	MEMORANDUM	Unique Identifier	216-54
		Revision	2
		Revision Date	May 2018
		Effective Date	September 2015
		Legal and Compliance Department	

**TO: GROUP CAPITAL
BETH O'CONNOR**

FROM: JEANY LEKGANYANE

DATE: 21 NOVEMBER 2016

**SUBJECT: REQUEST FOR ACCESS TO INFORMATION IN TERMS OF
THE PROMOTION OF ACCESS TO INFORMATION ACT BY
CENTRE FOR ENVIRONMENTAL RIGHTS**

1. Introduction


Eskom has received a request for access to information by Centre for Environmental Rights (CER) relating to options to extend lifespan of some power stations. We have been requested by Beth O'Connor of Group Capital to give a legal advice whether Eskom can sever some information contained in the relevant records.

2. Background

The CER requested the following:

"Background information and records pertaining to the pre-feasibility study authorised by the board of Eskom, to begin in or around April 2016, into the feasibility of, and options for, extending the lifespans of Eskom's Komati, Camden, Hendrina, Kriel and Arnot Power Stations. The requested record include:

- 1. The terms of reference for the pre-feasibility study;*
- 2. Envisaged timeframes for the pre-feasibility study;*
- 3. Records of any stakeholder engagement process conducted or planned to be conducted in relation to the study;*
- 4. Minutes of the board meeting at which the decision was made to proceed with the pre-feasibility study;*
- 5. The pre-feasibility study (if complete); and*

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6. *Any other studies commissioned by Eskom into the feasibility of extending the lifespans of its power plants."*


We are informed that Group Capital, as the custodian of the records, has perused them to verify whether they contain any confidential information that is protected from disclosure by the Promotion of Access to Information Act No. 2 of 2000 (PAIA) and some information in the records was identified to be confidential and may require to be severed. We were informed that the following are the relevant documents and copies thereof were provided to the Legal Department for verification on the grounds for severance under PAIA:

- Hendrina Power Station LifeEx Study: severance of names of individuals on page 2 and financial and commercial information relating to estimated costs;
- Task Instruction Fleet Renewal Project: severance of the price on page 1 and in Annexure A on page 2;
- Task Order 598: severance of names and prices on page 5, section 4, remove names from signature fields on pages 7, 8 and 9;
- Fleet renewal Progress Report: severance of prices from the cash flow estimate on page 3, remove names from signature field on page 3;
- Extract of minutes of the Board of 18 and 19 April 2016 where the Generation Fleet Renewal Strategy was presented: no severance proposed; and
- Presentation on Generation Fleet Renewal Strategy: severance of slide 5 containing financial information relating to cost of fleet renewal.

3. Assessment of the records and grounds for severance

3.1 It must be noted that in terms of section 11(1) of PAIA, a requester of information is entitled to information requested from a public body as long as it has complied with procedural requirements in the Act and as long as none of the grounds of refusal are applicable. Citizens are entitled to information held by the state or public entity as a matter of right. This is so regardless of the reasons for which access is sought and regardless of what the organ of state believes those reasons to be.¹

¹ De Lange and Another v Eskom Holdings Ltd and others 2012 (1) SA 280 (GSJ), p17

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3.2 The public body bears the burden of proving that secrecy is justified. The public body must allege sufficient facts that will justify the refusal.²

3.3 Hendrina Power Station LifeEx Study

3.3.1 Group Capital proposes the severance of names of people on page 2 as well as all financial information relating to potential costs of the life expansion of the relevant power stations which is likely to affect procurement should the Fleet Renewal Project proceed beyond feasibility. Access would be granted to the balance of the study.

3.3.2 Section 34 of PAIA provides for protection of privacy of a third party who is a natural person. Personal information includes, but is not limited to, the name of the individual, information relating to education or medical, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved, any identifying number, and address. It must be noted that the protection from disclosure excludes a record insofar as it consist of information about an individual who is or was an official of a public body ad which relates to the position or functions of the individual. The record may not be refused on the basis that it contains information of natural persons who is an employee. In *De Lange and Another v Eskom Holdings Ltd and Others* the court held that it was unjustifiable for Eskom to refuse access to information on the basis that disclosure would involve unreasonable disclosure of personal information of natural persons who were officers or employees of Eskom as this information does not deserve protection of section 34 of PAIA. The core of the request in this case was records of signatories of documents. In the request of instance, names of signatories or employees involved in the study is not the core and, although it may not be justifiable for Eskom to refuse the information, we are of the view that the names may be severed and the rest of the information disclosed. However, should the severance be appealed, it may be difficult for Eskom to justify it. For this response, Eskom may sever the information of natural persons from the record to be disclosed and wait to see if such severance is challenged.

² de Lange and another v Eskom Holdings Ltd and Others, p22

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3.3.3 The estimated costs for the works to expand the life of power stations is confidential financial and commercial information the disclosure of which would likely cause harm to the commercial and financial interest of Eskom as a public body and the disclosure of which could reasonably be expected to put Eskom at a disadvantage in contractual or other negotiations or prejudice commercial competition under section 42(3)(b) and (c).

