

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO:

In the matter between:

THE HEALTH JUSTICE INITIATIVE

Applicant

and

THE MINISTER OF HEALTH

First Respondent

**THE INFORMATION OFFICER,
NATIONAL DEPARTMENT OF HEALTH**

Second Respondent

NOTICE OF MOTION

KINDLY TAKE NOTICE that the Applicant intends to make application to this Court, on a date to be determined by the Registrar, for an order in the following terms —

1. To the extent necessary, setting aside and declaring invalid the failure by the Second and/or First respondent to provide access to the information requested by the Applicant in its request attached hereto as “A”;
2. Directing the First Respondent to supply the Applicant, within 10 days of the date of order, with copies of the following:

[A] Copies of all Covid-19 vaccine procurement contracts, and Memoranda of Understanding, and agreements including with the following parties and/or duly authorised licensed representative/s of:

- a. *Janssen Pharmaceuticals / Johnson & Johnson.*
- b. *Aspen Pharmacare.*
- c. *Pfizer.*

- d. Serum Institute of India / Cipla.
- e. Sinovac / Coronavac.
- f. Any other vaccine manufacturer / licensee.
- g. The African Union Vaccine Access Task Team (AU AVATT).
- h. 'COVAX' (with the Global Vaccine Alliance – GAVI /other).
- i. The Solidarity Fund.

(B) Copies of all Covid-19 vaccine negotiation meeting outcomes and/or minutes, and correspondence, including with the following parties and/or duly authorised licensed representative/s of:

- a. Janssen Pharmaceuticals / Johnson & Johnson.
- b. Aspen Pharmacare.
- c. Pfizer.
- d. Serum Institute of India / Cipla.
- e. Sinovac/ Coronavac.
- f. Any other vaccine manufacturer / licensee.
- g. The African Union Vaccine Access Task Team (AU AVATT).
- h. 'COVAX' (with the Global Vaccine Alliance – GAVI /other).
- i. The Solidarity Fund.

3. Directing that the costs of this application are to be paid jointly and severally by any Respondents opposing the relief sought.
4. Further and/ or alternative relief.

TAKE NOTICE FURTHER that the founding affidavit of **FATIMA HASSAN** will be used in support of this application

TAKE NOTICE FURTHER that the Applicant has appointed the offices of **POWER SINGH INC., C/O CENTRE FOR CHILD LAW, FACULTY OF LAW, LAW BUILDING (ROOM 4 – 31), UNIVERSITY OF PRETORIA, PRETORIA**, as the address at which they will accept service of all notices and processes in these proceedings. The

Applicant's attorneys will also accept electronic service at the following email addresses: tara@powersingh.africa and tina@powersingh.africa.

TAKE NOTICE FURTHER that if you intend opposing this application, you are required:

- a) to notify the Applicant's attorneys in writing, within fifteen (15) days of receipt of this application, and in such notice to appoint an address at which you will accept notice and service of all documents in these proceedings; and
- b) within fifteen (15) days of delivering such notice, deliver your answering affidavit, if any, together with any relevant documents.

TAKE NOTICE FURTHER that if no such notice of intention to oppose is delivered, this application will be made on a date to be set by the Registrar or so soon thereafter as counsel may be heard.

DATED at **CAPE TOWN** on the **17th** day **FEBRUARY** of **2022**.



POWER SINGH INC.

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Ref: Liesl Muller

TO: **THE REGISTRAR**
High Court of South Africa
Gauteng Division
PRETORIA

AND TO: **THE MINISTER OF HEALTH**
First Respondent
Dr AB Xuma Building
1112 Voortrekker Road
Pretoria Townlands 351 -JR
Pretoria

AND TO: **THE INFORMATION OFFICER**
NATIONAL DEPARTMENT OF HEALTH
Second Respondent
Dr AB Xuma Building
1112 Voortrekker Road
Pretoria Townlands 351 -JR
Pretoria

Our Ref: 001/NDoH/2021

19 July 2021

Information Officer:

Director General Dr Sandile Buthelezi

Per Email: dg@health.gov.za

Deputy Information Officer:

Mr Justinos Motalaota

Per Email: justinos.motalaota@health.gov.za

Dear Dr Buthelezi and Mr Motalaota

Request for information pursuant to the Promotion of Access to Information Act 2000 - Vaccine Contracts and Information

We refer to our previous correspondence in this matter, wherein the Health Justice Initiative (HJI) requested specific information related to the Covid-19 pandemic. Our requests have not been acknowledged and/or fully responded to.

Therefore, please find enclosed a completed **FORM A** request for access to information pursuant to the *Promotion of Access to Information Act 2 of 2000* (PAIA).

In order for us to undertake our work effectively, we request that you respond to this request as expeditiously as possible.

We submit that a review of PAIA reveals that there are no applicable grounds of refusal that may arise in respect of the records sought and we note further the provisions of section 46 of PAIA which provides for mandatory disclosure in the public interest.

Moreover, we remind you of the guidance from the Constitutional Court in *President of the Republic of South Africa and Others v M&G Media Limited* [2011] ZACC 32, in which the Constitutional Court explained that:

1. The scheme of PAIA is such that information must be disclosed unless it is exempt from disclosure, in circumstances where the exemptions must be narrowly construed.
2. It is indeed the holder of the information that bears the onus of establishing that a refusal of access to information is justified under PAIA.
3. A bare denial will not suffice to justify a refusal.
4. There is no discretion to withhold information that is not protected, and the unprotected material must be disclosed despite any other provision of PAIA, unless it cannot be reasonably severed from the protected portions.

