**IN THE HIGH COURT OF SOUTH AFRICA**

**(WESTERN CAPE DIVISION, CAPE TOWN)**

**REPORTABLE**

**CASE NO: 7973/2020**

In the matter between:

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| **WIDEOPEN PLATFORM (PTY) LTD** | **Applicant** |
| and | |
| **CITY OF CAPE TOWN** | **First Respondent** |
| **CHARLYNNE BLANCE ARENDSE** | **Second Respondent** |
| **ALDERMAN DIRK SMIT** | **Third Respondent** |
| **TRACTOR OUTDOOR (PTY) LTD** | **Fourth Respondent** |
| **CAPITALGRO (PTY) LTD** | **Fifth Respondent** |
| **ON TAP TWELVE PROPERTY (PTY) LTD** | **Sixth Respondent** |

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**JUDGMENT DELIVERED ELECTRONICALLY: THURSDAY, 10 FEBRUARY 2022**

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**NZIWENI AJ**

*Introduction and background*

[1] In these proceedings, the Applicant seeks to enforce its right to access records held by a public body, the First Respondent, in terms of the Promotion of Access to Information Act 2 of 2000 ("PAIA"). The First Respondent is the City of Cape Town Municipality ("the City"). This case involves a refusal by the City to impart information in its possession related to third parties to the request.

[2] The Applicant is a company with its registered office in Johannesburg. The Applicant's business entails the erection of large outdoor advertising structures. The Second and Third Respondents are employees of the City who took the impugned decisions on behalf of the City. According to the Applicant, the Fourth to Sixth Respondents are merely cited in these proceedings because they are either owners of the media displayed on the signage, or the landowners of the property on which the signage structure relevant to this case is situated.

[3] This matter has its genesis in the approval by some of the Respondents of the erection of signage within the City of Cape Town. The history between the First Respondent and the Applicant has been dominated by a series of requests for access to official documents, which the Applicant believes to be at the disposal of the City, and to which it claims a right of access in accordance with PAIA.

[4] This review application is brought in terms section 78 of PAIA. The application is the sequel to an exhausted internal appeal process, in which the Applicant appealed the refusal of its request to access records pertaining to outdoor advertising signage erected by the third parties. The Applicant's internal appeal was partially successful, in that the City disclosed some of the requested records. However, it refused to disclose the currently requested records on grounds that they contain information exempted from disclosure.

[5] In this application, the Applicant seeks to invoke the provisions of section 82 (a) and (b) of PAIA. The Applicant desires that this Court should review and set aside the decisions of the internal appeal and direct the First to Third Respondents to furnish the Applicant with the approval records issued by the City. The Applicant holds the view that the information sought falls within the ambit of the mandatory disclosures set out in section 46 of PAIA.

[6] As things stand, the stalemate between the parties concerns a request by the Applicant for access to information pertaining to only five signage structures located around the City of Cape Town. Consequently, the Applicant seeks access to specific copies of the approval documents for the signage, in respect of the following five applications:

(a) Erf 173335, Paarden Eiland;

(b) Erf 1158, Sea Point;

(c) Erf 30959, Milnerton;

(d) Erf 4217, Montague Gardens; and

(e) 199 Loop Street.

[7] This is not the first legal dispute of this nature involving the City and the Applicant, pertaining to the same issues. The Applicant lodged the instant application whilst the parties were expecting a judgment, from this Court, on some similar issues. In the other matter, Steyn J dismissed the Applicant's application with a punitive cost order.

[8] Notably, sometime later, after the Applicant had already launched this application, it amended its notice of motion in this matter. In the original notice of motion the Applicant sought access to 105 documents. In the amended notice of motion, the Applicant only sought access to 19 documents. Only during the hearing of this application, did the Applicant reduce its request to five documents. However, the grounds for seeking the relief remained the same.

[9] The First to Fourth Respondents oppose this application. Only the City and the Fourth Respondent have filed answering affidavits. The Fifth Respondent has filed a notice to abide. According to the Fourth Respondent, the terms, conditions and period of the approvals constitute information that would likely cause harm to its commercial or financial interests.

[10] The City persists in its refusal to disclose information related to the approval documents. The City justifies the non-disclosure on two grounds: firstly, the disclosure of the applications for approval would reveal financial, commercial, scientific, or technical information, in contravention of s 36 (1) (b) of PAIA; secondly, the disclosure of the confidential information could reasonably put the third party at a disadvantage in contractual or other negotiations, or prejudice the third party in commercial competition, contrary to s 36 (1) (c) of PAIA.