3.3.4 The response to the request for access to the Hendrina Power Station LifeEx study could be as follows:


“Eskom will grant access to the Hendrina Power Station LifeEx Study but has severed in terms of section 28 –

- information that would disclose personal information about a third party who is a natural person as protected from disclosure under section 34(1) of PAIA; and
- financial and commercial information relating to estimated costs of life expansion of the power station and the associated activities as this information contains financial and commercial information that is likely to cause harm to the commercial and financial interest of Eskom as a public body and the disclosure of which could reasonably be expected to put Eskom at a disadvantage in contractual or other negotiations and/or prejudice commercial competition and is protected from disclosure under section 42(3)(b) and (c) of the Promotion of Access to Information Act.”

3.4 Task Instruction Fleet Renewal Project, Task Order 598 and Fleet Renewal Progress Report

3.4.1 Names of people

3.4.1.1 With regard to names of people, as already stated in paragraph 3.3.2 above, names of officers of a public body do not enjoy protection insofar as they relate to their functions as employees of a public body. However, you may sever the information at this stage and should CER be aggrieved, they may appeal against the refusal which may be reconsidered by Eskom on appeal.

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3.4.1.2 The ground for severance would be: Eskom has severed, in terms of section 28, information that would disclose personal information about a third party who is a natural person as protected from disclosure under section 34(1) of PAIA.


3.4.2 Price

3.4.2.1 Section 36 of PAIA protects confidential information of third parties such as trade secrets, financial, commercial, scientific or technical information the disclosure of which is likely to cause harm to the commercial or financial interests of that third party. We have not been advised that the records contain information of a third party that may be protected from disclosure on the basis that it is likely to cause harm to the commercial or financial interests of that third party.

3.4.2.2 Section 42(3) of PAIA provides that the information office of a public body may refuse access to a record of that public body if contains trade secrets, financial commercial, scientific or technical information the disclosure of which would likely cause harm to the commercial or financial interests of the public body or if the disclosure of the record could reasonably be expected to put a public body at a disadvantage in contractual or other negotiations or prejudice commercial competition.

3.4.2.3 Financial information is protected from disclosure to the extent that the disclosure thereof may cause harm to commercial or financial interests of the public body. It does not qualify for automatic protection but the likely harm that could result from disclosure must be probable. In *Transnet Ltd and Another v SA Metal Machinery Co (Pty) Ltd 2006 (6) SA 285 (SCA)* held that there were no reasonable grounds that the disclosure of tender rates after the award of the contract would cause the winning tenderer probable harm in regard to competition for the award of a new contract in the future. Further, the court held that the harm should be probable, meaning could be expected and not merely possible.

3.4.2.4 The task instruction and the task order contain prices for services to undertake a fleet renewal study for Eskom. The task instruction contains an

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estimate of the cost by Eskom on page 1 and for the activity schedule in Annexure A. The task order contains prices from the cash flow estimate on page 5.

3.4.2.5 The confidentiality of the pricing information in the task instruction and task order is unclear and we are not aware of probable harm that could be caused by the disclosure of the pricing information to Eskom or any third party, particularly because the contract is already in place and there is no process requiring competition or a tender at the moment. Although the Act has a provision that may protect pricing information, being financial information, from disclosure, if no harm would be caused to Eskom or the contractor as a result of disclosure, then such information would not be protected from disclosure under section 43(3).


3.4.2.6 We are made to understand by the Group Capital representative that they regard such information as sensitive. As stated above, it is unclear how the disclosure of the pricing information for the service by the third party may cause Eskom harm as the contract is already in place. Eskom may sever the information from the record to be disclosed. However, it must be noted that if the severance is challenged by the requester, it is unlikely that Eskom would successfully defend such severance and may have to reconsider its position during the appeal.

3.3 Minutes of the Board

There is no proposal to sever extract of the minutes of the Board. We have perused the minute and it does not contain financial, commercial, technical or scientific information that may require protection from disclosure.

3.4 Presentation on Generation Fleet Renewal Fleet Strategy

You have proposed to grant access to the presentation and to sever slide 5 which contains financial information relating to the cost of coal for power stations which need to be renegotiated for fleet renewal. The coal costs, which may form the subject of future negotiations with the same or different supplies, appear to fall

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under section 42(3)(b) and (c) of PAIA, which provides protection from disclosure as follows:

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

- (a) Contains trade secrets of the State or public body;*
- (b) Contains financial, commercial, scientific or technical information, other than trade secrets, the disclosure of which would likely to cause harm to the commercial or financial interests of the State or public body*
- (c) Contains information, the disclosure of which could reasonably be expected –*
 - (i) To put a public body at a disadvantage in contractual or other negotiations; and*
 - (ii) To prejudice a public body in commercial competition; or"*

Eskom may refuse to grant access to the record on the following basis:

"Eskom has decided to sever slide 5 of the presentation as it contains financial information the disclosure of which would disadvantage or compromise Eskom in future contractual negotiations that are likely to be undertaken and would also compromise commercial completion from the market. The information is protected from disclosure under section 42(3)(b) ad (c)."

Jeany Lekganyane
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