. The information requested by Media 24 is not “information supplied in confidence” as the section requires. Billiton concluded an agreement with the State entity and the specific information sought constitutes a term in an agreement with the State entity. It is significant that Billiton makes no effort in its heads of argument to explain how section 36(1)(c) is applicable.”

As the **Billiton-case** confirmed the **Transnet-case**, the **Billiton-case** should be followed. In the **Billiton-case** under the list of cases used for the judgment, it is stated, with regard to the **Transnet-case**, that (own underlining):

*“**Transnet Ltd & another v SA Metal Machinery Co (Pty) Ltd 2006 (6) SA 285 (SCA) – Approved**”*

You rely on section 46 of the Act as one of your grounds for the appeal. Section 46 of the Act, deals with the “Mandatory disclosure in public interest” and only finds application after it has been decided that a record may legitimately be withheld.

Section 46 of the Act, provides as follows (own underlining):

“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."*

In the case of **Qoboshiyane NO and others v Avusa Publishing Eastern Cape (Pty) Limited and others [2013] JOL 30408 (SCA)**, (hereinafter referred to as the "**Qoboshiyane-case**"), the issue of mandatory disclosure in the public interest was considered and it was stated in this case as follows (own underlining):

"The final stage in an information officer's consideration of a request for access to a record, if circumstances exist that would otherwise justify refusing access, must be to consider whether nonetheless the record must be disclosed under section 46. The section provides that the information officer is obliged to disclose the record where two conditions are met. The first is that disclosure of the record would reveal evidence of a substantial contravention of, or failure to comply with, the law. The MEC accepted that this condition was met. The second condition is that the public interest in the disclosure clearly outweighs the harm contemplated in the provision under which the record could otherwise be withheld. The section applies where the record could otherwise legitimately be withheld for one of the reasons set out in PAIA and, as the heading makes clear, disclosure is mandatory where the conditions set out in the section are satisfied. If the information officer does not provide access the Court will order him or her to do so."

In the matter at hand, following the Auditor-General queries and subsequent report, the Service employed the services of Senior Counsel (Adv MC Erasmus) to provide a legal opinion on the following:

- Whether the Agreement concluded between Waymark and the Service has terminated.
- If indeed, whether the Service may enter into a further Agreement with Waymark without having to commence a new bid process.
- Could the Service have entered into the Addendums with Waymark relating to the FCS and the FPS, and whether the expenditure incurred by the Service in excess of the amount of R 92 849 822,00 constitutes irregular expenditure as contemplated in the Public Finance Management Act.

Senior Counsel subsequently concluded (4 October 2013 and 20 October 2013) that:

- With reference to the question as to whether the Agreement concluded between Waymark and the Service has terminated, Counsel advised that the Agreement with Waymark has not terminated, either due to a proper cancellation, or due to the effluxion of time, or because the Agreement has been fully implemented and the parties fully complied with their obligations in terms of the Agreement.
- With reference to the question as to whether the Service may enter into a further Agreement with Waymark without having to commence a new bid process, Counsel advised that the Service may enter into a further Agreement with

Waymark, provided that it is deemed necessary, and the matter falls within the four squares of Regulation 16A.6.4 of the Treasury Regulations.

- With reference to the question as to, whether the Service could have entered into the Addendums with Waymark relating to the FCS and the FPS, and whether the expenditure incurred by the Service in excess of the amount of R 92 849 822,00 constitutes irregular expenditure as contemplated in the PFMA, Counsel advised that the Service was entitled to enter into the Addendums with Waymark and that the cost attendant to the acquisition of the additional items does not constitute irregular or unauthorized expenditure.

Consequently, Senior Counsel concluded that there was no substantial contravention of, or failure to comply with, the law. Consequently, one of the conditions of Section 46 has not been met, as determined in the **Qoboshiyane-case**.

The Service is bound by section 217 of the Constitution to procure contracts for goods and services in accordance with a system that is fair, equitable, transparent and cost effective.

In view of the above it is clear that —

- the Service did not provide its decision within the 30 days from notifying the third party, Waymark, of the request for access, but as this was done in good faith to afford more time to the third party to make its decision and not with a view to prejudice you, such fact will not be the grounds on which to rely to grant access to the payment list or content and build specifications in the contract and addendums;
- in the **President-case**, it is stated that a party relying on section 36(1)(b) or section 36(1)(c) of the Act, must provide a basis to substantiate its reliance thereon. The third party, Waymark, did not provide a basis to substantiate its reliance on such section(s) (ie Waymark did not give detailed reasons for such refusal, or indicated how the disclosure would cause it harm);
- without Waymark substantiating its reliance on a certain section, the Service was unable to explain or provide such reasons for relying on section 36(1)(b) of the Act for such refusal;
- Waymark did not rely on the confidentiality clause, however, had they done so, the judgment in the **Transnet-case** (which case was approved by the Billiton case in 2013), will apply which applicable parts states that —
 - once entered into a commercial agreement of a public character, the imperative of transparency and accountability entitled members of the public to know what expenditure such an agreement entailed and the confidentiality clause could not protect the successful tenderer's price from disclosure after the contract had been awarded;
 - the successful tenderer must have known in advance that its schedule of

- prices and quantities would, if it secured the contract, become part of the agreement and therefore exposed to public scrutiny; and
- even if "tender price" in the notice included the schedule, the parties' intention could never have been to maintain confidentiality in respect of the rates after the award. Parties cannot circumvent the terms of the Act by resorting to a confidentiality clause;
 - in terms of the **Billiton-case**, the information is not protected from disclosure under section 36(1)(c) of the Act as the information requested is not "information supplied in confidence" as there was an agreement concluded with the State entity and the specific information sought, constitutes a term in an agreement with the State entity;
 - you cannot rely successfully on section 46 of the Act for a ground of appeal as one of the conditions of section 46 of the Act has not been met, as determined in the **Qoboshiyane-case**. With reference to the question as to whether the Service could have entered into the Addendums with Waymark relating to the FCS and the FPS, and whether the expenditure incurred by the Service in excess of the amount of R 92 849 822,00 constitutes irregular expenditure as contemplated in the PFMA, Senior Counsel, Adv MC Erasmus, advised that the Service was entitled to enter into the Addendums with Waymark and that the cost attendant to the acquisition of the additional items does not constitute irregular or unauthorized expenditure. Consequently, Senior Counsel concluded that there was no substantial contravention of, or failure to comply with, the law; and
 - the Service is bound by section 217 of the Constitution to procure contracts for goods and services in accordance with a system that is fair, equitable, transparent and cost effective. The Bid was already awarded to Waymark, therefore the importance of transparency and accountability entitles you (as a member of public) to know the expenditure entailed in the agreement. The tender prize list (not any invoices or payments that had occurred after the tender was awarded) and build specification (as Waymark did not substantiate its reliance on a section for refusal of access to such information) should be provided to you.

If you are aggrieved by the decision taken on the internal appeal, you may, within 180 days [as decided in the Constitutional Court Case, **Brümmer v Minister for Social Development and Others 2009 (11) BCLR 1075 (CC)**] lodge an application with a court against the decision on the internal appeal.

With kind regards


 EN Mthethwa
 Minister of Police
 Date: