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ACCESS TO INFORMATION HELD BY THE FINANCIAL INTELLIGENCE CENTRE

by

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DECLARATION OF ORIGINALITY

I, Khomotso Karabo Matate Hlongoane declare that this dissertation titled “**Access to information held by the Financial Intelligence Centre**” is my own work. It is submitted in fulfilment of the LLM in Mercantile Law requirement by the Department of Mercantile Law, University of Pretoria.

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ABSTRACT

The Financial Intelligence Centre Act 38 of 2001 (“FICA” or the “Act”) established both the Financial Intelligence Centre (“FIC” also known as the “Centre”) and the Money Laundering Advisory Council. The purpose for these two formations was mainly to fight money laundering activities and related terrorist activities. The Act further imposes certain duties on institutions that might be used for money laundering purposes and related terrorist activities.

FICA’s main objectives are to identify the unlawful activities relating to money laundering. The duty of the FIC is to interpret, process and analyse the information disclosed to it and to further monitor and give directive to accountable institutions and supervisory bodies regarding their duties under the Act. The focus of the dissertation is mainly on access to information in terms of section 40 of FICA.

Section 40 deals with access to information held by the FIC and further provides for which relevant persons are entitled to information held by the FIC. The relevant persons are the investigating authorities, the South African Revenue Services (“SARS”) and the intelligence services, who will all be provided with information regarding suspicious transactions, on request or at the initiative of the Centre.

Furthermore, section 40 makes provision for the sharing of information with foreign entities who perform the same or similar function as the FIC. The sharing of information with foreign entities is only possible through a formal written agreement between the Centre and the entity. The Centre at its own discretion may furthermore decide to provide information to accountable or reporting institutions or persons regarding steps taken by its analysts in connection with transactions that these parties reported to the Centre, unless it would be deemed inappropriate to disclose such information.

The study in principal is about access to information in terms of FICA and further compares it with other instruments pertaining to access to information, such as the Constitution of the Republic of South Africa, 1996, the Protection of Personal Information Act 4 of 2013 and the Promotion of Access to Information Act 2 of 2000. It will be seen that different considerations apply in the different contexts, which largely justify the differences in approach.

LIST OF ABBREVIATIONS

FATF	Financial Action Task Force
FIC	Financial Intelligence Centre
FICA	Financial Intelligence Centre Act 38 of 2001, read with the Financial Intelligence Centre Amendment Act 1 of 2017
PAIA	Promotion of Access to Information Act 2 of 2000
POCA	Prevention of Organised Crime Act 121 of 1998
POCDATARA	Protection of Constitutional Democracy against Terrorism and Related Activities Act 33 of 2004
POPI	Protection of Personal Information Act 4 of 2013
SARS	South African Revenue Services
STR	Suspicious Transaction Report

TABLE OF CONTENTS

ACKNOWLEDGEMENTS	I
DECLARATION OF ORIGINALITY	II
ABSTRACT	III
LIST OF ABBREVIATIONS.....	IV
TABLE OF CONTENTS.....	V
CHAPTER 1 INTRODUCTION	1
1.1 Introduction and background to the study.....	1
1.2 Purpose of FICA.....	2
1.3 Objectives of the study	6
1.4 Overview of chapters.....	6
CHAPTER 2 ACCESS TO INFORMATION HELD BY THE CENTRE IN TERMS OF CHAPTER 3 OF THE FINANCIAL INTELLIGENCE CENTRE ACT 38 OF 2001	8
2.1 Introduction.....	8
2.2 The kind of information kept by the centre.....	8
2.3 The regulation and distribution of access to information in terms of section 40 of the Financial Intelligence Centre Act	13
2.4 Conclusion.....	18
CHAPTER 3 ACCESS TO INFORMATION IN TERMS OF OTHER STATUTES	20
3.1 Introduction.....	20
3.2 The right of access to information as a fundamental right in terms of the Constitution.....	20
3.3 The Protection of Personal Information Act	25
3.4 The right of access to information in terms of the Promotion of Access to Information Act 2 of 2000.....	29
3.5 Information held by public bodies and procedure to be followed	34
3.6 Information held by private bodies and procedure to be followed.....	37

CHAPTER 4 CONCLUSION AND RECOMMENDATIONS.....	41
BIBLIOGRAPHY.....	45
Literature.....	45
Internet sources	46
Legislation.....	46
Government publications	47
Case law	47

CHAPTER 1

INTRODUCTION

1.1 Introduction and background to the study

As De Koker explains, the Financial Intelligence Centre (“FIC” also known as the “Centre”) is a relatively young institution that was established in terms of the Financial Intelligence Centre Act 38 of 2001 (“FICA”).¹ The FIC was established for the collection, analysis and disclosure of information to benefit the discovery, prevention and avoidance of money laundering as a whole. FICA came into operation on 1 July 2003 and was introduced to assist in the fight against financial crimes, such as money laundering, tax evasion and terrorist financing activities.

Money laundering refers to any act that obscures the illicit nature or the existence, location or application of the proceeds of crime. Money laundering is of a relatively recent origin. According to Gilmore, the phrase appears to have been coined by American law enforcement officials and entered popular usage during the Watergate inquiry in the United States in the mid-1970s.² Money laundering in general refers to the action of translating money from illegal activities into the financial system.³ In simple terms some authors have defined money laundering as the processing of criminal proceeds to mask illegal source.

In 1989 an inter-government body, namely the Financial Action Task Force (“FATF”), was established. Pressure from the FATF and the international environment to implement effective money laundering control legislation led to the development of the FICA. FATF is a global standard setting body which is made up of 36 member states including South Africa. FATF is the only international body that focusses on policies to control money laundering. FATF issued a report which outlined an assessment of money laundering problems and forty recommendations which created

¹ L de Koker *South African Money Laundering and Terror Financing Law* (2007) 5-9.

² WC Gilmore *Dirty Money – The Evolution of International Measures to Counter Money Laundering and the Financing of Terrorism* (3 ed Council of Europe Publication, 1999) 20.

³ AJ Hamman and RA Koen “*Cave pecuniam: lawyers as launderers*” PER / PELJ 2012(15) 5, states that money laundering process generally is a triadic one, commencing with placement, proceeding through layering, and terminating with integration at 80/638.

a strategy for countries to combat it.⁴ FATF's main purpose is to examine existing money laundering techniques and development, both nationally and internationally. South Africa having become a member of FATF shortly after the implementation of FICA, FICA is required to remain relevant in line with international best practice as determined by FATF.

FATF was mainly formed to regulate and evaluate local and international control structures relating to the fight against money laundering. Its formation involved the set-up of standards and the implementation and promoting of effective law and regulatory measures to combat money laundering and other related activities.⁵ As a result, a great responsibility was placed on the FATF and the broader international environment to implement effective money laundering control legislation, which resulted in the enactment of FICA in South Africa. A number of initiatives have been put in place to deal with this problem at an international level. With South Africa meeting the required recommendations in terms of the implementation of the FICA, it became a full member of the FATF in June 2003 after it was evaluated and found to have developed a comprehensive legal structure to combat money laundering activities.

FICA has brought South Africa in line with similar legislation in other countries⁶ designed to uncover the movement of monies resulting from unlawful activities or rather illegal activities and thereby to control money laundering and other criminal activities.

1.2 Purpose of FICA

The purpose⁷ of FICA is to assist in the identification of the proceeds of unlawful activities, to combat money laundering, the financing of terrorist and related activities. Control measures for the detection and investigation of money laundering are stipulated in FICA.⁸ The creation of a legal framework through FICA is aimed at establishing systems for the effective identification and verification of client identities,

⁴ FAFT Forty Recommendations 1990.

⁵ L de Koker *South African Money Laundering and Terror Financing Law* (2012) 9-10.

⁶ C Marnewick, W Erasmus & N Joseph *Information technology project manager's competencies* (2016) Cape Town: Aosis 122.

⁷ Section 3(1) of FICA.

⁸ <https://www.fic.gov.za/Documents/note%201%2016.Guidance%20concerning%20identification%20of%20clients.pdf> (accessed 27 November 2017).

record keeping, reporting processes, staff training, compliance requirements and the establishing of the FIC and Counter-Money Laundering Advisory Council.

FICA operates hand in hand with the Prevention of Organised Crime Act 121 of 1998 (“POCA”), which mainly deals with the offences relating to money laundering, racketeering and criminal and civil fines. POCA creates a general reporting responsibility for companies who may find themselves in possession of goods subject to suspicious transactions. In addition, the Protection of Constitutional Democracy against Terrorism and Related Activities Act 33 of 2004 (“POCDATARA”) is also connected to FICA in that POCDATARA provides new reporting obligations. The new reporting obligations surrounding suspicious transactions were extended to include suspicious transactions relating to property that is linked to the financing of terrorism. Therefore, these three statutes cannot be read in isolation from each other because there is a link between them, namely the main goal being the combating of money laundering.

FICA was also enacted to impose certain duties on institutions like banks, insurance companies, estate agent, casinos and other persons who might be used for money laundering purposes and the financing of terrorism and related activities. Furthermore, FICA was established to clarify the application of the Act in relation to other laws. One of the objectives of the FICA is to provide for the sharing of information kept by the FIC to specified institutions such as investigating authorities, the intelligence services and the South African Revenue Services (“SARS”). This information aspect of the FIC’s functions will be the main focus of this dissertation.

FICA introduced a comprehensive anti-money laundering regime in South Africa that seeks to satisfy the major FATF recommendations.⁹ FICA lists 19 institutions that qualify as accountable institutions¹⁰ that must fulfil the various obligations imposed by the Act. Duties are imposed on accountable institutions in order to minimise the extent of the potential activities to launder money. As a result, because these institutions have been identified as being vulnerable to exploitation by criminals, they are obliged to

⁹ [http://www.fatf-gafi.org/publications/fatfrecommendation/?hf=10&b=0&s=desc\(fatf_releasedate\)](http://www.fatf-gafi.org/publications/fatfrecommendation/?hf=10&b=0&s=desc(fatf_releasedate)).