Annexure A is a letter of authorisation from the Health Justice Initiative (HJI).

Please find enclosed the relevant attachments in relation to the above-mentioned request.

Kindly advise of the amount of the request fee to be paid and provide us with the bank details so that we can attend to the payment accordingly.

Yours sincerely,



Dr Marlise Richter

Marlise@healthjusticeinitiative.org.za

info@healthjusticeinitiative.org.za



REPUBLIC OF SOUTH AFRICA

FORM A
REQUEST FOR ACCESS TO RECORD OF PUBLIC BODY
(Section 18(1) of the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000))
[Regulation 6]

FOR DEPARTMENTAL USE

Reference number:

Request received by (state rank, name and surname of information officer/deputy information officer) on (date) at (place).

Request fee (if any): R

Deposit (if any): R

Access fee: R

SIGNATURE OF INFORMATION OFFICER/DEPUTY INFORMATION OFFICER

A. Particulars of public body

The Information Officer/Deputy Information Officer

Information Officer:
 Director General Dr Sandile Buthelezi (Information Officer)
 By email: dg@health.gov.za

Deputy Information Officer:
 Justinos Motalaota
 By email: justinos.motalaota@health.gov.za;

B. Particulars of person requesting access to the record

- (a) The particulars of the person who requests access to the record must be given below.
 (b) The address and/or fax number in the Republic to which the information is to be sent, must be given.
 (c) Proof of the capacity in which the request is made, if applicable, must be attached.

Full names and surname: Marlise Richter

Identity number:

7	6	1	2	2	2	0	0	0	4	0	8	4
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Postal address: 2nd Floor Community House; 41 Salt River Road, Salt River, Cape Town South Africa 7925

Telephone number: (082 ...) 858 9927 Fax number: (.....)

E-mail address: marlise@healthjusticeinitiative.org.za and info@healthjusticeinitiative.org.za

Capacity in which request is made, when made on behalf of another person:

Dr Richter is a Senior Researcher at the Health Justice Initiative. She has been authorised to submit a request on behalf of the Health Justice Initiative in the public interest.

C. Particulars of person on whose behalf request is made

This section must be completed ONLY if a request for information is made on behalf of another person.

Full names and surname: Not applicable

Identity number:

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D. Particulars of record

- (a) Provide full particulars of the record to which access is requested, including the reference number if that is known to you, to enable the record to be located.
 (b) If the provided space is inadequate, please continue on a separate folio and attach it to this form. The requester must sign all the additional folios.

1. Description of record or relevant part of the record:

See next page:

Covid-19 Vaccine Contracts:

1A.) Copies of all Covid-19 vaccine procurement contracts, and Memoranda of Understanding, and agreements including with the following parties and/or duly authorised licensed representative/s of:

- a. Janssen Pharmaceuticals / Johnson & Johnson.
- b. Aspen Pharmacare.
- c. Pfizer.
- d. Serum Institute of India / Cipla.
- e. Sinovac/Coronavac
- f. Any other vaccine manufacturer / licensee.
- g. The African Union Vaccine Access Task Team (AU AVATT).
- h. 'COVAX' (with the Global Vaccine Alliance – GAVI /other)
- i. The Solidarity Fund.

1B.) Copies of all Covid-19 vaccine negotiation meeting outcomes and/or minutes, and correspondence, including with the following parties and/or duly authorised licensed representative/s of:

- a. Janssen Pharmaceuticals / Johnson & Johnson.
- b. Aspen Pharmacare.
- c. Pfizer.
- d. Serum Institute of India / Cipla.
- e. Sinovac/Coronavac
- f. Any other vaccine manufacturer / licensee.
- g. The African Union Vaccine Access Task Team (AU AVATT).
- h. 'COVAX' (with the Global Vaccine Alliance – GAVI /other)
- i. The Solidarity Fund.

2. Reference number, if available:

3. Any further particulars of record:

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.....

E. Fees

- (a) A request for access to a record, other than a record containing personal information about yourself, will be processed only after a request fee has been paid.
- (b) You will be notified of the amount required to be paid as the request fee.
- (c) The **fee payable for access** to a record depends on the form in which access is required and the reasonable time required to search for and prepare a record.
- (d) If you qualify for exemption of the payment of any fee, please state the reason for exemption.

Reason for exemption from payment of fees:

Not applicable

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F. Form of access to record

If you are prevented by a disability to read, view or listen to the record in the form of access provided for in 1 to 4 below, state your disability and indicate in which form the record is required.

Disability: Not applicable

Form in which record is required:

Mark the appropriate box with an X.

NOTES:

- (a) Compliance with your request for access in the specified form may depend on the form in which the record is available.
- (b) Access in the form requested may be refused in certain circumstances. In such a case you will be informed if access will be granted in another form.
- (c) The fee payable for access to the record, if any, will be determined partly by the form in which access is requested.