***The Parties' submissions***

The Applicant's submissions

[11] The Applicant submits that it seeks to find out whether:

(a) a sign was approved;

(b) what type of sign was approved; and

(c) the conditions of the approval.

[12] It is the Applicant's contention that the information it seeks can be obtained from the approval records. The Applicant points out that the Respondents, by concealing information from the public, are defeating the purpose of PAIA, which is transparency and accountability. The Applicant further strongly contends that, because the approval authorises third parties to display advertising to the public, the corollary of this is that any person is entitled to see the terms, conditions and period of the approvals.

[13] Moreover, the Applicant contends that no harm can be occasioned to the Fourth Respondent if such information is given as, so the argument continues, any genuinely protectable information contained in the approval form can be severed from the rest of the record.

[14] It is also the Applicant's contention that it seeks to level the playing field in Cape Town, amongst competitors in the outdoor advertising industry. The Applicant staunchly contends that the City issued the approvals illegally and/or irrationally.

Accordingly, it was asserted on behalf of the Applicant that the Fourth Respondent - the biggest player in the industry in Cape Town - is also guilty of contravening bylaws and has unlawfully profited from illegal signs.

[15] The Applicant maintains that it should be granted the order that it seeks, because the First to Third Respondents did not provide independent reasons for refusing its requests to be given access to the approvals, as they do not provide any elaboration. The Applicant further contends that the Respondents have not established which information falling within the ambit of section 36 (1) (b) and (c) would be disclosed, or the probable harm, disadvantage or prejudice the third parties will suffer if such information were to be disclosed to the Applicant.

[16] Furthermore, it is the Applicant's firm view that it is not in the public interest not to disclose, because the disclosure of the approvals could well reveal evidence of the contravention of by-laws or that the City officials were biased.

[17] Additionally, the Applicant disputes that the applications for approval contain the following:

(a) financial, commercial, scientific or technical information, other than trade secrets, of a third party, the disclosure of which would be likely to cause harm to the commercial or financial interests of that third party; or

(b) information supplied in confidence by a third party, the disclosure of which could reasonably be expected to:

(b1) put the third party at a disadvantage; or

(b2) prejudice the third party in commercial competition.

[18] The Applicant contends that the provisions of section 46 of PAIA are applicable because:

(a) The applications for approval do not require any confidential or proprietary information to be contained in such application.

(b) The applications were available for inspection by interested parties before their approval; they were also published to neighbouring properties and certain information was made available to interested parties. The argument continues that once the information enters the public domain, a party cannot contend that such information contains anything the disclosure of which will cause harm to the commercial interests of the party.

(c) Regarding the owners of the properties on which the signs were erected, their identities are public knowledge; the applicant already obtained their identities from the deeds office.

(d) The Respondents can redact information in the application if it considers it confidential.

(e) The decision of the City is irrational.

(f) The Third Respondent ignored and paid lip service to the Applicant's allegation that the advertising signs were illegal, on the basis that the parties were involved in a competitive industry.

(g) The Second and Third Respondents did not apply their minds to the matter, as they did not even realise that the information requested had already been made public; on the Respondents' version, certain information contained in the application had already been made available to the affected party.

(h) The details concerning the specifications of the signs and products used are already, and readily, available to the public.

(i) There is an issue of public interest. The Applicant, as a member of the public, has an interest in viewing the approvals granted to determine why they were given, notwithstanding the fact that they appear to contravene the by-laws of the City.

(j) The disclosure may reveal evidence of a contravention, by the holder of the approval, during the erection.

(k) Public interest in the disclosure outweighs third party interests.

[19] According to the Applicant, the City's decision should be set aside on the following grounds:

(a) The City paid no or insufficient regard to mandatory disclosure of information in the public interest in terms of section 46 of PAIA.

(b) The City's approval of the applications could not contain any confidential or propriety information of the third party, nor could it implicate either section 36 (1) (b) or (c) of PAIA.

(c) The Second Respondent did not indicate the nature of the information furnished to it by the third party, or how the disclosure of the information could put the third party at a disadvantage as envisaged by section 36 (1) (c) of PAIA.