¹⁰ Accountable institutions include attorneys, estate agents, banks, long term insurance, foreign exchange dealers, investment advisers and money remitters.

identify and verify the identities of clients who they conclude transactions¹¹ with and further to report any unusual or suspicious transactions to the FIC. As a result, FICA therefore imposes duties for the verification and identification of customers on both accountable institutions and reporting institutions.¹²

The main category of persons affected by FICA is the so-called accountable institutions. In terms of FICA, “accountable institution” means a person referred to in Schedule 1 of the Act.¹³ FIC requires accountable institutions to uphold certain duties. In terms of FICA, certain responsibilities are placed upon accountable institutions, which are to identify and verify new and existing clients,¹⁴ keeping records of identification of clients and those transactions which are entered with clients or with third parties.¹⁵ In terms of the 2017 Amendment Act, accountable institutions are obliged to conduct client due diligence in order to establish and verify the identities of their clients. This means that accountable institutions need to know the clients whom they are conducting business with. The Amendment Act requires on-going measures

¹¹ “Transaction” means transaction concluded between client and accountable institution in terms of the business carried on by that particular institution.

¹² Motor vehicle dealerships and dealers in Krugerrands.

¹³ Schedule 1 of the FICA provides a list of accountable institutions, namely: An attorney as defined in the Attorneys Act, 1979 (Act 53 of 1979); A board of executors or a trust company or any other person that invests, keeps in safe custody, controls or administers trust property within the meaning of the Trust Property Control Act, 1988 (Act 57 of 1988); An estate agent as defined in the Estate Agents Act, 1976 (Act 112 of 1976); A financial instrument trader as defined in the Financial Markets Control Act, 1989 (Act 55 of 1989); A management company registered in terms of the Unit Trusts Control Act, 1981 (Act 54 of 1981); A person who carries on the 'business of a bank' as defined in the Banks Act, 1990 (Act 94 of 1990); A mutual bank as defined in the Mutual Banks Act, 1993 (Act 124 of 1993); A person who carries on a 'long-term insurance business' as defined in the Long-Term Insurance Act, 1998 (Act 52 of 1998), including an insurance broker and an agent of an insurer; A person who carries on a business in respect of which a gambling licence is required to be issued by a provincial licensing authority; A person who carries on the business of dealing in foreign exchange; A person who carries on the business of lending money against the security of securities; A person who carries on the business of rendering investment advice or investment broking services, including a public accountant as defined in the Public Accountants and Auditors Act, 1991 (Act 80 of 1991), who carries on such a Business; A person who issues, sells or redeems travellers' cheques, money orders or similar instruments; The Postbank referred to in section 51 of the Postal Services Act, 1998 (Act 124 of 1998); A member of a stock exchange licensed under the Stock Exchanges Control Act, 1985 (Act 1 of 1985); The Ithala Development Finance Corporation Limited; A person who has been approved or who falls within a category of persons approved by the Registrar of Stock Exchanges in terms of section 4 (1) (a) of the Stock Exchanges Control Act, 1985 (Act 1 of 1985); A person who has been approved or who falls within a category of persons approved by the Registrar of Financial Markets in terms of section 5 (1) (a) of the Financial Markets Control Act, 1989 (Act 55 of 1989) and A person who carries on the business of a money remitter.

¹⁴ Section 21(1) of FICA.

¹⁵ Section 22 of FICA.

with regard to client due diligence and monitoring business relationships.¹⁶ Furthermore, the Amendment Bill introduces a couples of additional due diligence measures relating to legal trusts and partnership¹⁷ and as a result client due diligence will need to be reviewed by accountable institutions and a need for accountable institution to review their current FICA frameworks in order to address all the changes introduced by the amendment bill.¹⁸

The enactment of FICA and the formation of the FIC were centred on bringing South Africa in line with the longstanding and global effort to combat organised crime, money laundering and terrorist financing.¹⁹ The main objective of the FIC is to help with the identification of proceeds of unlawful activities in the context of combating organised crime, and money laundering and terrorist financing activities. The Centre's additional objectives are:

- the distribution of the information collected to other investigative authorities in order to maintain the enforcement of the South African laws; and
- the exchange of information with other international counterparts in relation to money laundering and other related activities.²⁰

The FIC was established on 31 January 2002, and commenced with the receiving of section 29 reports from February 2003. It has managed to play a leading role in the implementation of anti-money laundering and anti-terror financing laws. The Centre has access to a variety of sources of financial, administrative and law enforcement information through a number of mechanisms in order to effectively realise its objective of receiving, analysing and disseminating valuable financial intelligence. Access to information is a fundamental right in terms of the Bill of Rights, while the Centre is in possession of information regulated by section 40 of FICA. This section makes provision for investigating authorities, SARS and intelligence services to be provided

¹⁶ Section 1 of FICA defines 'business relationship' as an arrangement between a client and an accountable institution for purposes of concluding transaction on a regular basis.

¹⁷ Section 21B of FICA, after the Financial Intelligence Centre Amendment Act 1 of 2017.

¹⁸ Financial Intelligence Centre Notice: Amendment of the Schedules to the Financial Intelligence Centre Act, 2001 (Act 38 of 2001) of 14 September 2016.

¹⁹ *Financial Intelligence Centre Annual Report 2016/2017*, available at <http://www.fic.gov.za> (accessed 15 February 2018).

²⁰ Section 3(2)(b) of FICA.

with information regarding suspicious transactions, on request or at the initiative of the Centre.

The FIC was established in terms of FICA in order to identify the proceeds of unlawful activities and to combat money laundering activities. As a result, the FIC collects information and makes it available to investigation authorities when appropriate.²¹ One of the functions of FIC is therefore to maintain records pertaining to information that will eventually give support and ensure performance of the investigating authorities.²²

1.3 Objectives of the study

The objective of this study is to critically analyse the provisions of FICA, PAIA, POPI and the Constitution of the Republic of South Africa in terms of access to information and the kind of information that is covered under these statutes. All the mentioned statutes explain what access of information entails and some of them also set out the procedures that need to be followed in order to obtain the requested information.

This dissertation will focus mainly on why the FIC was established and the kind of information kept by the Centre. In this context it will evaluate the importance of access to information, and investigate some of the statutes that deal with access to information. Despite all the legislation supporting access to information, many people still fail to obtain the information requested by them for various reasons. Access to information held by the state and then, to a lesser degree, access to information held by private bodies shall be examined. One should bear in mind that access to information is a fundamental human right and this right cannot be underestimated in a democratic country such as South Africa where openness and transparency is a central pillar to a citizen's right to know and to be informed.

1.4 Overview of chapters

Having introduced the dissertation in chapter one, chapter two focuses on the kind of information that is kept by the Centre. It will discuss in detail the specific information

²¹ Section 3 (2) (a) of FICA.

²² Section 4 (c) of FICA.

that is kept by the Centre and the duty of the Centre to keep certain records. I then discuss the regulation and distribution of information in terms of section 40 of FICA. The chapter will also investigate how the accountable institutions are mandated to keep records of all the verification and identification information as well as to obtain such information before establishing a business relationship. This will assist accountable institutions to recognise the nature of the business relationship or transaction and the parties to the transaction.

Chapter three will interrogate other statutes that contain similar provisions in relation to access of information. There has been debates about the rationale for the kind of information that needs to be available to the requester. In terms of the other statutes analysed, the starting point will be the fundamental right of access to information contained in the Bill of Rights in chapter two of the Constitution of the Republic of South Africa, 1996 (“Constitution”).

In respect of the Protection of Personal Information Act 4 of 2013 (“POPI”), the chapter then outlines the right to privacy as it relates to personal information. The chapter further investigates the right of access to information in terms of the Promotion of Access to Information Act 2 of 2000 (“PAIA”). Here the focus will be on the objectives of PAIA and I will differentiate between information held by a public body and that held by a private body, specifically dealing with sections 11 and 50 of PAIA.

In the fourth and final chapter I compare the different Acts to show some links between the mentioned statutes and emphasise the importance of access to information as a whole. It will also be observed how that the different approaches taken in the different statutes are justified by the divergent considerations applicable, especially when comparing the fight against money laundering with the purposes of the other statutes.

CHAPTER 2

ACCESS TO INFORMATION HELD BY THE CENTRE IN TERMS OF CHAPTER 3 OF THE FINANCIAL INTELLIGENCE CENTRE ACT 38 OF 2001

2.1 Introduction

In this chapter the main focus will be to firstly interrogate the kind of information that is kept by the Financial Intelligence Centre (“FIC” or “the Centre”) followed by a discussion surrounding the importance of access to information. The regulation and distribution of access to information will be discussed as the main focus of the dissertation.

The aim of the Financial Intelligence Centre Act 38 of 2001 (“FICA”) was to establish the Financial Intelligence Centre (“FIC”) and the Counter-Money Laundering Advisory Council for the benefit of fighting money laundering activities. As a result, institutions in the financial system are to deal with customers who are known by them, who conduct legitimate business and who they are able to identify when they are conducting business that may be of an illegal nature. The idea is to then report this to the correct authorities. The FICA scheme for client identification and verification¹ is of assistance in this regard. The Financial Intelligence Centre Amendment Act 1 of 2017 was, amongst other purposes, introduced to further define certain words and expressions, to clarify the Act when compared to other laws and to further extend the functions and objectives of the Centre. The amendment, also anticipates the dissolution of the Counter-Money Laundering Advisory Council.

2.2 The kind of information kept by the centre

Some of the main objectives of the Centre are to make information collected by the Centre available to investigation authorities, SARS and the intelligence services to enable the administration and enforcement of the laws of the Republic, to exchange

¹ L de Koker “Client identification and money laundering control: Perspectives on the Financial Intelligence Centre Act 38 of 2001” 2004 *TSAR* 715-746.

the same information with other countries specifically relating to money laundering activities, to enforce compliance with FICA and to facilitate effective supervision and enforcement by supervisory bodies.²

Section 1 of FICA defines money laundering as follows:

“money laundering or money laundering activity means an activity which has or is likely to have effect of concealing or disguising the nature, source, location, disposition or movement of the proceeds of unlawful activities or any interest which anyone has in such proceeds, and includes any activity which constitutes an offence in terms of section 64 of this Act or section 4, 5, or 6 of the Prevention Act”.