1. If the record is in written or printed form:

<input checked="" type="checkbox"/>	copy of record*		inspection of record	
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2. If record consists of visual images -

(this includes photographs, slides, video recordings, computer-generated images, sketches, etc.):

	view the images	<input checked="" type="checkbox"/>	copy of the images*		transcription of the images*	
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FORM A: REQUEST FOR ACCESS TO RECORD OF PUBLIC BODY

3. If record consists of recorded words or information which can be reproduced in sound:					
<input checked="" type="checkbox"/>	listen to the soundtrack (audio cassette)		transcription of soundtrack* (written or printed document)		
4. If record is held on computer or in an electronic or machine-readable form:					
	printed copy of record*	<input checked="" type="checkbox"/>	printed copy of information derived from the record*		copy in computer readable form* (stiffy or compact disc)

*If you requested a copy or transcription of a record (above), do you wish the copy or transcription to be posted to you? Postage is payable.			YES <input checked="" type="checkbox"/>	NO
Note that if the record is not available in the language you prefer, access may be granted in the language in which the record is available.				
In which language would you prefer the record? English				

G. Notice of decision regarding request for access

You will be notified in writing whether your request has been approved / denied. If you wish to be informed in another manner, please specify the manner and provide the necessary particulars to enable compliance with your request.

How would you prefer to be informed of the decision regarding your request for access to the record?

Via email correspondence at marlise@healthjusticeinitiative.org.za and info@healthjusticeinitiative.org.za

Signed at Cape Town this day 19th of July year 2021



SIGNATURE OF REQUESTER /
PERSON ON WHOSE BEHALF REQUEST IS MADE

Appendix A:

19 July 2021

To whom it may concern

Letter of Authorisation: Health Justice Initiative (HJI)

To the extent that a letter of authority is requested, this is to confirm that Dr Marlise Richter is duly authorised to submit a request in terms of the *Promotion of Access to Information Act of 2000* on behalf of the Health Justice Initiative.

Yours sincerely,



Fatima Hassan

Director: Health Justice Initiative

**IN THE HIGH COURT OF SOUTH AFRICA
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THE HEALTH JUSTICE INITIATIVE

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and

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First Respondent

**THE INFORMATION OFFICER,
NATIONAL DEPARTMENT OF HEALTH**

Second Respondent

FOUNDING AFFIDAVIT

I, the undersigned,

FATIMA HASSAN

do hereby make oath and state:

1. I am the Director of the Applicant – the Health Justice Initiative (“HJI”) – a registered not-for-profit organisation with registered offices at 41 Salt River Road, Community House, 2nd Floor, Salt River, Cape Town.

2. I am duly authorised to make this application and depose to this affidavit on behalf of the Applicant. A duly signed resolution by the Board of the HJI is attached marked as annexure “HJI1”.

3. The facts contained in this affidavit are true and correct, to the best of my knowledge and belief. Unless otherwise stated or indicated by context, they fall within my personal knowledge. Where I make submissions of law, I do so on the advice of the HJI's legal representatives.

INTRODUCTION

4. The Covid-19 pandemic, and the consequent declaration of a national state of disaster, has had an enormous impact on the functioning of South Africa. It has cost lives, limited rights and freedoms, required behavioural change, pressurised the health system, and severely disrupted the country's social and economic landscape.
5. Vaccines play a vital role in mitigating the consequences of Covid-19, by preventing death and controlling the spread of the virus. They are a central element of the global – and also the South African – response to Covid-19, prompting a worldwide effort to immunise billions of people. The Organisation for Economic Co-operation and Development ("OECD") has emphasised the importance, to trust in the vaccination programme, of governments demonstrating their ability to procure vaccines and to develop effective and inclusive roll-out plans. It recommends that such plans should be open to public scrutiny and require proactive disclosure of information. An extract of the report, titled 'Enhancing Public Trust in COVID-19 Vaccination: The Role of Governments', is attached as "**HJI2**".
6. South Africa has procured, and secured options for the future procurement, of millions of doses of vaccines – through direct purchase agreements with vaccine manufacturers or their licensees; through the Covax Facility and by way of donations. As of 13 February 2022, 30 559 431 vaccines have been administered in South Africa. Those vaccines have been procured at great cost: the 2021 National Budget alone allocated an amount of R10-billion for the purchase of Covid-19 vaccines.

7. I – and the HJI – recognise the tremendous efforts of our government in the development of a pandemic response and in securing vaccines in the context of global demand and consequent shortages. For example, the HJI has supported government in its approach of prioritising equity via a single national roll-out programme.
8. However, the basis on which vaccines have been procured has not been very transparent. Limited public information has been provided as to who negotiations were conducted with, on what basis, exactly how many vaccine doses have been procured, whom vaccines have been procured from, at what price, when delivery is expected, and on what terms. As set out below, public speculation is rife that government may have been compelled to overpay for vaccines, or to accept extremely onerous procurement terms. This has the real potential to erode public trust in the vaccination programme, and in government's ability to effectively procure and administer vaccines. In the absence of publicly available information, it is simply impossible to address and meet these concerns, or to hold government to account.
9. The lack of transparency violates the principle (entrenched in section 195(1) of the Constitution) that the public administration must be accountable and must foster transparency by providing the public with timely, accessible, and accurate information. It also undermines the public's right to information (entrenched in section 32 of the Constitution), and places the National Department of Health ("NDOH") in breach of its duty, under section 217 of the Constitution, to procure goods through a process that is fair, equitable and transparent. The disclosure of such records would be in the public interest for at least two reasons: first, they enable accountability at a time when the diversion of funds could cost lives and, second, they enable trust in government institutions to effectively procure and administer vaccines.
10. The HJI requested access to all the NDOH's vaccine contracts, and records relating to negotiations in respect thereof, from the NDOH in terms of the Promotion of

Access to Information Act 2 of 2000 (“**PAIA**”). A copy of our request is attached as “**HJI3**”. But to no avail: we have received no meaningful response to either the request or its subsequent internal appeal (attached as “**HJI4**”). The HJI accordingly brings this application in terms of section 78 of PAIA, for an order directing the production of the records sought.