(d) The disclosure of the application for approval of the signage could not be a breach of confidence owed to a third party, as the application was made available for inspection by neighbouring properties and other role players prior to the approval being granted, and no undertaking of non-disclosure was given by any of such parties.

(e) The City failed to discharge its onus in terms of section 81 (3) of PAIA, which provides that the burden of showing that the refusal of a request for access to information complies with the provisions of PAIA, rests upon a party claiming that it complied.

(f) The Applicant has a constitutional right of access to information, which constitutional right could only be vindicated if the Second and Third Respondents properly and adequately account for and justify their refusal to provide the information requested.

***Respondents' submissions***

The First to Third Respondents' response

[20] The City contends that the Applicant's case is predicated on a misguided view. It is the City's contention that it cannot furnish the information sought by the Applicant, because the relevant information contains protectable financial, commercial or technical information of third parties. The argument continues that section 36 (1) (c) (ii) of PAIA allows the City to refuse the request.

[21] It is the City's contention that the information required contains inside information, the disclosure of which will prejudice the third party in commercial competition.

[22] The City describes the Applicant's submission regarding the pre-printed form as cynical. According to the City, the Applicant is requesting a populated form with the details of the third party, and not a blank application form. It is strongly contended that when the application form is filled out, it becomes protected. According to the City, the form contains more information about the details of the property owner than what is contained in the deed search. It also contains contact or personal details of the contact person.

[23] Furthermore, the City's contention is that the application for approval form (annexure 'FA 36' to the founding affidavit) is accompanied by attachments that contain information which is mostly technical and proprietary to the applicant. According to the City, the information contained in the application form may include technical and scientific information, environmental information, and heritage impact and traffic assessments.

[24] The City submits that the compilation of the information required in the approval form, is the result of effort, research and expertise. It is further contended on behalf of the City that the approval application form, by its very nature, does require technical information; for instance:

(a) Photomontage;

(b) Photographs with scale bar markings;

(c) Technical drawings showing structural details;

(d) Site plans; and

(e) Technical lighting details.

[25] It is staunchly contended by the City that its policy pertinently indicates that an application is likely to be approved, if an applicant can outline in it that the signage will fit the architectural design of the building. According to the City, the financial information includes banking records of applicants, banking transaction with the City, details of the third parties' suppliers and details of the property owner.

[26] It is the City's submission that the information contained in the record as required in terms of the by-law, indicates the duration of the lease, details of the property owner, and the details of the agent that the property owner uses to negotiate with prospective signage tenants.

[27] According to the City, the Applicant wants to obtain, at all costs; information relating to its competitors' financial, commercial and technical information. The City staunchly contends that disclosure of this information, would enable the Applicant to identify and approach key role players, determine the duration and terms of the leases, and to gain a competitive advantage in negotiating with landlords.

Public domain response

[28] The City contends that the Applicant is making sweeping statements in this regard, as it does not state which applications were published to neighbouring properties. According to the City, it only provided one application to a neighbouring property, because of the proximity of the signage to the neighbouring residential property. It is further the City's contention that the fact that the information was made available to a particular neighbour, does not make it publicly available, within the meaning of PAIA. None of the affected parties stood to benefit from the disclosures made to them.

[29] It is further the City's submission that, to reveal information to interested parties and directly affected parties, does not make the information not protectable commercial proprietary information. According to the City, the determining factor as to whether the information is protectable or not, is whether the party that seeks the specific information, may benefit from the disclosure to the detriment of the third party.

Public interest

[30] The City contends that an issue does not simply become of public interest because a requester is a member of the public. Equally, the mere fact that a person is a member of the public does not mean that the person is acting in the public interest, or that the information will benefit the broader public.

[31] It is further submitted that the Applicant does not furnish information to explain why the disclosure of the information required would be in the interest of society in general. The Applicant merely makes speculative submissions that the disclosure could well reveal evidence of a violation of the law. No evidence is provided to support the assertion. It is also asserted that the information required would be to the Applicant's competitive advantage.

Constitutional right to access

[32] The City maintains that no right is unlimited, and that the Applicant is also faced with an insurmountable hurdle pertaining to the constitutional principle of subsidiarity.

Duration of the approval

[33] The approval form contains the duration of the contract, information that is critical to competitors. The approval form contains similar information to the application document.

*The relevant provisions of PAIA*

[34] Insofar as the provisions of section 46 of PAIA are concerned, they reaffirm that there is no blanket prohibition in accessing personal information.