Section 32 of FICA places a duty on accountable and reporting institutions and any other person who is in possession of a report pertaining to cash transactions above prescribed limits,³ property associated with terrorist and related activities,⁴ suspicious and unusual transactions⁵ and conveyance of cash to or from the Republic⁶ to report that to the Centre. This was done as a principal compliance tool and to ensure that accountable institutions adhere to the internal policy and procedures imposed by FICA. When dealing with record-keeping according to sections 22 to 26, this mostly refers to all documents and records in respect of each client where a transaction has been concluded.⁷ Information that is handled by the money laundering officer is not limited to clients’ identification, proof of address and sources of funds, for example salaries and donations. The records kept must also include clients’ letters, application forms, quotes, receipts and emails.

FICA sets out the kind of information that accountable institutions and the FIC should keep as part of their records. The records to be kept by the FIC are those that relate to information of business relationships and transactions.⁸ This generally means that whenever an accountable institution forms a business relationship or concludes a transaction with a client, certain information should be collected and kept by the accountable institution. This information includes, among other things, the identity of

² Section 4 of FICA.

³ Section 28 of FICA.

⁴ Section 28A of FICA.

⁵ Section 29 of FICA.

⁶ Section 30 of FICA.

⁷ Sections 22-26 of FICA.

⁸ Section 22 of FICA.

the client, whether the client is acting on behalf of another person or in his own name, the nature of the business and, in case of a transaction, information relating to the money involved. The identities of all other parties to the transaction are of importance as well. FICA stipulates a period of five years for which the records in respect of business transactions, suspicious or unusual transactions should be kept by the Centre.⁹

In terms of the records to be kept by an accountable institution, section 22 of FICA provides that accountable institutions who conclude a transaction are required to keep records of a single transaction or additional transactions concluded as part of the business relationship. As a result, full particulars and details of the information will be kept as records, manually and electronically. The information kept by the accountable institution, as stated in section 22 of FICA, can also be kept by a third party¹⁰ who is authorised by the accountable institution and acts on behalf of the accountable institution. In terms of section 24 of FICA, the appointed third party must comply with the requirements provided in section 22 and the accountable institution will be accountable for any form of failure by the third party, since the latter would be acting on the accountable institution's behalf. It should be noted that records kept in terms of sections 22 and 24 of FICA or any other certified extract of such record, will be admissible when presented as evidence in a court of law.

Section 26 of FICA lists five indicators with regard to the Centre's access to records kept by accountable institutions:

- an authorised representative of the Centre can have access to records and may either examine, make extracts or copies of the records;
- an authorised representative of the Centre may exercise the powers to either examine, make extracts or make copies of the records only when he has been granted a warrant by either a magistrate or regional magistrate or judge of an area of jurisdiction within which all the records or any part of them are kept or within which the accountable institution conducts business, but this may not apply in respect of records to which the public is entitled to have access;

⁹ Section 23 of FICA.

¹⁰ Section 24 of FICA.

- a warrant may only be granted by either a magistrate or regional magistrate or judge on the basis that it is reasonably believed that there is a reasonable suspicion of unlawful activities or money laundering activities;
- the warrant issued by either a magistrate or regional magistrate or judge may contain conditions regarding access to the relevant records and these conditions will be up to the courts' discretion; and
- the accountable institution is duty bound, without any delay, to give the authorised representative all the necessary assistance so that the authorised representative may easily examine, make extracts and make copies of the records as an outcome of exercising the powers.

There are two kinds of information that are kept by the FIC. Firstly, FIC has records that are available without formal requests and, secondly, it has information that can only be released if a certain procedure is followed in terms of the Promotion of Access to Information Act 2 of 2000. Information that is available without any formal procedures to be followed relates to circulars, annual reports and other documents in respect of information or links to anti-money laundering and combating of financing of terrorism statutes, regulations, international organisations and bodies. Furthermore, the information available without formal request includes information that is available on the Centre's website,¹¹ such as public notices to accountable institutions and other stakeholders, information relating to the Centre's registration and reporting system, public compliance communications and directives.

General information pertaining to the Centre's organisation profile in relation to contact details, public forms, news articles, media releases and legislation can be made publicly available without making a formal request.¹²

In relation to the new amendments made to FICA by the 2017 Amendment Act, the main objective remains to enhance the transparency in the financial system based on influential customer due diligence measures in order to ascertain who is doing business with financial and non-financial institutions and the specifications of the

¹¹ Financial Intelligence Centre *Manual on the Promotion of Access to Information Act 2 of 2000* (updated June 2016) page 7.

¹² Financial Intelligence Centre *Manual on the Promotion of Access to Information Act 2 of 2000* (updated June 2016) page 7.

nature of that business. This is mostly to ensure that adequate information is properly captured in the records of the financial institutions in order to support any subsequent investigations of money laundering and terrorist financing.

Furthermore, there are new amendments made in FICA¹³ with regard to the automatic exchange of information between countries, especially when dealing with tax matters, create additional reporting obligations for accountable institutions. It therefore seems that the type of information or records collected from clients under FICA are classified as personal information.

One can further ask a question as to why the FICA amendments were necessary. These amendments were necessary simply to continue to make a significant change to the FICA in order to ensure that a high quality financial intelligence is generated or produced by the FIC. To a certain extent the amendments were able to achieve some goals, amongst others, the Amendment Act has ensured that South Africa as a member of the FATF international body still continues to conduct business in line with the FATF standards and norms.

The amendment bill includes new concepts and approaches and to mention a few, the amendment bill includes an expansion of the requirements for the customer due diligence which are aimed at having an understanding of customers better as opposed to simply identifying and verifying their identities, customer due diligence risk-based which allows usage of resources, making compliance easier for low risk clients, beneficial ownership which allows institutions to understand natural persons who at the end have to exercise control over legal entities and influential persons and politically exposed persons which allows institutions to better manage risk relating to relationship with prominent persons.

Furthermore, based on the need for improvement and transparency of the financial system, FIC realises the need of a process of discussing with businesses who perform the activities which fall outside the scope of FICA.¹⁴ FIC provides that the inclusion of more institutions¹⁵ will safeguard or rather prevent the high risk of the same business

¹³ The Financial Intelligence Centre Amendment Act 1 of 2017.

¹⁴ Financial Intelligence Centre Notice: Amendment of the Schedules to the Financial Intelligence Centre Act, 2001 (Act 38 of 2001) of 14 September 2016.

¹⁵ Potential additional businesses and institutions includes, Professional accountants; Persons who provide trust and/or company services; Dealers in high value goods (including, amongst others,

and institutions being used to carry out money laundering. This potential list would be included under Schedule 1 of FICA. This automatically makes it harder for individuals to hide behind legal entities to evade tax.

South Africa shows great interest and commitment to the combating of financial crime and on the other hand protection of the integrity of our financial system. As a result, all of these amendments are aimed at continuing to combat money laundering and the financing of terrorism.

2.3 The regulation and distribution of access to information in terms of section 40 of the Financial Intelligence Centre Act

Chapter 3 of FICA, in particular section 40, which deals with access to information held by the Centre, is the main focus of the discussion contained in this part of the dissertation. The following is a summary of the section.

Section 40(1) (a) makes a provision of which people are allowed or rather entitled to access information that is in possession of the Centre. Those specific people are the intelligent services, SARS and the investigative authority¹⁶ within the Republic. However, the section further states that the same people who are entitled to access information held by the Centre have to first follow the proper channels before getting the requested information. Information will only be given if the authorised officer¹⁷ on

precious metals and stones, motor vehicles and coins); Co-operatives which provide financial services, as defined in the Co-operatives Banks Act, 2007 (Act 40 of 2007); Short-term insurers as defined in the Short-Term Insurance Act, 1998 (Act 53 of 1998); Credit providers who are required to register as contemplated in section 40 of the National Credit Act, 2005 (Act 34 of 2005); Money or value transfer providers; Providers of private security boxes or security vaults for the safekeeping of valuables; Auctioneers, including sheriffs, as defined in the Sheriff's Act, 1986 (Act 90 of 1986) when performing the job of an auctioneer at a public auction; Dealers in copper material; Virtual currency exchanges where virtual currency is bought and sold for fiat currency (money that government has declared to be legal tender).

¹⁶ In terms of Section 1 of the Financial Intelligence Centre Act, 'investigating authority' means an authority that in terms of national legislation may investigate unlawful activities.

¹⁷ Section 1 of the Financial Intelligence Centre Act defines authorised office as any official of-

- (a) the South African Police Service authorised by the National Commissioner of act under this Act;
- (b) the national prosecuting authority authorised by the National Director of Public Prosecutions to act under this Act;
- (c) an intelligence service authorised by the Director-General of that service to act under this Act; or

written authority based on the fact that there is belief that the information required is for the sole purpose of investigating a suspected unlawful activity.

The above section guarantees that access to information can be accessible without limitation for as long as the required procedures of accessing the information are adhered to by the authorised officer. Section 40 further provides for safety measures where it states that not only information would be given as and when the information is requested but strict procedures have to be followed and adequate reasons given. The section also adds emphasis by clearly setting out who specifically is entitled to access of information in terms of this section.

Section 40(1) (b)¹⁸ provides that information can also be provided to entities or institutions outside of South Africa who fulfil the same function as the Centre. If the Centre, within its discretion, believes that sharing of information will help a foreign institution to deal with unlawful activities and fight money laundering or other related activities of offences, it can provide them with the relevant information. The above section provides that access to information will also be granted to foreign entities performing functions similar to those of the FIC where the information will assist them to resolve their cases. This section proves that South Africa as a member of the FATF is empowered to help other countries with the relevant information that can be used in the identification of the proceeds of unlawful activities or the combating of money laundering or financing of terrorist and related activities or similar offences in the country in which that entity is established. Similarly, there is a reciprocal duty from the same foreign countries to also provide FIC with the relevant information that can assist it to fight money laundering and other related activities.