PARTIES

The Applicant

11. The Applicant is **THE HEALTH JUSTICE INITIATIVE (“HJI”)**, a not-for-profit company established in 2020 and incorporated in accordance with the laws of South Africa.
12. The HJI is a dedicated public health and law initiative. Its mandate is to address inequities in access to healthcare through research, advocacy, and legal action. It works to ensure a more inclusive and equitable public health system that includes access to lifesaving diagnostics, treatment, and vaccines.
13. The HJI’s focus areas include advocating for equitable health care, access to affordable life-saving medicines, and national profiteering. Throughout the Covid-19 pandemic, the HJI has engaged in activities concerning, among other things, the conduct of the private sector in the pricing of personal protective equipment, and the lack of meaningful engagement and transparency from the state with regard to its vaccine plans. The HJI has embarked on research, advocacy and litigation strategies to advance various constitutional rights, including the right to access healthcare, life, equality, dignity, and access to information in the context of a pandemic.
14. The HJI brings this application in its own interest, as an organisation directly involved in the health sector, and in promoting equitable access to medicines and other

medical technologies. The HJI has a clear interest in ensuring that various rights are respected, protected, and promoted during this unprecedented health crisis.

15. The HJI also brings this application on behalf of the South African public, and in the public interest.

15.1. There is an obvious public interest in obtaining the information necessary to ascertain the extent and basis on which the NDOH has negotiated for and ultimately procured vaccines. That empowers people to know how the decisions that affect them are made and how public funds are being used in a pandemic.

15.2. There is a heightened need for transparency and accountability during a declared national disaster, where a number of the usual checks and balances (including in relation to procurement processes) have been curtailed, and life-saving medicines have been procured, at great public cost and on an urgent basis.

15.3. That is even more the case in the wake of serious allegations that corruption has diverted billions of Rands away from Covid-19 relief measures (including the R500-billion relief package allocated to provide for food parcels, a temporary social grant, and the Temporary Employer/Employee Relief Scheme (“**TERS**”)). The public, and civil society must be given access to information that is required to ensure accountability and to monitor compliance with section 217 of the Constitution (among others).

The Respondents

16. The First Respondent is the **MINISTER OF HEALTH**, who is cited in his official capacity as head of the Ministry of Health in the national government, whose address is 1112 Voortrekker Road, Pretoria Townlands 351-JR, Pretoria within the jurisdiction of this honourable Court. The Minister is the official responsible for the

negotiation and conclusion of the vaccine agreements at issue, as well as the deemed refusal of the internal appeal against the NDOH's failure to provide access to them.

17. The Second Respondent is the **INFORMATION OFFICER OF THE NATIONAL DEPARTMENT OF HEALTH**, whose address is 1112 Voortrekker Road, Pretoria Townlands 351-JR, Pretoria (within the jurisdiction of this honourable Court). He is cited in his official capacity as the officer designated to receive, deliberate upon, and determine requests for access to information, brought in terms of PAIA.
18. Obviously the NDOH had counterparties in respect of the vaccine agreements, and the negotiations it undertook in respect thereof. We accept that such counterparties may have an interest in the relief sought in these proceedings. I am advised, however, that PAIA places the obligation on the respondents (as the representatives of the public body to whom the request was directed) to notify them of, and to procure their involvement, in PAIA proceedings (including court proceedings). It is accordingly for the respondents to take steps to join those counterparties to these proceedings, should they wish to participate therein. We invite them to report in their answering affidavits on the steps that they take in this regard.
19. Even if my assertion – that the NDOH bears the responsibility of joinder – is incorrect, the HJI is not in a position to join the relevant third parties because their identities are unknown to us and have not been disclosed to the public.
20. The largely opaque nature of the Government's procurement of Covid-19 vaccines has made it difficult to ascertain, with certainty, who the NDOH's counterparties to the negotiations and consequent vaccine agreements are. This difficulty is compounded by the fact that the manufacture of Covid-19 vaccines has entailed partnerships between various private companies, as well as academic institutions. Multiple additional subsidiaries, distributors, and fill-and-finish companies are also involved in the supply chain.

21. The HJI has taken reasonable steps to identify the NDOH's counterparties to the various negotiations and agreements, but our efforts have been frustrated.
 - 21.1. On 8 December 2021, our attorneys wrote to the Minister, and to the local representatives of the pharmaceutical companies whose vaccines have been approved for domestic use or from whom the NDOH has been procuring vaccines and asked them to identify the entities that have negotiated or concluded vaccine procurement agreements with the government. Copies of those letters are attached as "**HJI5**" – "**HJI9**".
 - 21.2. On 11 January 2022, our attorneys sent follow-up correspondence to the entities that did not respond by 7 January 2022, as requested. The letters are attached as "**HJI10**" – "**HJI13**".
 - 21.3. Pfizer Laboratories (Pty) Ltd and the NDOH were the only two entities that responded. They both declined to provide us with the requested details. Their responses are attached as annexures "**HJI14**" and "**HJI15**".
22. Consequently, we are unable to join the relevant third parties to these proceedings – even if we were obliged to do so (which is denied). We will not, however, oppose their intervention or joinder, should they wish to participate.