[35] Section 46 of PAIA reads:

'**46 Mandatory disclosure in public interest.** –Despite any other provision of this Chapter, the information officer of a public body must grant a request for access to a record of the body contemplated in section . . . 36 (1) . . . if –

(a) the disclosure of the record would reveal evidence of-

(i) a substantial contravention of, or failure to comply with, the law; or

(ii) an imminent and serious public safety or environmental risk; and

(b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question.'

[36] On the other hand, in chapter 4 of PAIA, under the heading 'GROUNDS FOR REFUSAL OF ACCESS TO RECORDS', it is quite clear that PAIA specifically and intentionally draws a clear distinction between peremptory and mandatory grounds to refuse access to information. The specific sections read as follows:

'**33. Interpretation.**- (1) The information officer of a public body-

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

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

unless the provisions of section 46 apply.

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

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

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

Section 36 of PAIA justifies the refusal to grant access to information on various grounds. The terms of section 36 (1) are peremptory and not discretionary. Section 36 stipulates the following:

' **36. Mandatory protection of commercial information of third party.** (1) Subject to subsection (2), the information officer of a public body must refuse a request for access to a record of the body if the record contains—

(a) trade secrets of a third party;

(b) financial, commercial, scientific or technical information, other than trade secrets, of a third party, the disclosure of which would be likely to cause harm to the commercial or financial interests of that third party; or

(c) information supplied in confidence by a third party the disclosure of which could reasonably be expected—

(i) to put that third party at a disadvantage in contractual or other negotiations; or

(ii) to prejudice that third party in commercial competition.

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

(a) already publicly available;

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

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

(3) For the purposes of subsection (2) (c), the results of any product or environmental testing or other investigation do not include the results of preliminary testing or other investigation conducted for the purpose of developing methods of testing or other investigation.'

The contention by the Applicant has been labelled as misguided. According to the City, onus of proof is applicable to an application to court and not to an internal appeal process, and that it was premature for purposes of this application.

[37] In these proceedings the Applicant has an onus to show that any records which the City has and is refusing to disclose, contain any information as contemplated in section 46 of PAIA.

[38] The City contends that it does not make drawings available to any external party which is not involved with the application.

*Analysis*

[39] It is of paramount importance to take cognisance of the fact that the request for access to information is predicated upon the Constitution. It has been stated that access to state held information is one of the cornerstones of an open and democratic

society. Affording citizen access to official documents, which are inter alia in possession of public bodies, signifies and enhances good administration, together with transparent and good governance. See *Brümmer v Minister for Social Development and Others* 2009 (6) SA 323 (CC), at paragraph 62.

[40] The right of access to information has been extensively hailed and acknowledged as a right that guarantees that citizens are provided with the necessary information in order to effectively participate in the democratic dispensation. It also promotes accountability, as it can bolster the monitoring and public scrutiny of government institutions. The obvious corollary of this is that accesses to information can effectively thwart the scourge of corruption.

[41] The Constitution, in section 32, reaffirms the right of a person to access information. While at first it may seem that the right of access to information may be a blanket or unqualified general right, the law, however, in the form of PAIA does not impose a general obligation upon authorities to impart information.

[42] Albeit PAIA is a tool to give effect to the general right to information afforded by section 32 of the Constitution, it also serves as a restriction to that right. In other words, PAIA grants an exemption to the general right.

[43] Consequently, the right of access to information is subject to certain formalities, which may in turn restrict the right. For purposes of this case, it is of critical importance to acknowledge that the law does prescribe restrictions or limitations to the right. The right to have access to public documents is thus not an absolute one.

[44] Information received in confidence by the City is protectable. Certainly, public institutions in possession of protectable information should always be vigilant of competitors using PAIA to obtain important and crucial commercial information about the activities, prospects and plans of third parties. Hence, it is highly important to maintain a healthy balance between the right of access to information, and the right to privacy. As far as I am concerned, there is a thin line which divides the right of access to information and the right to privacy and/or confidentiality.

[45] I am well alive to the fact that if a public institution is in possession of personal information, it has an onerous task of handling such information with the greatest care and sensitivity, in order to protect the rights of the owner of the personal information. Naturally, if a public institution is in possession of private or confidential information, the test to gain access to such information is strict. Without doubt, when considering imparting information the authorities involved have to consider the impact and scale of that access. Ordinarily, privacy trumps access. The right to privacy protects the privacy of personal information in the custody of a public institution. Inherently, the right to privacy can also effectively restrict the right of access to information.