Section 40(1) (c) provides that information regarding steps taken for transactions reported by an accountable institution can be provided to an accountable institution or anyone else at the initiative of the Centre unless of the Centre believes the disclosure of such information would constrain the achievement of the Centre's objectives, the fulfilment of the Centre's functions, the performance of the functions of another organ of state, or infringe the rights of any other person. In this instance, section 40(1)(c) indicates that the FIC may decide to provide information to an accountable or reporting

(d) the South African Revenue Service authorised by the Commissioner for that Service to act under this Act.

¹⁸ Para (b) substituted by section 27(1) of Act 33 of 2004.

institution or any other person regarding steps taken by the Centre in relation to the transactions reported by the accountable institution or reporting institution or any other person to the FIC. The section also sets certain limitations in respect of the provision of information regarding the steps taken by the Centre in connection with transactions reported by such accountable institution, reporting institution or person. The Centre is required to ascertain whether the production of information would not affect the functions or objectives of the Centre or prejudice anyone's rights. This is a safety or protection measure that the Centre places in order to make sure that the collected information is handled properly.

Section 40(1)(d), (e) and (f) jointly provide that the Centre may upon its discretion provide a supervisory body with information that the Centre reasonably believes will assist the supervisory body in terms of its functions, powers and dealings with an accountable institution. This section points out further that no person is entitled to information held by the Centre, except where a court order has been granted or where any other national legislation permits access to information. This section further makes provision that information may be provided to certain bodies who can use the information to deal with accountable institutions. Thus, the FIC can be obtained through a court order or other national legislations such as PAIA or POPI.

Section 40(2) provides that written reasons must be given when requesting information. Therefore, this subsection states that reasons should accompany the request, containing a detailed explanation as to why the requested information is needed. This section places an obligation for the requester to give written reasons why access to information should be granted. The requester is further required to advance reasons, in a specified manner, for the request of information. For example, the requester must show a link between the request of information and the purpose of which the information is needed for. This section allows the Centre to make a determination of whether to grant or refuse a certain request of information.

Section 40(3) provides that the Director of the FIC should put measures in place to safeguard against breaches of confidentiality when the information is requested. This subsection therefore states that practical procedural arrangements will be put in place for the purpose of maintaining the privacy of the information. Confidentiality is an important aspect when dealing with records or information, mainly because most of the information contains personal details of the individuals, company details and trade

secrets. Thus there is a need to safeguard this kind of information. It is upon the Centre to ensure that the objectives of safeguarding the information are achieved by protecting confidential information being processed by it at all times.¹⁹

Section 40(4) emphasises that the exchange of information between the Centre and a foreign institution who fulfils the same function as the Centre can be accomplished through a written agreement between the Centre and the relevant foreign institution. This provision ensures that the exchange of information between the Centre and foreign institution is done through a formal agreement that is considered to be legal and binding.

Section 40(5) provides that the written agreement between the Centre and foreign institution mentioned above will not take place if the written agreement has not been approved by the Minister of Finance in writing. Nor does the written agreement between the Centre and foreign institution give the Centre permission to provide any information that the entity would otherwise not be allowed to give to the Centre. The fact the Minister's permission is required can also be viewed as another safeguard layer to the information that will be shared with a foreign institution.

Section 40(6) provides that all requesters who request information should make use of that information within their powers and duties and to use the information for the same purpose and reasons they outlined when requesting the said information. This subsection also emphasises the fact that information obtained should be used wisely and efficiently and only for the specific purpose for which the information was provided.

The primary source of financial intelligence is a so-called "suspicious transaction report" or "STR",²⁰ which involves information received from people, entities and accountable institutions with statutory reporting obligations as listed in schedule 1 of FICA, as well as from people who carry on a business, are in charge of a business or manage a business as per the generic reporting obligation under section 29 of the FICA.

A client's information must be regularly updated. Records may be kept physically or in electronic form and must be kept for a minimum of five years from the date on

¹⁹ Section 41 of FICA.

²⁰ This refers to a suspicious and unusual transaction report made in terms of section 29 of FICA.

which the transaction is concluded or the relationship is terminated.²¹ A third party may be appointed by the accountable institution to keep records on its behalf on condition that the record can easily be made available.²² However, where a third party has been appointed, the accountable institution remains liable for failure of specified record storage.

Representatives of the Centre can only be allowed to have access to records to examine, make extracts or copies of such records, on condition that a warrant is issued by a judge or magistrate or regional magistrate within the relevant jurisdiction in which the records or any of them are kept, or in which the accountable institution conducts business.²³ These records or part thereof are admissible in court as evidence.²⁴

Information may also be supplied to a supervisory body to enable it to exercise its powers and perform its functions in relation to an accountable institution, for instance client identification and verification and related matters.²⁵ This entails the keeping of records to enable them to report certain information and to implement measures that will assist them in complying with FICA. In addition, the Centre may supply information in terms of a court order or in terms of other national legislation.²⁶

The kind of data or information that the FIC keeps will be of great assistance to bodies like SARS. For instance, FICA creates a special relationship between SARS and the FIC with the aim to combat tax evasion. If SARS for example suspects that an accountable institution is purposely involved in a suspicious transaction, it must report the suspicious transaction to the FIC. Moreover, FICA requires all businesses to report any transactions that may be connected to the investigation of any evasion of a duty to pay tax or levy under any legislation that is administrated by SARS.²⁷ That being said, FICA makes provision for SARS to put in place reasonable procedural arrangements and to impose reasonable safeguards to maintain the confidentiality of the information that is disclosed in terms of FICA.²⁸

²¹ Section 23.

²² Section 24.

²³ Section 26(1) and (2) of FICA.

²⁴ Section 25 of FICA.

²⁵ L de Koker "Client identification and money laundering control: Perspectives on the Financial Intelligence Centre Act 38 of 2001" 2004 *TSAR* 715-746.

²⁶ Section 40(1)(e) and (f) of FICA.

²⁷ Section 29 of FICA.

²⁸ Section 36(3) of FICA.

FICA was amended in 2017 with the aim to strengthen our financial system, which will ensure a risk-based approach that will allow businesses to take a differentiated view on understanding its risks and the people behind the entities it deals with on a daily basis. The FICA amendments are in line with the international standards which are contained in the FATF Recommendation which ensures that South Africa complies with international standard and best practice.²⁹ FICA is essentially part and parcel of a tool which fight against money laundering and related crimes³⁰ and the core duties of FIC is to identify customers³¹, keep records³² and report certain transactions.³³

The obligations on accountable institutions to comply with provisions of FICA have been achieved and, even more so, the FICA amendments have listed additional entities that fall under the definitions of accountable institutions. This will indeed strengthen the duties regarding money laundering which is to identify clients, retain records of business relationship, report certain transactions, appoint a compliance officer and provide training to their employees. Failure to adhere to these requirements could result in harsh penalties.

2.4 Conclusion

Section 40 provides for the persons, entities and bodies that are entitled to information held by the FIC. The section sets out procedures that these persons must follow to gain the relevant information.

The section also makes provision of sharing of information with foreign institutions who perform the same duties and function of the Centre. As a safeguard the section requires that requested information must be done in writing and the agreement between the Centre and the foreign institution must be affirmed by the Minister in writing.

The purpose of section 40 as a whole is evidently to support the right of access to information and as a result the provision of information under the control of FIC is mainly to assist other institutions, bodies and authorities to fulfil their mandates in a

²⁹ Guidance Note 3A paragraph 24.

³⁰ Section 3(1) of FICA.

³¹ Section 21 of FICA.

³² Sections 22- 26 of FICA.

³³ Sections 27-41 of FICA.

more efficient manner. Consequently, information held under FICA cannot be accessed for any reasons that are not linked to the mandate of the institutions, bodies and authorities listed in the Act.

CHAPTER 3

ACCESS TO INFORMATION IN TERMS OF OTHER STATUTES

3.1 Introduction

In the previous chapter it was seen that FICA contains provisions regulating the access to information held by FIC. However, there are other statutes that one can rely on when one requests access to information held by either a public or private body. Therefore, this chapter investigates a selection of other statutes that also protects and/or regulates the right to access of information and explores these statutes that afford certain rights and privileges that people have to request and have access to certain types of information in order to assist them. The statutes that will be discussed all have one common factor, namely that they relate to the right of access to information. The purpose of this discussion will be to compare the treatment of information in these statutes with the way in which FICA treats it.

3.2 The right of access to information as a fundamental right in terms of the Constitution

In the past, the disclosure of certain information in South Africa was restricted by a number of statutes, such as the Official Secrets Act 2 of 1956, the Protection of Information Act 84 of 1982 and the Publication Act 42 of 1974. All of these statutes led to abuses of power, as the South African practice of disclosure was guided by the Apartheid regime and thus influenced by political considerations.¹ As a result, the disclosure of information was the exception rather than the rule and there existed a need for a change alongside the political transition to democratic and participatory governance.

The right of access to information found its place in the Bill of Rights of the Interim (1993) Constitution as well as in the constitutional principles against which the Final

¹ See the preamble of PAIA.

(1996) Constitution² was to be measured. After a long parliamentary process of deliberation, legislation giving effect to section 32 of the 1996 Constitution was enacted in the form of the Promotion of Access to Information Act 2 of 2000 (“PAIA”).

The Bill of Rights in its current form was adopted as part of the Final Constitution and came into operation in 1997. Its preamble recognises, amongst others, the past’s injustices and honours people who have suffered for justice, freedom and to develop and build our country. Significantly, the Constitution is the supreme law of the Republic. For purposes of this dissertation, it is significant that the Bill of Rights also contains a right to receive or impart information and ideas.³

For the efficient functioning and development of any society, the right to access and distribute information is crucial. This functioning and development is thus premised on the value of transparency, for access to information gives expression to transparency. This notion supports the belief that a society functions best when it opens itself to scrutiny. Section 195 of the Constitution also provides for the principle of transparency as one of the basic values and philosophies governing administration. This section further provides that the principle of transparency must be fostered by providing the public with timely, accessible and accurate information.

When dealing with transparency and access to information, the nature of the type of information needs to be the first thing that one considers. Other factors include the quality, relevance and consistency, as well as the process which entails the granting of such information, the procedures for recording and storage. If such elements are not met, then transparency becomes weakened.⁴

Section 195 of the Constitution is supported by section 32, which provides everyone with the right to have access to information held by the state as well as information held by any other person that is required for the exercise or protection of any right. The Constitution further regards the right of access to information as part of the right to freedom of expression, which is contained in section 16(1)(b) of the Constitution. Access to information can, amongst others, be seen as creating a duty in the context of monitoring government agencies in order to combat corruption related activities.