THE VACCINE PROCUREMENT AGREEMENTS

23. Medicines and vaccines cannot be sold or distributed in South Africa unless they have been approved for use by the South African Health Products Regulatory Authority ("**SAHPRA**"). To the best of my knowledge, SAHPRA has approved the use of the following vaccines:
 - 23.1. The Johnson & Johnson vaccine (Ad26.COV2.S);

- 23.2. The Pfizer-BioNTech Vaccine (Comirnaty);
 - 23.3. Sinovac Life Sciences (CoronaVac); and
 - 23.4. Oxford-AstraZeneca (Covishield).
24. In turn, I understand that the NDOH has negotiated to procure doses of some or all of those vaccines through direct purchasing agreements, and the COVAX Facility. The South African government is currently the only procurer of vaccines in South Africa. Private entities are not as yet contracting directly for vaccine supply mainly due to supplier preferences.
 25. Whilst I am aware that, to date, the Government has used donations of vaccines from the US government, to the best of my knowledge the NDOH has opted out of procuring vaccines via the African Union's Vaccine Acquisition Task Team (AVATT) mechanism, led by UNICEF. Donations I believe, are subject to a different set of agreements.

Direct Purchasing Agreements

26. There has been limited to no transparency concerning the conclusion and terms of purchase agreements concluded between the Government (through NDOH) and third-party vaccine manufacturers or licensees. No contracts or detailed information have been published. It is my understanding that most of the agreements entered into contain a non-disclosure undertaking (although such an undertaking could not be lawfully agreed to by the NDOH and would be contrary to public policy and unenforceable).
27. Media reports suggest that the government procured vaccines at differential, comparatively inflated prices, and that the country's vaccine procurement agreements may also contain onerous and inequitable terms including *inter alia*:

- 27.1. broad indemnification clauses;
 - 27.2. prohibiting export restrictions;
 - 27.3. prohibiting disclosure of any details;
 - 27.4. prohibiting onward sale or donation;
 - 27.5. non-refundability clauses for down-payments made; and
 - 27.6. indemnifications (through government guarantees and compensation schemes) against future litigation arising out of any vaccine-related injuries and even manufacturer negligence.
28. A selection of the relevant media articles is attached as "**HJI16 – HJI20**". If those claims are true, the public has a right to know as much.
 29. Similar claims have been made, at least against Pfizer, in other jurisdictions:
 - 29.1. In February 2021, the Bureau of Investigative Journalism published a ground-breaking story accusing Pfizer of "*bullying*" governments in Covid vaccine negotiations. The article is attached marked "**HJI21**".
 - 29.2. A subsequent report by the advocacy group *Public Citizen*, attached marked "**HJI22**", flagged six areas of concern in relation to vaccine procurements agreements concluded between Pfizer and various governments, including the United States of America and the United Kingdom. The trends in these agreements indicate that Pfizer has in its vaccine agreements included terms and conditions that:

- 29.2.1. insist on non-disclosure of government officials involved in negotiations;
 - 29.2.2. preclude governments from disclosing the terms of the contracts and 'silencing' governments from speaking out;
 - 29.2.3. restrict or control donations of the same vaccine;
 - 29.2.4. indemnify the company against any intellectual property infringements and also any vaccine injury liability;
 - 29.2.5. preclude courts from resolving contractual disputes (insisting instead on private, secret panel arbitration);
 - 29.2.6. require some governments to waive sovereign immunity;
 - 29.2.7. permit unilateral delivery adjustments on the part of the company.
- 30. Without the agreements, it is impossible to know if Pfizer, or any other pharmaceutical manufacturer or licensee, has indeed insisted on such terms. Presumably, if they have not contracted with the NDOH on such inequitable terms, they will want that publicly known.
 - 31. From the information available in the public domain, it is clear that direct purchase agreements have been concluded in respect of the following vaccines.

The Johnson & Johnson vaccine

- 32. The Johnson & Johnson vaccine, Ad26.COV2.S, is manufactured by Janssen Pharmaceuticals, a worldwide group of pharmaceutical companies that is part of Johnson & Johnson, a healthcare corporation based in the United States of America.

Janssen Pharmaceuticals has subsidiary companies based all over the world, including South Africa, and has at least 10 manufacturing sites.

33. It is a matter of public record that South Africa is administering the Johnson & Johnson vaccine. As at 13 February 2022, 7 502 896 Johnson & Johnson vaccines have been administered in South Africa including 735 452 for the Sisonke programme.
34. I am further aware that a purchasing agreement exists between the NDOH and one of the Janssen Pharmaceuticals companies. The existence of the agreement is evident from the following:
 - 34.1. Janssen Pharmaceuticals released a press statement on 28 February 2021, noting that the government of South Africa had entered into an agreement with Janssen Pharmaceutica NV for the supply of '11 million doses' of its Covid-19 vaccine, Ad26.COV2.S. The press statement is attached marked "**HJI23**".
 - 34.2. This was reaffirmed in a press statement, published by Parliament on 31 March 2021, where it was noted that South Africa had secured '10 million vaccines' from Johnson & Johnson and had successfully negotiated an 'additional 20 million' doses. The press statement is attached marked "**HJI24**".
35. Although there are discrepancies in the number of doses, it would appear that the South African government purchased at least 31 million doses of the Johnson & Johnson vaccine. The latest record of the number of purchased doses was noted in the National Assembly's Committee Meeting Report of 17 June 2021 as '31.390 million', an extract of which is attached marked "**HJI25**". In terms of the UNICEF Vaccine market dashboard, attached and marked as annexure "**HJI26**", 11 million of those are apparently 'secured' doses and 20 million are 'optioned' doses,