[46] In the instant case, it is the City's strong contention that it is refusing to impart the information to protect the rights of others. As mentioned previously, the City is relying on section 36 (1) (b) and (c) of PAIA, in refusing access to the requested information. Of course, the Applicant is not willing to accept the justification that the restriction is necessary.

[47] It seems that the City is contending that it did not entirely refuse or hinder the Applicant's access to the information it sought. It only took some measures and merely restricted it. Thus, the refusal was not a generic one. According to the City, it was justified in its refusal as it has, in the context of this case, legitimate reasons to refuse to impart the information sought as it is protecting the interests and rights of others.

*What is the nature of information sought?*

[48] Access to information cannot be granted merely because a requester demands it. I think it is highly important to take note of the fact that the relief sought by the Applicant has morphed significantly since the issuance of the original notice of motion. The Fourth Respondent strongly maintains the view that the Applicant's persistence in seeking disclosure of the records, evinces that the Applicant is highly competitive and that the information sought by the Applicant is not trivial, but valuable, and that it is confidential information that is useful in a competitive industry.

[49] In *Sibex Engineering Services (Pty) Ltd v Van Wyk and Another* 1991 (2) SA 482, at 502D-F, it was stated that there are two types of proprietary interests capable of protection. The first one is the 'trade connections' of the business, also known as its goodwill, which consists of its relationships with customers, potential customers, suppliers and others. The second one is the 'trade secrets' of the business, consisting of all the confidential matters which are useful for the carrying on of the business and which, if disclosed to a competitor, can be used to gain a competitive advantage over the business.

[50] First, the question which aptly arises is whether the information in the custody of the City is information as contemplated in s 36 (1) (b) and (c) of PAIA. As previously mentioned, the Applicant firmly disputes that the application for approval contains protectable information.

[51] It is the Fourth Respondent's contention that the approval records sought by the Applicant contains: details of the person or entity that has a right to consent to a site development; the conditions of the approval; the duration of the approval; the expiry of the approval; and technical information such as structural details and site plans. Furthermore, it is the Fourth Respondent's strong contention that the information sought also includes protected information. According to the Fourth Respondent, the Applicant is trying to access the location and photomontage of the site, that is communicated only to a person who may be impacted.

[52] When it comes to the aspect of what type of information is currently in possession of the City, this Court is faced with conflicting versions. When dealing with the apparent dispute of facts, I am well alive to what was stated in the case of *President of the Republic South Africa and others v M & G Media Ltd* 2012 (2) SA 50 CC, when Ngcobo CJ opined the following at paragraphs 34-36:

'[34] The facts upon which the exemption is justified will invariably be within the knowledge of the holder of information. In these circumstances, the requester may have to resort to a bare denial of the facts alleged by the holder of information justifying refusal of access. A bare denial will normally not be sufficient to raise a genuine dispute of fact, and the *Plascon-Evans* rule would require that the application be decided on the factual allegations made by the party refusing access to the record.

[35] On the other hand, a holder of information who needs to rely on the contents of the record itself, in order to justify the exemption claimed, will be prevented from doing so by the provisions of ss 25 (3) (b) and 77 (5) (b) of PAIA, which preclude "any reference to the content of the record" in order to support a claim of exemption.

[36] Courts should therefore approach these disputes mindful of both the disadvantage at which requesters are placed in challenging evidence put forward by the holder of the record, and the restraints placed on the party holding the information in terms of how it may refer to the contents of the record in justifying refusal of access. In the light of these challenges in producing and refuting evidence, courts have been empowered by s 80 to call for additional evidence in the form of the contested record so that they may test the validity of the exemptions claimed.' (Internal footnote omitted.)

[53] Turning to the instant case, besides the affidavits of the parties, I also have the benefit of being placed in possession of a sample of the form [Annexure FA 36 to the

founding affidavit] used for the application for approval and the by-laws relevant in the completion of the application form in question. Moreover, the Fourth Respondent, who also happens to be a third party and in a better position, than the Applicant to identify why disclosure cannot be permitted, categorically states that the information sought is protected information.