² Constitution of the Republic of South Africa, 1996.

³ See section 16(1)(b) of the Constitution.

⁴ DL Marais, M Quayle & JK Burns “The role of access to information in enabling transparency and public participation in governance” (2007) 9 *African Journal of Public Affairs* 38.

The right of access to information is a general condition for good governance and also has been acknowledged to promote other rights contained in the Constitution.⁵ The court held that section 32 of the Constitution cannot be solely relied upon as to serve a cause of action, but one can rely solely on section 32 of the Constitution where the constitutionality of an act of Parliament is challenged.⁶ In its preamble, the Constitution lays the foundations for a democratic and open society. It, amongst others, places a premium on transparency. In this regard section 32 of the Constitution provides as follows:

- “(1) Everyone has the right of access to -
 - (a) any information held by the state; and
 - (b) any information that is held by another person and that is required for the exercise or protection of any rights.
- (2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.”

Section 32(2) obliges the legislature to give effect to the right of access to information. This raises a question as to what type of *effect* is referred to in terms of this section. Section 32(2) cannot be viewed on its own, as the culture of transparency is entrenched in numerous provisions, so to give *effect* is to be understood as promoting or implementing or making effective, which incorporates the duty to set out enforcement procedures.⁷ Section 32(2) is furthermore a special limitation clause, which supplements the general limitation clause in the Constitution.⁸ This special limitation clause allows the law to provide reasonable measures to improve the administration and financial burden on the state, which is caused by access to information. The crucial point concerning a public right of access to information is always whether to apply an approach of secrecy or to regard the right of access as the general rule and then to establish certain limitations as exceptions.

⁵ J Klaaren “A second look at the South African Human Rights Commission, access to information, and the promotion of socioeconomic rights” (2005) 27 *Human Rights Quarterly* 539-561 556.

⁶ *Institute for Democracy in South Africa v African National Congress* 2005 (5) SA 39(C).

⁷ I Currie & J Klaaren “*The Promotion of Access to Information Act Commentary*” (2002) para 2.2.

⁸ Section 36 of the Constitution.

The Constitutional Court has to this end sought to explain the importance of access to information in the following terms:

“Apart from this, access to information is fundamental to the realisation of the rights in the Bill of Rights. For example, access to information is crucial to the right to freedom of expression which includes the freedom of the press and other media and freedom to receive and impart information or ideas.”⁹

A further question that must be considered, however, relates to the interaction between personal information and the right to privacy, as contemplated in section 14 of the Constitution. In this regard section 14 of the Constitution provides as follows:

“Everyone has the right to privacy, which include the right not to have-

- (a) their person or home searched;
- (b) their property searched;
- (c) their possessions seized; or
- (d) the privacy of their communications infringed”.

Is there a limitation to this right and, if so, what are the criteria for justifiably limiting this right? The limitation of rights in the Bill of Rights is regulated by section 36 of the Constitution (the limitations clause). According to this provision, rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The following non-exhaustive list of factors must be considered:

- The nature of the right;
- the importance of the purpose of the limitation;
- the nature and extent of the limitation;
- the relationship between the limitation and its purpose; and
- if there are any less restrictive means to achieve the purpose.¹⁰

The table of non-derogable rights in section 37¹¹ of the Constitution does not make sacrosanct the right to privacy. In short, the right to privacy may be limited, but only on

⁹ *Brummer v Minister of Social Development and Others* 2009 (6) SA 323 (CC) para 63.

¹⁰ See section 36(1) of the Constitution.

¹¹ See section 37(1) of the Constitution.

the grounds discussed above. Navigating the balance between the right to privacy and the right of access to information therefore requires a diligent and respectful approach.

The right to privacy is not an absolute right due to certain limitations, as indicated above. This limitation can be based on the rights or interest of others who would want to use such information for effective reasons, such as for purposes of investigation, prevention and prosecution of crime. For example, this is where FICA would come into play where it compiles accountable institutions to identify and verify the identity of new clients before the conclusions of any transactions or any business relationship. This are some of the limitations against the right to privacy because FICA would have to get personal information of individual in order to achieve their prevention of illegal crimes.

Before the enactment of the Interim Constitution, there was no right of access to information and as a result many proceedings in which information was claimed, failed based on the fact that the applicant did not have a right of access to information as of law.¹² South African courts carefully revised their attempt to hold back information from the public after relying on national security as a reason. The courts expected individuals to prove sufficient interest to gain access to information. This kind of behaviour of holding back information was caused by the Apartheid government.¹³ For instance, commercial information such as business trade secrets and confidential information indicated a possible counterpoint to the right of access to information under section 32. This was taken aback by the experiences of iron-tight secrecy during Apartheid,¹⁴ but eventually South Africa made the society transparent at large.¹⁵

PAIA is now the primary recourse for persons seeking access to information. Furthermore, PAIA was specifically passed for the purpose of granting access to information to the general public, but the Constitution still plays an important role in its commitment of transparency and accountability.¹⁶ It is arguable that section 32 can still be used directly to claim access to information in situations not covered by PAIA.

¹² These cases discussed the challenge of the right of access to information in the Constitutional Court and the Appellate Division. See *Nkayi and Another v Head of the Security Branch of the SA Police, Pretoria* 1993 (3) SA 244 (AD); *Shabalala and Others v Attorney-General of the Transvaal and Another* 1996 (1) SA 725 (CC).

¹³ E Devenish *A Commentary on the South African Bill of Rights* (1999) 450.

¹⁴ See the preamble of PAIA.

¹⁵ Hence, a substantial shift from the Protection of Information Act 84 of 1982 to the Promotion of Access to Information Act of 2000.

¹⁶ Section 32 of the Constitution.

It is in fact possible that the Constitution can provide a way for a person to obtain access to information under circumstances where requests for such information are not covered by PAIA. However, that right may have certain limitations depending on the kind of information that is requested. To justify limitations on the right under section 32, the courts would for instance have to balance the right of access to information with commercial confidentiality.¹⁷

However, one should note a general rule that under PAIA, all South Africans and non-nationals can request information from public or private bodies, but the information from private bodies can only be obtained if it is in the interest to protect other rights. As mentioned above, PAIA gives effect to section 32 of the Constitution, which is subject to justifiable limitations, including but not limited to the following aspects:

- limitations aimed at the reasonable protection of privacy;
- commercial confidentiality; and
- efficient and affective governance.

These limitations are made in such a way that they form a creative balance between access to information and any other right, including the rights in the Bill of Rights. Access to information is fundamental to a healthy democracy and therefore it must also be considered when issues surrounding information are investigated in the context of FICA. In what follows, a number of statutes related to information are discussed in order to expand on the information context within which FICA is one of the puzzle pieces.

3.3 The Protection of Personal Information Act

The purpose of the Protection of Personal Information Act 4 of 2013 (“POPI”) is mainly to ensure that all South African entities, when collecting, processing, storing and/or sharing another entity’s personal information, conduct themselves in a responsible manner so that they do not abuse or compromise personal information which belongs

¹⁷ GE Devenish *A Commentary on the South African Bill of Rights* (1999) 450.

to any person in any way. POPI¹⁸ applies to the processing¹⁹ of personal information entered in a record by or for the responsible party²⁰ by making use of automated or non-automated means. POPI considers one's personal information to be of great importance and certain rights of protection are provided to the owner of that personal information.

The right of personal information does not only apply to a natural person but also applies to any legal entity, such as a company, communities and other legally recognised organisations. As an individual, the right will entail the protection of personal information, such as your name, identity number, age and email address. For companies it would include the protection of information pertaining to employees, suppliers, vendors, service providers and business partners.²¹

POPI states its purpose as follows:

“2 The purpose of this Act is to—

- (a) give effect to the constitutional right to privacy, by safeguarding personal information when processed by a responsible party, subject to justifiable limitations that are aimed at—
 - (i) balancing the right to privacy against other rights, particularly the right of access to information; and
 - (ii) protecting important interests, including the free flow of information within the Republic and across international borders;
- (b) regulate the manner in which personal information may be processed, by establishing conditions, in harmony with international standards, that prescribe the minimum threshold requirements for the lawful processing of personal information;
- (c) provide persons with rights and remedies to protect their personal information from processing that is not in accordance with this Act; and

¹⁸ Section 3(1) of POPI.

¹⁹ In terms of section 1 of POPI “processing” means any operational activity concerning personal information including the collection, organisation, storage, modification, communication and destruction of information.

²⁰ In terms of section 1 of POPI “responsible party” means a public or private body or any other person which, alone or in conjunction with others, determines the purpose of and means for processing personal information. The use of the word “alone or in conjunction with others” appears to imply that more than one person may be the responsible party in connection with the processing of certain personal information.

²¹ Section 1 of POPI.

- (d) establish voluntary and compulsory measures, including the establishment of an Information Regulator, to ensure respect for and to promote, enforce and fulfil the rights protected by this Act.”²²

POPI is relatively new, since it was signed by the President on 26 November 2013. The right of privacy is enshrined in the South African Constitution which expressly states that everyone has the right to privacy. Data protection and information privacy protection were both some of the legislation that were proposed by the South African Law Reform Commission.²³ POPI is aimed at facilitating the protection of privacy right as enshrined in the Constitution.²⁴ The right to privacy includes a right to protection against the unlawful collection, retention, dissemination and use of personal information. Thus it should be noted that the privacy rights listed in section 14 of the Constitution are not exhaustive and could extend to other unlawful methods of obtaining information or making unauthorised disclosures.