36. The contract between the NDOH and the relevant Janssen Pharmaceuticals company has not been made publicly available and no reliable information has been provided concerning the exact purchase price, the dosage, and the delivery schedules.
37. It appears that, in addition, there is a contract in place between Aspen Pharmacare Limited (trading as Aspen Pharmacare), Janssen Pharmaceuticals, Inc. and Janssen Pharmaceutica NV concerning the filling and finishing of the Ad26.COV2-S vaccine at Aspen's Gqeberha site in South Africa, which contract permitted the export of vaccines, manufactured in South Africa, to Europe – despite the lack of timely domestic supply at the relevant time (now paused). A statement released by 'Aspen Holdings' in this regard is attached marked "**HJI27**". That export arrangement had drawn extensive criticism at the time because it was seen as demonstrating a prioritisation of European lives over those of others in Africa and crippled the continents and mainly South Africa's access to vaccines at a time when access was desperately needed, as several African states were entering a new wave of the pandemic.
38. The exact nature of the contractual relationship between these entities, on the one hand, and the NDOH, on the other, is unknown. It appears from media reports, attached marked "**HJI28**", that the vaccine procurement agreement between the Government and Johnson & Jonson precluded the South African government from taking any action to limit or impose reasonable restrictions on exports of locally produced vaccines in the separate agreement entered into between Aspen and Johnson & Johnson.
39. It is not evident whether the NDOH has also entered into an agreement with Aspen Pharmacare for any of the additional Johnson & Johnson doses it is expected to receive, or whether any of the companies have made any undertakings to guarantee delivery of supplies promised under the contracts. These are manifestly issues of public importance.

The Pfizer-BioNTech vaccine

40. The Pfizer-BioNTech vaccine, Comirnaty, is manufactured by Pfizer Inc. and BioNTech. Pfizer Inc. is an American multinational pharmaceutical and biotechnology corporation, and it appears to have several subsidiary companies incorporated in South Africa, which include Pfizer Laboratories (Pty) Ltd, based in Johannesburg. BioNTech is a biotechnology company based in Germany.
41. Again, it is a matter of public record that South Africa is administering the Pfizer-BioNTech vaccine. As at 13 February 2022, 23 056 535 doses of the Pfizer-BioNTech vaccine have been administered.
42. I am aware that a purchasing agreement exists in respect of this vaccine: the NDOH confirmed to Parliament, in a committee meeting on 28 April 2021, that it had concluded a contract with Pfizer. An extract of the committee meeting report is attached marked “**HJI29**”. It was further noted in a press statement, published by Parliament on 31 March 2021, already attached and marked as “**HJI24**”, that South Africa had ‘20 million’ doses of the Pfizer-BioNTech vaccine in the pipeline.
43. However, I am not certain which entity the NDOH entered into the purchasing agreement with.
44. It is also not evident how many purchasing agreements exist for the supply of the Pfizer-BioNTech vaccine. According to the UNICEF Covid-19 Vaccine Market Dashboard (a screenshot of which is already attached as “**HJI26**”), South Africa has entered into two separate agreements for the Pfizer-BioNTech vaccine. One agreement, entered into on 7 April 2021, is for the purchase of ‘20 million’ vaccines, while the other agreement, entered into on 14 April 2021, is for ‘10 million’ vaccines. According to a statement of 14 April 2021, attached marked “**HJI30**”, the South African government has purchased at least 30 million doses of the Pfizer-BioNTech vaccine.

45. None of the agreements for the purchase of the Pfizer-BioNTech vaccine have been published and there is limited to no information available concerning the price, number of doses, delivery schedule and other terms and conditions.

The Oxford-AstraZeneca (Covishield) vaccine

46. The Oxford-AstraZeneca vaccine was developed by Oxford University and AstraZeneca, a multinational pharmaceutical company with its headquarters in Cambridge, England. The vaccine, AZD1222, is also marketed under the names Vaxzeria and Covishield. Covishield is manufactured by the Serum Institute of India and is a version of the Oxford-AstraZeneca vaccine under license.
47. In terms of media reports, attached as “**HJI31**”, it appears that the Serum Institute of India has partnered with CIPLA South Africa, a company incorporated in South Africa but owned by CIPLA India. It appears that South Africa entered into an agreement with the Serum Institute of India for the special provision of 1 million doses of the Covishield vaccine, as recorded on the UNICEF dashboard (a screenshot of which is already attached as “**HJI26**”). This is partially confirmed in a media briefing of 7 January 2021, where the NDOH announced that South Africa will receive its first batch of vaccines and that the Oxford- AstraZeneca vaccine would be given to healthcare workers. This is attached marked “**HJI32**”.
48. The NDOH halted the use of the Covishield vaccine and seemingly on-sold the 1 million doses.
 - 48.1. On 7 February 2021, it was announced that South Africa would not use the vaccine based on scientific advice given to government at the time. The news article that confirms this is attached marked “**HJI33**”.

- 48.2. In a media statement, released by the Ministry of Health on 21 March 2021, it was indicated that South Africa ‘sold’ the batch to member states of the African Union. The media statement is attached marked “**HJI34**”.
 - 48.3. However, a media report of 9 April 2021 and attached marked “**HJI35**” suggests that South Africa donated Covishield vaccines to Jamaica.
49. The agreement concluded by the NDOH for the supply of the Covishield vaccine has not been published. There is accordingly no publicly available information concerning the purchase price, the number of doses or the conditions for donations or re-sale.
 50. Further, it is not evident whether the purchase agreement was cancelled or amended, and whether South Africa is still expecting to receive additional doses. Limited information has been published concerning South Africa’s re-sale of this batch of vaccines. It is not evident whether the entire stock was sold, the price per dose and whether the purchase would be considered a fruitless and wasteful expenditure.