[54] As far as my perusal of the blank application form [Annexure FA 36] is concerned, I get the distinct impression that the information required from the application form does not only involve the listing of personal details. The application form requires, amongst others, site plans, elevations and signs details, structural details, drawings showing structural details, photographs or a photomontage indicating the position and appearance of the sign, registered property owner details, and details of the authorised agent.

[55] The City's "Outdoor Advertising and Signage By-law 2001" pertinently states what is required for the competitor to enter the arena of signage business in Cape Town. Additionally, it is easily discernible from the by-law [under the heading "Part B – Submission of Applications"] what information is required to be filled in on the application form. The by-law requires that the application form, for instance, should contain the following information:

'2.1 A site plan showing the site on which it is proposed that the sign is to be erected or displayed, drawn to a scale . . . showing clearly and accurately the position of the sign and the building, if any, to which it is to be attached and showing every building and the existing

signs on the site, existing and proposed landscaping, . . . with dimensions, of the sign or sign in relation to the boundaries of the site and the location of the streets abutting the site, together with its existing approved zoning conditions.

2.2 A drawing, which complies with the requirements of the National Building and Regulations Standards Act . . . and is in sufficient detail to enable the Municipality to consider the appearance of the sign and all relevant construction detail, including a description of the materials of which the sign is to be constructed, the colours to be used, and whether or not the sign is to be illuminated; and in the latter event, the plan shall indicate whether or not the sign is an electronic sign and, if so, full details shall be furnished.' (My own underlining)

[56] Merely from the above two extracts of the bylaw, it is quite clear that the information requested in the instant case is not only about personal information or details filled out in the course of completing a blank form. Rather it also discloses information which relates to the design of the signage, agent's details, materials used to construct the sign, and drawings in compliance with the National Building and Regulations Standards Act 103 of 1977.

*Is the information contained in the undisclosed records worthy of protection?*

[57] From the onset I wish to state that it is evident that there was an expenditure of skill and labour in the gathering of the information required in completing the application form for approval. Plainly, the information required in the application form calls, amongst others, for data relating to the specifications of the sign, and the process of design, either of which has been arrived at by the expenditure of skill. It is undeniable that designs and drawings have an artistic element to them, relating to the

specifications of a product. Through illustrations, detailed information and ideas about the object are provided or conveyed.

[58] Undoubtedly today's market is extremely competitive. Therefore, it is highly important and necessary for an entity to protect itself by protecting its confidential information. Otherwise the entity may lose the leverage it has against its competitors.

[59] The Applicant submits that the information sought cannot be deemed confidential and thus it is not worthy of protection. To the contrary, I consider that the information is used in the Fourth Respondent's business, and offers an opportunity to gain an advantage over its competitors who are not privy to it. The information can also be used to steal designs or to get a head start in design development.

[60] Counsel on behalf of the Applicant emphatically stated that the information related to the approvals is contained in a letter and nothing is protectable about it. Beyond the merely possible or speculative, the information sought by the Applicant (regarding duration of approval, terms and conditions of approval, details of the agents and land owners) can most certainly afford a party lead-time, which can put the Applicant at an advantage. In other words, there is a real probability that the information can provide insight into opportunities in order to pre-empt them.

[61] Inasmuch as some of the information sought may not be innovative or novel, nonetheless the information will empower the Applicant to navigate the Cape Town signage market sooner than it would have otherwise been able to. The information can also help the Applicant to determine or identify where the Fourth Respondent, as a competitor, is in the market. As previously mentioned, if the access to information sought by the Applicant is granted, it may also help to thwart the Fourth Respondent's or other third parties' actions or developments. Consequently, information cannot be disclosed if its disclosure is going to open the floodgates, or create opportunities for pre-emption.

[62] With the information sought, the Applicant will also be able to identify the potential moves of the Fourth Respondent or the other third parties. The Applicant can thus be able to pre-empt the strategies of the Fourth Respondent or other third parties before they formulate them. In the context of this case, it is not farfetched that the information the Applicant seeks can be used to compete with the Fourth Respondents or other third parties.

[63] As a result, if the Applicant obtains the information it seeks it may be able to make an offensive manoeuvre and snatch away the head start from the Fourth Respondents, or the other third parties, who are already in the signage business in Cape Town. The Applicant's statement in its papers that it wants to level the playing field in Cape Town is quite illuminating.