POPI seeks to promote the protection of personal information processed by public and private bodies and to introduce certain conditions so as to establish minimum requirements for the processing of personal information. Its main purpose is to safeguard personal information used by companies or any other legal entities in relation to business or other purposes. Essentially, personal information is defined in the Act as information concerning identifiable, living, natural or juristic persons.²⁵ Further, POPI is aimed at bringing South Africa in line with international data protection laws and it regulates the way in which personal information should be processed. POPI promotes transparency with regard to what information is collected and what is processed. POPI contains eight conditions for the lawful processing of personal information which need to be adhered to, namely accountability, processing limitation, purpose specification, further processing limitation, information quality, openness, security safeguards and data subject participation.²⁶

Personal information has a broad meaning and includes identity numbers, date of birth, age, contact details, online identifiers, race, gender, ethnic, origin, photos, voice recordings, CCTV footage, biometric data, marital status, criminal record, religious

²² Section 2 of POPI.

²³ <http://www.justice.gov.za/salrc/dpapers/dp109.pdf> (accessed 07 June 2018).

²⁴ Section 14 of the Constitution.

²⁵ Section 1 of POPI.

²⁶ Section 4(1) of POPI.

beliefs, financial and educational information, physical and mental health information and even memberships to organisations.²⁷ It is important to take note that POPI does not only apply to new clients' information but also governs information of existing clients, and as a result one must obtain existing clients' consent to hold their information. The presence of security safeguards has been mentioned above as one of the conditions for the lawful processing of personal information. This requires that the responsible party must ensure the integrity and confidentiality of any personal information in their possession by implementing appropriate, reasonable technical and organisational measures to prevent loss, damage and unauthorised and unlawful access to the personal information in their custody and control.²⁸

POPI was introduced as a reaction to the special danger posed by the unregulated processing of personal information. It aims to regulate the processing of personal information, and to give effect to the constitutional right to privacy by introducing measures to ensure that organisations use personal information in a fair, reasonable, responsible and secure manner.

In the context of FICA, the new measures introduced by POPI will require the FIC to take appropriate steps and measures in terms of personal information that is in its possession, so as to prevent loss, damage, destruction and unauthorised access to such personal information. To emphasise the above point, the 2017 FICA Amendment Act also has a new provision covering the protection of personal information.²⁹ It added a section that deals with appropriate measures which must be taken in respect of personal information under FICA. These provisions are mainly for the prevention of unlawful access of information, loss of information, damage of information and processing and unauthorised destruction of information in accordance to POPI.

The Information Regulator has expressly stated that the organisation as a whole is aimed at ensuring that personal information is fully protected and the promotion of free flow of that information.³⁰ As a result the Information Regulator was formed to ensure that both the protection of the constitutionality guaranteed right to access to

²⁷ Section 1 of POPI.

²⁸ Section 19(1) of POPI.

²⁹ Section 41A of the Financial Intelligence Centre Amendment Act 1 of 2017.

³⁰ K Ramatsho "Information Regulator to ensure protection of personal information" April 2017 *De Rebus* 7.

information and the right to privacy are both protected. It should also be noted that the right to privacy, like any other rights enshrined in the Constitution, is not an absolute right. In terms of the Constitution the right to privacy can be limited by a law of general application, provided that such limitation is reasonable and justifiable.³¹ Thus the right to privacy can be limited by the legitimate interests and rights of others to obtain and use personal information, and also by the public interest, for example the public interest in the investigation, prevention and prosecution of crime by the relevant authorities such as SAPS, SARS and FIC. Under these circumstances, it would be reasonable and justifiable for the granting of access to personal information and this would not be regarded as unlawful breach of informational privacy.

The protection of certain types of information and access to information are mainly regulated by POPI and PAIA. It is without a doubt that every business have certain information which needs to be protected such as personal business trade secrets and information related to client, employees and customers. POPI read in conjunction with the Constitution and PAIA allows for access to personal information under certain strict conditions.

3.4 The right of access to information in terms of the Promotion of Access to Information Act 2 of 2000

The Promotion of Access to Information Act 2 of 2000 ("PAIA") was promulgated in 2000 and came into operation on 9 March 2001. PAIA aims to foster a culture of accountability and transparency in public and private bodies by giving effect to the right of access to information. Indeed, the Act's preamble recognises the historical context of the system of government in South Africa before 27 April 1994, which resulted in a secretive and unresponsive culture in public and private bodies and which, in turn, led to abuses and the violation of human rights. The Act incorporates section 32 (the right of access to information), section 34 (the right of access to court) and section 33 (the right to just administrative action) of the Constitution.

When discussing PAIA it is important to briefly discuss the history and reason behind the enforcement of PAIA. In around 1994 a task group was formed by then-

³¹ Section 36 of the Constitution.

Deputy President Thabo Mbeki. The task group's main focus was on the idea of Open Democracy, which entailed the consideration of legislative changes necessary to foster an inclusive, transparent and democratic society as envisaged by the Interim Constitution.

It was envisioned that the Open Democracy Act would eventually give effect to the constitutional ideal of an open and democratic society and that is why different statutes were established to provide other ways of supporting the notion of access to information. The draft Open Democracy Bill was presented to the cabinet in 1994 and it proposed four principles, namely freedom of information held by the state bodies, data privacy legislation for the protection of unauthorised use of personal information, legislation providing for meetings of state bodies to be open to the public, and protective legislation for whistle-blowers.

After considering the draft Open Democracy Bill for more than a year, cabinet introduced a modified version of the Open Democracy Bill into Parliament as Bill 67 of 1998. What is interesting is the fact that Parliament removed a chapter that dealt with data protection. The reason given was that the Open Democracy Bill should rather deal only with the issue of access to personal information and not with other privacy related interests such as its control and correction.³² As a result the Open Democracy Bill was at the end renamed and eventually enacted as the Promotion of Access to Information Act.³³

PAIA provides for how one can go about accessing information kept by institutions. It is important to consider that one does not have an automatic right to access the documents one requests and as a result one's request may be rejected if there are valid grounds for refusal, which are outlined in PAIA. PAIA is designed to allow as many people as possible to use it. Section 11 of PAIA, read with section 1, provides for the right of access to records of public bodies by all persons, provided that the requester complies with all prescribed procedural requirements.

The justification for access to information legislation is based on independent principles that generally relate to increased governmental accountability by improving

³² The principle resolution of the parliamentary amendments was to give more inclusive effect to the right of access to information in private hands (section 32(1)(b) of the Constitution of the Republic of South Africa, 1996) than either the draft Bill 67 of 1998 had done.

³³ I Currie & J Klaaren "*The Promotion of Access to Information Act Commentary*" (2002) para 1.9.

citizen monitoring of public bodies.³⁴ However, other provisions for access to information 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. For instance, section 50 of PAIA creates 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 right.

Certain parts of the freedom of information legislation of New Zealand, Ireland, Canada, Australian and the United States of America were used as models for PAIA.³⁵ The Act has been amended on a number of occasions³⁶ and various regulations³⁷ have been promulgated by the Minister.³⁸ PAIA applies throughout the country, meaning that any law that contradicts the provisions of PAIA will have to be brought in line with it so that the right of every person to access information is not limited without just cause.³⁹ PAIA is also regarded as one of the most complex pieces of legislation that has come into operation since 1994.⁴⁰

The objectives of PAIA are as follows:

- to promote transparency, accountability and effective governance of all public and private bodies by empowering everyone on how to understand and exercise their rights in terms of PAIA in relation to public and private bodies and to understand the functions and operations of national spheres;

³⁴ Section 195 of the Constitution. See also *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC) para 187.

³⁵ JM Ackermann & IE Sandoval-Ballesteros "The global explosion of freedom of information laws" (2006) 58 *Administrative Law Review* 85 111; I Currie & J Klaaren "The Promotion of Access to Information Act Commentary" (2002) 72.

³⁶ The amendments by the Judicial Matters Amendment Act 42 of 2001 and the Promotion of Access to Information Amendment Act 54 of 2002 can be considered technical; see I Currie & J Klaaren *The Promotion of Access to Information Act Commentary* (2002) 74.

³⁷ See *inter alia* the Promotion of Access to Information Act, 2000 Regulations Regarding the Promotion of Access to Information: Regulation No 187/2002, Gazette No. 23119, Vol. 440 Pretoria 15 February 2002; Regulation No 1244/2003, Gazette No. 25411, Vol 459 Pretoria 22 September 2003.

³⁸ In terms of section 92 of PAIA.

³⁹ Section 2 of the Constitution provides as follows: "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled." When this is read with section 32(2), "National legislation must be enacted to give effect to this right [access to information]", the position is that PAIA has the universal application enjoyed by the Constitution and, likewise, can only be limited with careful justification.

⁴⁰ DT McKinley "The state of access to information in South Africa" (2003) available at <http://www.csvr.org.za> 11.

- to promote effective participation in decision making by public bodies that affects their rights;
- to ensure that the state takes part in promoting a human rights and social justice culture; and
- to promote openness that provides access to information in an as speedy and effortless manner as reasonably possible.⁴¹

As stated above, section 32 of the Constitution enshrines the right of access to certain information, and PAIA gives effect to that constitutional right. The Act maintains and protects South Africans' right to access any information held by the state and/or information held by another person (including private bodies) that is needed to protect or exercise any right. Access to information will be granted once certain requirements have been met.⁴² The Act also recognises that the right of access to information may be limited if the limitations are reasonable in an open and democratic society (for example, a limitation that protects privacy).

Section 51 of PAIA gives effect to the requirements of section 32 of the Constitution. The reference to access to information is to any information in addition to that specifically required in terms of section 51 of PAIA. However, it does not create any right or entitlement to receive such information, other than in terms of PAIA. As a result, in terms of the principles of constitutional subsidiarity, claims for enforcing the right of access to information must be based on PAIA and not the constitutional provision itself directly.⁴³ PAIA must be interpreted purposively⁴⁴ based on the fact that it has a special status as a statute that supplements the constitutional right in section 32.⁴⁵ In fact, PAIA is hailed as one of the most progressive pieces of access to information legislation in the world.⁴⁶

⁴¹ Section 9 of PAIA.

⁴² Sections 18 and 53 of PAIA.

⁴³ *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) para. 73. See also *MEC for Education, KwaZulu-Natal, and Others v Pillay* 2008 (1) SA 474 (CC) para. 40; *South African National Defence Union v Minister of Defence and Others* 2007 (5) SA 400 (CC) para 52; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) paras 22-26.