Additional Vaccine Manufacturers

51. The HJI has been unable to find public information confirming South Africa’s sourcing of vaccines from possible additional manufacturers, licensees, or other regional procurement mechanisms.
52. According to the UNICEF vaccine dashboard (a screenshot of which is already attached as “**HJI26**”), South Africa was at one point in discussion with the Beijing Bio-Institute of Biological Products Co Ltd for the procurement of ‘10 million’ doses of the Sinopharm / BIBP vaccine, developed by Sinopharm / China National Pharmaceutical Group. (to date, not authorised by SAHPRA). It is also unclear

whether South Africa has engaged in materially significant procurement discussions with any other company, such as Moderna, or not.

53. The public has a right to know whether such negotiations were conducted and what they entailed.

Vaccines Procured through the COVAX Facility

54. The Access to Covid-19 Tools Accelerator (“**ACT-A**”) was established at the Global Covid-19 Pledging Conference in May 2020. It is a global collaboration that works to accelerate the development, production, and equitable access of Covid-19 tests, treatments, and vaccines. President Cyril Ramaphosa is, to the best of our knowledge, still the co-chair of the ACT-A Facilitation Council.
55. ‘COVAX’ is in turn one of three pillars of ACT-A. It focuses on securing equitable access to Covid-19 vaccines globally. It is coordinated by GAVI, the Vaccine Alliance (“**GAVI**”); the Coalition for Epidemic Preparedness Innovations (“**CEPI**”); and the World Health Organisation (“**WHO**”). According to GAVI’s website, it is “co-leading COVAX, the vaccines pillar of the Access to Covid-19 Tools (ACT) Accelerator. This involves coordinating the COVAX Facility, a global risk-sharing mechanism for pooled procurement and equitable distribution of Covid19 vaccines”.
56. The COVAX Facility is trying to enable participating countries to access vaccines through a committed advance purchase commitment (AMC) or an optional purchase commitment. The COVAX Facility negotiates with vaccine manufacturers. Voluntary participation in the facility can, at times, secure access to vaccines when they become available especially for low-income countries. According to GAVI’s website, as at 6 December 2021, COVAX has shipped 610 million vaccines to 144 countries, far short of its original target
57. It has been widely reported, as evident in attachment “**HJI36**”, that South Africa paid R283 million (at first, through the Solidarity Fund) to GAVI, to secure entry into the

COVAX Facility. The sum represents a ‘down payment of 15% of the total cost’ for access to vaccines. It is my understanding that the Solidarity Fund has since been reimbursed by the National Treasury of South Africa.

58. Since South Africa is participating in the COVAX Facility, an agreement must exist between the South African Government and GAVI and/or its representatives. However, the terms of the agreement with the COVAX Facility is not publicly available. The limited public information reveals the following details:
 - 58.1. In terms of COVAX’s interim supply and distribution forecast, released on 3 February 2021, South Africa was to receive ‘2.976 million AstraZeneca vaccines’ and ‘177 000 Pfizer vaccines’ in the first quarter of 2021. This is evident in the interim distribution forecast, attached marked “**HJI37**”.
 - 58.2. On 17 June 2021, the NDOH advised Parliament in a committee meeting, already attached marked “**HJI25**”, that it had ‘secured 31 million doses of the Johnson & Johnson vaccine and 31.39 million doses of the Pfizer vaccine, including 1.39 million through COVAX’.
 - 58.3. President Cyril Ramaphosa announced through a statement dated 27 June 2021, attached marked “**HJI38**” that South Africa had ‘received an additional 1.2 million doses of the Johnson & Johnson vaccine and 1.4 million doses of the Pfizer vaccine through the COVAX facility’.
59. To the best of my knowledge, in our work of trying to track supplies of vaccines into South Africa, only about 1.3 million vaccines have been provided via COVAX (of Pfizer) to South Africa for the entire 2021, and to date.
60. There has been little to no transparency concerning whether the agreement with the COVAX Facility still stands, whether it has been cancelled, or whether any further payments have been made.

- 60.1. It is not known which vaccine will be supplied, the price per dose, the rules for ‘vaccine swooping’, indemnification and liability undertakings, the number of doses to be received, the delivery schedule, re-sale conditions, donation conditions and breach provisions.
- 60.2. If the COVAX Facility does not deliver at all or on time, it is unclear what recourse the South African public has and against whom. There is an obvious public interest in the disclosure of this information.

Vaccines Procured Through Regional Mechanisms

61. A regional mechanism has been established to procure vaccines for the African continent, initially called the African Vaccine Acquisition Task Team (AVATT), with the contracting support of UNICEF.
62. This regional mechanism has negotiated through UNICEF for supplies for Africa with COVAX, and bi-laterally with vaccine manufacturers and licensees, such as inter alia Johnson & Johnson /Aspen, for the purchase of at least 220 million doses.
63. As far as I am aware, South Africa has opted-out of procuring vaccines through this mechanism – although I invite the respondents to confirm whether or not this is indeed the case, in their answering papers.

THE PAIA REQUEST AND THE DEEMED REFUSAL

64. Due to the limited amount of information available publicly, the HJI wrote to the NDOH on 22 June 2021, requesting the voluntary disclosure of information concerning the sourcing and procurement of Covid-19 vaccines. It noted that the public health crisis occasioned by the Covid-19 pandemic, coupled with concerning allegations of corruption in the health sector, necessitated voluntary disclosure of information concerning the government’s response. Specifically, it requested the

voluntary disclosure and automatic availability of Covid-19 vaccine-related agreements. A copy of the letter is attached marked “**HJI39**.”