[64] The information can be used to sabotage contractual relationships or negotiations of third parties. For instance, in order to stay ahead of the competition, the Applicant may use the information to secure the site currently used by the Fourth Respondent, for a period after the expiry of the current approval. Therefore, with the benefit of the 'inside information' in its possession, the Applicant would be able to engage the owner of the site in negotiations and will not have to wait until the duration of the approval by the City expires.

[65] Given the above mentioned, the Fourth Respondent cannot be faulted when it contends that if information provided in confidence is used, it would be to the detriment of its business, as it will be of great value to its competitor.

[66] The other information sought by the Applicant in this regard falls within the realm of designs and technical information. Thus it constitutes protectable information as contemplated by PAIA. It is therefore unnecessary to divulge the details of the person or entity that has the right to consent to a site development; the conditions of the approval; the duration of the approval; the expiry date of the approval; personal information; or the drawings of plans, **unless** the requirements of section 46 of PAIA are satisfied.

[67] An institution can refuse to impart records if these would constitute personal information. Conversely, an institution cannot refuse disclosure of personal information falling within the provisions of section 46 of PAIA

The City replied, and comprehensively so, to the request by the Applicant.

Is the information public knowledge?

[68] It is settled now that information which is public knowledge is not protectable.

[69] The Fourth Respondent contends that the Applicant is not seeking information that has entered the public domain.

[70] The contention by the Applicant ignores the fact that, if the information is given to a restricted number of people who also happen to be affected parties, this does not mean that that information is in the public domain, or that it is public knowledge.

[71] I have already made a finding that the information that the Applicant seeks is protectable information.

The public interest test

[72] Public interest plays a critical role in the overall assessment as to whether it is necessary to disclose information, particularly the disclosure of information which is encompassed by the provisions of PAIA under the mandatory protected commercial information of third parties.

[73] The Applicant is of the view that its request, in the circumstances of this matter, is an issue of public interest. However, public interest is significantly distinguishable from what is of interest to the public. The mere fact that the public is interested in information does not translate itself to mean that the information is of public interest.

[74] The question which aptly begs, is whether in the context of this matter there is an inherent public interest which calls for disclosure of the confidential information.

[75] It is undeniable that the need for disclosure of information can be indispensable if public interest demands disclosure to ensure transparency in public entities, irrespective of whether the disclosure will cause harm to the business of a third party. Public interest, transparency and accountability in governments go hand in hand.

[76] Of particular significance in the present context is that the mere fact that the relevant information contains personal data, does not necessarily mean that such information cannot be accessed. If the benefits of disclosure outweigh the harm to the third party, disclosure is peremptory. For instance, one can argue that personal information which also reveals illegalities, is a matter of public interest as well and, therefore, important for a public debate or accountability.

[77] An institution can be mandated under PAIA to disclose protected information, if the factors listed under section 46 of PAIA, for instance public interest; outweigh the

right to privacy. Put differently, in order for a public institution to disseminate protected information, the requester has to show the need for the information, and one of those reasons is public interest.

[78] In the instant case, the City strongly contends that the Applicant's request does not fall within the ambit of public interest. The City contends in this matter that the Applicant's concerns have absolutely nothing to do with the interests of the public at large; but have everything to do with its own business interests.

[79] On the other hand, the Applicant suggests that there might have been arbitrary decision-making or wrongdoing involved in the approvals granted. Evidently, the Applicant harbours some suspicion regarding the approval process.

[80] Based on all the facts stated by the Applicant in its papers, I am not satisfied that there is a reasonable suspicion of wrongdoing on the part of the City, or the City's employees. Even on the Applicant's own version, there is no cogent reason for the perception of wrongdoing. Instead, the Applicant avers that the disclosure may reveal evidence of a contravention by the holder of the approval during the erection; or that the approvals appear to contravene the by-laws of the City.

[81] Surely, there must be some sort of evidence that supports the suspicion of wrongdoing. For that matter, the photos filed by the Applicant, depicting the City's

employee together with one of the third parties, also do not help without any context to them. The Applicant in this regard is not reporting an act of wrongdoing, it merely suspects wrongdoing. Consequently, in this matter, there is no scintilla of information to show that reasonable grounds exist to believe that wrongdoing was committed.