⁴⁴ Section 2(1) of PAIA; *S v Makwanyane and Another* 1995 (6) BCLR 665 (CC) para 9.

⁴⁵ I Currie & J Klaaren *The Promotion of Access to Information Act Commentary* (2002) 2.

⁴⁶ A Akro-Cobbah "The right of access to information: civil society and good governance in South Africa" (2007) paper delivered at 73rd IFLA General Conference and Council, available at <http://www.ifla.org/iv/ifla73/index.htm> (accessed 11 May 2010).

PAIA was promulgated to ensure that people are able to obtain information in order for them to participate in decisions that affect their lives. This allows the public and private bodies to become more transparent and less corrupt, which contributes to an open democracy. To this end PAIA is a good tool to hold government accountable for decisions on spending and service delivery.

The rights of access to information held by public and private bodies may be limited to the extent that the limitation is reasonable and justifiable in an open and democracy society based on human equality, freedom and dignity as contemplated in section 36 of the Constitution. In terms of looking at PAIA in a global context, this “freedom of information” (FOI) law is often seen as a model for the African continent.⁴⁷

There are global reasons and standards of FOI laws which, when PAIA was drafted, were used as foundational values. These reasons are as follows:

- promoting transparency and openness;
- effective and efficient governance;
- fostering a culture of accountability;
- FOI as a vehicle to access other rights;
- ensuring participatory democracy; and
- providing information in an effortless manner.⁴⁸

There are many challenges locally and globally for FOI laws, such as their relevance to people’s needs, substandard protection for the poor in terms of court fees, a non-user-friendly legal framework for complaints and access to information.⁴⁹

PAIA makes an important distinction between public and private bodies. Therefore, the first thing to determine is if the information the person seeks to access is held by either a public or private company.

⁴⁷ <http://www.sahrc.org.za/home/index433d.html?ipkContentID=26&ipkMenuID=46>. (assessed 29 July 2017).

⁴⁸ <http://www.sahrc.org.za/home/index433d.html?ipkContentID=26&ipkMenuID=46> (assessed 29 July 2017).

⁴⁹ <http://www.sahrc.org.za/home/index433d.html?ipkContentID=26&ipkMenuID=46> (assessed 29 July 2017).

A public body refers to any state department, administration in the national or provincial sphere of government, municipality in the local sphere of government or any other functionary that is performing a duty in terms of the Constitution or exercising a public power in terms of any legislation.⁵⁰ When submitting a PAIA request to a public body, one does not have to explain why one requires the information.⁵¹

A private body refers to any natural person, partnership or any former or existing juristic person, which excludes a public body, which carries on any trade, business or profession.⁵² A private body performs a private function and has no connection to government, and therefore it is privately owned. As a result, when submitting a PAIA request to a private body one must state which right one seeks to protect or exercise by asking for the information. For example, one must specify if one is attempting to exercise one's right of access to adequate housing or one's right to fair labour practices.

The procedures for requesting a record from both public and private bodies all fall under PAIA, however under different parts of PAIA and as a result they are treated differently. In the ensuing paragraphs 3.5 and 3.6 below, the two different procedures in relation to information held by public and private bodies are fully outlined.

3.5 Information held by public bodies and procedure to be followed

Section 11 of PAIA gives effect to the right of access to information held by public bodies. The section can be summarised as follows.

Section 11(1) provides that information held by a public body should be given to anyone who request it if that requester follows the procedural requirements that are stipulated in the Act in itself. It further states that access to that information may not be refused in terms of any other ground than that which is provided for in chapter 4 of the Act.

⁵⁰ Section 1 of PAIA.

⁵¹ I Currie & J Klaaren 'The Promotion of Access to Information Act Commentary' (2002) para 5.6.

⁵² Section 9 of PAIA.

Section 11(2) provides that the requester referred to in section 11(1) covers access to records which contain personal information of the requester. This provision has been replaced by section 110 of POPI.

Section 11(3) provides that the rights of the requester to access to information may not be affected by reasons the requester provides for requesting access or the belief of the information officer as to what the requester's reasons are for requesting access.

In the *Mittal Steel* case⁵³ the relevant public body had lost its appeal in the Pretoria High Court and was ordered to release records of its labour relations practices, including minutes of management meetings, between the periods of 1965 to 1973. The information was requested from Mittal Steel by Mondli Hlatshwayo in 2002, when it was still trading as ISCOR Ltd. Hlatshwayo was an MA student at the University of the Witwatersrand who was working on a dissertation on labour relations at ISCOR while it was still a public body. He asked to conduct in-depth interviews with current and former employees, and to have access to all documentary sources, including all relevant reports, minutes and archival material.

When his request in terms of PAIA was refused, he applied to the Pretoria High Court to allow him access to minutes of meetings at ISCOR Vanderbijlpark. ISCOR claimed that the researcher was not entitled to the records, as ISCOR was not a public body. It also argued that the records should not be disclosed because they related to the exercise of a power or performance of a function as a private body. Under PAIA, members of the public have a right to access information held by a public body but not – so it was argued – from a private body.

Hlatshwayo had graduated and needed the information for his PhD. He said the purpose of his study was to examine the relations between employers and employees in an environment without trade unions. He focused on ISCOR because it was a large company whose predominantly black workforce had no formal union representation, and also because ISCOR played a pivotal role in the policies underlying the labour relations of the apartheid government. His attorney argued that this case would have an impact on many entities, as it considered various tests to determine whether the records requested in terms of PAIA relate to the entity's function either as a private body or a public body. Factors such as state control and the exercise of monopolistic

⁵³ *Mittalsteel South Africa Ltd v Hlatshwayo* 2007 (1) SA 66 (SCA) para 30.

powers may count. Also, if some collective benefit for the public is involved and if the public accepts this as such, then the company may be treated as a public body and hence have to make available the requested records. The Supreme Court of Appeal ruled that the nature of the records requested related to ISCOR's performance of a public function and should thus be released on the basis that it was a public body. It dismissed the appeal with costs, and ordered that the relevant documents be handed over to Hlatshwayo within forty days.⁵⁴

This case supports Klaaren's explanation that the right to access to information should be viewed as the right to have instruments in place in order to give people the opportunity to request information which they seek.⁵⁵

PAIA states that every public body should have an information manual and section 14 sets out the type of information that the manual should contain, which will help in terms of how people should go about when they want to request certain information. The manual should mainly cover how the organisation is set up, the structure and services provided by the organisation and how people can lodge a request. They must make it clear to the requester to whom he or she needs to lodge the request and furthermore the manual should contain contact details of the relevant people, particularly of the Information Officer and Deputy Information Officer. Moreover, the section 14 manual should also contain a list that deals with what sorts of information is kept by the public body to make it easy for the reader to understand the contents.

The procedure to be followed is that the requester needs to allow the Information Officer to identify the kind of information needed. The request can be made either in writing or orally. The request can be granted or refused. In the event that the request is granted, a stipulated fee shall be charged and a form will also be issued in case there is a fee dispute. If the request is refused, reasons should be given as to why the request was refused, and the provisions of the Act relied upon and the right to appeal⁵⁶ the decision should be stated.

If the public body does not have the record of the requested information, the public body needs to transfer the request to the relevant body within 14 days and thereafter

⁵⁴ *Mittalsteel South Africa Ltd v Hlatshwayo* 2007 (1) SA 66 (SCA) para 2.

⁵⁵ J Klaaren "A right to a cellphone? The rightness of access to information" in R Calland & A Tilly (eds) *The Right to Know, The Right to Live* (2002) 17-26.

⁵⁶ Section 25(3) of PAIA (records of public bodies) and section 56(3) of PAIA (records of private bodies).

they need to notify the requester.⁵⁷ The forms of access to information held by a public body includes inspection, viewing of the record, copies, transcripts or extraction of the information from the record by a machine.⁵⁸ Information needs to be granted in the form and language requested.⁵⁹

PAIA provides two remedies for non-disclosure, which is firstly the internal approach appeal and secondly taking the matter directly to the courts. In the first remedy of internal approach appeal, the requester can challenge the non-disclosure, the fees and the forms of access granted.⁶⁰ The Act states that the appeal must be lodged within 60 days⁶¹ and the outcome should become available within 30 days.⁶² A second remedy involves taking the matter to court to get the appropriate relief. This appeal based on dissatisfaction of the internal appeal should be lodged within 30 days.⁶³

The court only has certain rather limited powers to review the unlawfulness, reasonableness and procedural fairness of the request denial but it cannot consider the merits of the case when faced with a non-disclosure case.⁶⁴ The court can further view the records that were requested by the requester but it cannot disclose the records to the requester.⁶⁵ The court can either confirm or set aside the decision made by the internal appeal but it must make an order that is just and equitable.⁶⁶

3.6 Information held by private bodies and procedure to be followed

Section 50 of PAIA gives effect to the right of access to information held by private bodies. The section reads as follows:

- “(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;

⁵⁷ Section 20 of PAIA.

⁵⁸ Section 29(2) of PAIA.

⁵⁹ Section 31 of PAIA.

⁶⁰ Section 25(c).

⁶¹ Section 75(1)(a) of PAIA. It has to be lodged within 30 days if third party notification is required.

⁶² Section 77(3)(a) of PAIA.

⁶³ Within 30 days if third party notification is required.

⁶⁴ I Currie & J Klaaren “*The Promotion of Access to Information Act Commentary*” (2002) paras 9.9 and 9.13.

⁶⁵ Section 80(2) of PAIA.

⁶⁶ Section 82 of PAIA.

- (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 protection of any rights, other than its rights, it must be acting in public interest.
- (3) A requester 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.”

A request for access to private information can only be granted if it is required for the protection of a right and if the request complies with the procedural requirements listed in the Act. Access to the records of private bodies is envisaged by Part 3 of PAIA, which provides for the general right of access to records in terms of section 50. The latter section requires transparency⁶⁷ from private and non-profit organisations. Private information refers, for example, to the following kinds of information that should be formally requested in terms of PAIA: compliance and regulatory records, legislative and policy framework records, corporate governance records, information technology records, financial management records, human resource management records, project management records and communication records.⁶⁸

The private body's manual must contain the address and contact details of the body, a description of the guide referred to in section 10, and categories of the records that are kept by the body to make it easy for the requester to know what kind of information he or she can request from the body.⁶⁹ The private body can on a regular basis voluntarily submit an update of the categories of records that are available without a person having to request access in terms of the Act.⁷⁰ Private bodies must also have provisions that deal with the publication and availability of certain records, considering also the grounds of refusal that are set out in sections 63 and 70.

⁶⁷ JM Ackermann & IE Sandoval-Ballesteros “The global explosion of freedom of information laws” (2006) 58 *Administrative Law Review* 85 100.

⁶⁸ Financial Intelligence Centre *Manual on the Promotion of Access to Information Act 2 of 2000* (updated June 2016) 8-9.

⁶⁹ Section 51(1)(a) and (b) of PAIA.

⁷⁰ Section 51(1)(c) of PAIA.

There is a prescribed manner in which a request should be made to the private body. Before processing a request for information, a stipulated fee is set out by the head of the private body to be the person requesting access to information.⁷¹ The fee will basically cover the costs of preparing the record and the requester may be required to pay a deposit.⁷² The private body then has 30 days to give the requester reasons or notice of the outcome of the information requested.⁷³ However, the 30 days can be extended based on the fact that the private body may seek more time to be able to interrogate the request, when the information needed is too voluminous or if there is a large number records that needs to be searched. In other circumstances the information may necessitate a search of records located in a different town or consultations need to be made with various private bodies. The requester should be told of the extension within the 30 day period, giving reasons of such extension and giving the requester the opportunity to lodge an application based on extension.⁷⁴ The private body can either refuse or grant the information requested. The Act goes into detail regarding the grounds for refusal of information.⁷⁵ The sub-headings of the grounds for refusal of access to records are as follows:

- mandatory protection of privacy of third party who is natural person;⁷⁶
- mandatory protection of commercial information of third party;⁷⁷
- mandatory protection of certain confidential information of third party;⁷⁸
- mandatory protection of safety of individual and property;⁷⁹
- mandatory protection of records privilege from production in legal proceedings;⁸⁰
- commercial information of private body;⁸¹

⁷¹ Section 54(1) of PAIA.

⁷² Section 54(2)(b) and 54(3)(a) of PAIA.

⁷³ Section 56 (1) of PAIA.

⁷⁴ Section 57 of PAIA.

⁷⁵ Section 62 of PAIA.

⁷⁶ Section 63 of PAIA.

⁷⁷ Section 64 of PAIA.

⁷⁸ Section 65 of PAIA.

⁷⁹ Section 66 of PAIA.

⁸⁰ Section 67 of PAIA.

⁸¹ Section 68 of PAIA.

- mandatory protection of research information of third party and of private body;⁸² and
- mandatory disclosure in public interest.⁸³

PAIA outlines a wide range of categories when it comes to persons requesting access to information. There are also time frames governing requests as well as for the transfer of requests, the form and cost of access and the providing of written reasons where a request is denied. However, when compared to FICA, the latter does not set categories in which people can request information.

PAIA has wide application, is drafted very progressively and carries a high potential for strengthening participatory democracy, although its procedures are complex. Besides condemning PAIA for being apologetic and a limping version of what was proposed before, it seems more appropriate to see it as a classic example of just how far South Africans must still go in order to turn the corner from affirmation to realisation.⁸⁴ The link between access to information and the principle of justification was explained by Mureinik when he stated that access to information is a matter of importance, since it establishes a culture of justification.⁸⁵

⁸² Section 69 of PAIA.

⁸³ Section 70 of PAIA.

⁸⁴ *President of the RSA v M & G Media Ltd* (998/2013) [2014] ZASCA 124.

⁸⁵ E Mureinik "A Bridge to where? Introducing the interim Bill of Rights" (1994) 10 *SAJHR* 31-32.

CHAPTER 4

CONCLUSION AND RECOMMENDATIONS

This dissertation firstly looked at the background of FICA and how it came about. The paper went further to unpack the kind of information held by FICA and the regulation and distribution. FIC does not investigate any unlawful activities or money laundering or other related activities of offences, however FIC provides evidence and data to cooperate with and give guidance to investigation authorities, SARS and intelligence service who execute the investigations. The main focus of this paper was in relation to access of information in terms of FICA. Statutes such as POPI and PAIA were later discussed which also deals with the provisions of access to information and further process and procedures were laid out in which one needs to follow and where necessary give reasons for requesting access of information. Then the paper looked at the Constitution which has the same right of access to information envisaged as a Bill of right.

It is important to note that the right of access to information as enunciated in section 32 of the Constitution is embraced in numerous statutes in South Africa, for example PAIA, POPI and FICA. These statutes serve to build on the culture of transparency, accountability and responsibility by the democratic institutions and private bodies. The other important factor is that the right of access to information may be limited if the limitations are reasonable in an open and democratic society (for example, a limitation that protects privacy). PAIA, POPI and FICA demonstrate that this fundamental right of access to information is not absolute and therefore refusal of access to information may, in line with section 36 of the Constitution, be justifiable under certain circumstances.

These statutes all contain the provisions of the right to access of information and make certain provisions for any person to access specific information. Further these statutes also provide strict measures where a person cannot request access to information for no apparent reason. This really shows how South Africa has evolved from the past apartheid where information was kept in secrecy and there was no room to give reasons why the requested information is needed.

Section 40 of FICA is the main provision that regulates and deals with access to information held by the Centre. The section makes provision for the investigating

authorities, SARS and intelligent services to obtain the relevant information from the FIC. Therefore, these institutions should be provided with information regarding suspicious transactions.

There are limitations placed on access to information in both FICA and PAIA. Section 40(2) of FICA states that the purpose of the request of the information must be in writing and set out with specific reasons, while under PAIA one need not state the specific reasons why access to information is requested. But the limitation imposed by section 40(2) of FICA – namely the providing of reasons for the request – is arguably a justifiable limitation, because access to information under FICA is for a specific purpose and if the request is not for the purpose of fighting crime, then that information cannot be granted.

The FIC keeps information for specific purposes to help specific institutions with that information. As a result, the FIC cannot grant access to information to someone who is not listed in the legislation for purposes that are unrelated to the FIC or any specific mandate of the institutions. However, section 40(1)(c) of FICA provides that any other person may, at the initiative of the Centre or on written request, be provided with information regarding the steps taken by the Centre in connection with transactions reported by such accountable institution, reporting institution or person. Under section 40(1)(c) of FICA the legislature narrowed the right of access to information by any other person only to steps taken by the FIC in relation to reported transactions and this right of disclosure can be denied by the Centre if it reasonably believes that such disclosure will undermine its own objectives or prejudice any person. PAIA on the other hand states that anyone can obtain access to information as long as certain requirements are met. Overall, the right to access information held by the FIC is an important development in that it entrenches the value-based principles of transparency contained in the Constitution subject to certain limitations.

POPI's main objective on the other hand is to protect personal information and to create the balance between the rights to privacy, access to information, the need for free flow of information and more importantly the regulation process of personal information. Public or private bodies or anyone who keeps records of person's information unless that specific personal information is governed by any other legislation will be obliged to follow the minimum standards set by POPI for the protection of that information. It is without a doubt that one can only collect personal

information mainly for lawful purpose and therefore the person/subject should be given reason why the personal information is collected.¹As a result you can only use the collected personal information specifically for purpose which you collected it for.² The Information Regulator is an independent body which was established in terms of POPI and it is responsible for monitoring and enforcing compliance by public and private bodies of the provisions of POPI and PAIA. On the issue of compliance, South Africa's major banks were fined for failing to adhere to measures which were put into place as part and parcel of the complying with the provisions of FICA.³

Above all, the South African Constitution has globally been recognised as one of the most advanced constitutions in the world, also because it decisively establishes a separate right of access to information.⁴ The Constitution guarantees an unqualified right to access information held by the state, but this right may be limited in terms of a law of general application.⁵

FICA provides access to information to specific institutions, while the Constitution gives everyone the right to access any information held by the state or any other person protecting any right. In this respect, PAIA also comes into play, as it was enacted to give effect to the constitutional right of access to information, whereas POPI is relevant because it protects personal information that may not be shared with the public. Most of the accountable institutions process a lot of personal information daily and that process is thus regulated by POPI, therefore it is upon the accountable institutions to make sure that proper procedures and processes are followed in keeping such personal information safe. The amendment bill incorporates the provisions of POPI.

The purpose of this dissertation was to investigate these statutes as well as the constitutional provision and to compare them, specifically from the vantage point of the way in which FICA treats information held by the FIC. Each of the considered legal instruments have different purposes and thus contain different rules and procedures for obtaining access. There are also differences regarding the type of information one

¹ Section 13 of POPI.

² Section 15 of POPI.

³ "Reserve Bank Fines banks over lack effective anti-money laundering measures" 1 2014 also available at <https://www.businesslive.co.za/bd/companies/financial-services/2014-04-16-reserve-bank-fines-banks-over-lack-of-effective-anti-money-laundering-measures/> (accessed 07 June 2018).

⁴ Section 32 of the Constitution.

⁵ Section 36 of the Constitution.

can get access to and lastly the remedies that can be used. It is notable that South African law has in recent history added a number of statutes and norms regarding access to information. Many aspects require further development and further consideration, and there is no doubt that we still have some way to go in understanding the tension between, for instance, the right to privacy and the right to access information.

South Africa still has a long way to go and the Information Regular can start with placing strict obligations to all accountable institutions to implement the necessary measures. The accountable institutions need to be obligated to conduct enhanced client due diligence in terms with the amendments bill and by doing just that this may decrease the level of illegal crimes or activities in respect of money laundering. The additional entities defined as accountable institutions under the schedule 1 of the amendment bill were necessary as a lot of business and professionals fell outside the ambit of FICA.

In conclusion, the differences between the statutes considered in this dissertation show us that different considerations apply in different contexts. Specialised rules are required to mitigate the tensions and risks involved in the divergent contexts. FICA, when compared to the other regimes, for example illustrates how, in the context of combating money laundering and terrorism financing, different rules must necessarily apply than the case with access to information in other contexts.

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