[82] Chiefly, disclosure of protectable information is permissible in matters which are of interest to society as a whole, and not only to the individual who demands disclosure. Obviously, there is public interest in the exercise of a discretion by public institutions; public officials' honesty or objectivity; influence on public officials to act improperly; management of government funds or property; and in ensuring competitors can compete on a 'level playing field', etc.

[83] In this matter, it is also a weighty consideration that a competitor seeks access to information under the guise of public interest. In the context of this matter, the Respondents cannot be faulted for contending that the Applicant seeks the information for his private interest and not for a public good or concern. This aspect also does not assist the Applicant in using the public interest argument in order to access to information. Particularly in light of the fact that there is no tangible evidence that it would be in the interest of the public to release the information.

[84] To determine whether it is in the public interest to release the information, I have to ask the question whether the information sought is necessary or not, and

consider the purposes of seeking the information, and the role of the person seeking the information in the bigger scheme of things.

[85] It is my firm view that the information requested has nothing to do with open governance; this court is clearly dealing with a competitor which simply wants to pry and meddle in the businesses of other entities. At the risk of repetition, there is nothing in this matter to suggest that public welfare will benefit if the information is disclosed.

Onus of proof

[86] In relation to the onus of proof, given the fact that the City is refusing to grant access, in terms of section 81 (3) of PAIA, the City bears the onus to prove that the non-disclosure is justified. See *M & G Media Ltd*, supra, at paragraph 13.

[87] In the context of this case, I am satisfied that the City, on a balance of probabilities, discharged the burden of showing that the refusal of access to information was justified.

Application to strike out

[88] The First to the Third Respondents launched an application to strike out certain paragraphs of the Applicant's papers. I am however not convinced that if the relief sought by the First to Third Respondents is not granted that they would suffer prejudice. Consequently, this Court is not inclined to grant the said relief.

Costs

[89] In Wideopen Platform v City of Cape Town and Others, unreported judgment dated 7 December 2020, (Case Number 12671/2019), Steyn J, stated the following at paragraph 62-63 and 101

"62 The application form attached, '**SA2**', details some technical information which was required of an applicant in this matter. I was referred to the wording of the relevant By-Law that describes the procedure to be followed and the criteria to be used when obtaining approval for a sign applicable to outdoor advertising in the City of Cape Town. It recognises that there is an extensive amount of technical details applicable

63. It cannot be maintained, as Wideopen does, that no technical information is required in this application and approval process . . . Moreover, it has been established that Wideopen is familiar with the By-Law which describes the present application /approval process as arduous and very technical. Wideopen's alleged ignorance of the fact that the relevant application forms for signage and approval do not require technical information is doubtful. .. The evidence indicates that Wideopen has an interest in applications and approvals for advertising and signage space made by its competitors . . .

[101] I am satisfied that the persistence with litigating penalised with a punitive cost order."

[90] Having regard to the above extract, the Applicant's assertion that the judgment of Steyn J, does not address the approvals is unfathomable. Likewise, it is not clear why the Applicant's counsel would maintain that this case is distinguishable from the facts decided by Steyn J.

[91] Notwithstanding the fact that the judgment of Steyn, J involved a different third party, I tend to align myself with the sentiments as expressed on behalf of the Respondents; that the Judgment of Steyn J, cannot be completely ignored. Disclosure of approvals was sought in that matter as well. The assertion on behalf of the Applicant that the Applicant is no longer seeking disclosure of 19 approvals, following the judgment of Steyn J, is quite telling.

[92] Overall considered, the facts of this matter plainly evinces that these proceedings were instituted without sufficient grounds. Moreover, even though the judgment of Steyn J was a clear indication that the claim launched by the Applicant was unsustainable, it persisted in this matter in seeking the relief claimed. The actions of the Applicant are highly disingenuous, irresponsible and an abuse of court processes. In my view, it is undeniable that this application is vexatious and frivolous litigation.

[93] It was argued on behalf of the Respondents that the conduct of the Applicant justifies a punitive cost order. It is my view that a punitive cost order in this instance, would serve to mark this court's displeasure of the conduct displayed by the Applicant.

[94] The employment of two counsel by the First to Third Respondents was warranted due to the complexity of the matter.

In the premises, I make the following order:

1. The applicant's application is dismissed;

2. The Applicant is ordered to pay the costs on attorney and client scale.

3. Costs awarded to include the costs of the employment of two counsel by First to Third Respondents.

[redacted]

**CN NZIWENI**
**Acting Judge of the High Court**