65. The NDOH did not voluntarily disclose such information.
66. For this reason, on 19 July 2021 the HJI submitted a request for access to certain records to the NDOH in terms of section 53(1) of PAIA, under the cover of a letter. A copy of the PAIA request and the letter has already been attached as “**HJI3**”
67. The PAIA request sought the following information:

“Covid-19 Vaccine Contracts:

1A.) Copies of all Covid-19 vaccine procurement contracts, and Memoranda of Understanding, and agreements including with the following parties and/or duly authorised licensed representative/s of:

- a. *Janssen Pharmaceuticals / Johnson & Johnson.*
- b. *Aspen Pharmacare.*
- c. *Pfizer.*
- d. *Serum Institute of India / Cipla.*
- e. *Sinovac/Coronavac*
- f. *Any other vaccine manufacturer / licensee.*
- g. *The African Union Vaccine Access Task Team (AU AVATT).*
- h. *‘COVAX’ (with the Global Vaccine Alliance – GAVI /other)*
- i. *The Solidarity Fund.*

1B.) Copies of all Covid-19 vaccine negotiation meeting outcomes and/or minutes, and correspondence, including with the following parties and/or duly authorised licensed representative/s of:

- a. *Janssen Pharmaceuticals / Johnson & Johnson.*

- b. *Aspen Pharmacare.*
 - c. *Pfizer.*
 - d. *Serum Institute of India / Cipla.*
 - e. *Sinovac/Coronavac.*
 - f. *Any other vaccine manufacturer / licensee.*
 - g. *The AU AVATT.*
 - h. *'COVAX' (with the Global Vaccine Alliance – GAVI /other).*
 - i. *The Solidarity Fund."*
68. The Director-General of Health replied to the HJI on 29 July 2021 and advised that they had resolved to ‘notify the vaccine manufacturers and distributors of the request and invite them to make representations in response’. The NDOH requested an extension of time for their response to enable them to consider the responses of the manufacturers. The letter is attached marked “**HJI40**”.
69. The HJI granted the request and gave the NDOH until 25 August 2021 to respond. The HJI’s response was included in a letter of 6 August 2021 which is attached marked “**HJI41**”.
70. The NDOH did not respond by 25 August 2021.
71. On 13 September 2021, HJI wrote to the NDOH to advise that the extended deadline for a response had lapsed. It further noted that in terms of section 47(2) of PAIA, the latest date upon which the NDOH could have notified the third parties was 13 August 2021. In terms of section 49(1) of PAIA, the NDOH had 30-days from that date to make a decision, and to notify relevant parties of it. The HJI advised that it would file an internal appeal by 15 September 2021. The letter is attached marked “**HJI42**”.
72. I point out that the HJI’s 13 September 2021 letter (marked “**HJI42**”) incorrectly recorded the date of the submission of its PAIA request as ‘23 July 2021’, instead

of '19 July 2021'. A correct calculation of the timeframes would in fact have required a response from the NDOH even earlier, on 8 September 2021.

73. The NDOH did not respond to the PAIA request within the contemplated timeframe. Under section 27 of PAIA, it is deemed to have refused the request.
74. The HJI accordingly submitted a notice of internal appeal to the Information Officer of the NDOH on 15 September 2021 on the grounds of the deemed refusal. The internal appeal has already been attached as "**HJI4**".
75. In terms of section 77(2)(a) of PAIA, the NDOH had until 15 October 2021 to notify any relevant third parties of the internal appeal. Thereafter, in terms of section 77(3)(b), it had until 14 November 2021 to make a determination on the internal appeal.
76. The NDOH did not provide notice of the decision on the internal appeal within the contemplated timeframe and, in terms of section 77(7), is regarded as having dismissed it. It is on this basis that the HJI now applies to this court for appropriate relief in terms of section 82 of PAIA.

THE HJI IS ENTITLED TO THE INFORMATION IN TERMS OF PAIA

77. Section 32 of the Constitution provides for a right of access to information, which states that:
 - "(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."

78. PAIA was enacted to give effect to the right of access to information, envisaged in section 32(2) of the Constitution.
79. In terms of section 11(1) of PAIA, a requester must be given access to a record of a public body if two requirements are met. First, the request must comply with the procedural requirements in terms of PAIA and second, no ground of refusal, contemplated in Chapter 4 of PAIA, must apply. Each of those requirements were met in this case: the procedural requirements of PAIA have been complied with and no ground of refusal lawfully applies. Certainly, none has been identified by the First or Second Respondents, who bear the onus in this regard.
80. Even if there were a basis ordinarily to refuse access to the records sought (which is denied), the disclosure of the records sought is manifestly in the public interest and would render disclosure mandatory under section 46 of PAIA.
81. On either basis, I submit that the requested information falls to be disclosed.

CONCLUSION

82. This case raises important questions relating to the constitutionally protected right of access to information, and the constitutional imperatives of accountability, responsiveness, and openness. Access to vaccine supply information – information held by the state and third parties in a pandemic – is crucial for promoting a transparent and accountable government. The enjoyment of various rights under the Bill of Rights depends on a transparent and accountable government. Therefore, the HJI respectfully submits that access to the information requested is imperative in the circumstance.
83. The HJI, therefore, prays for an order in terms of the Notice of Motion.

FATIMA HASSAN

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at _____ on this the ____ day of _____ 2022, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended by R1648 of 19 August 1977, and as further amended by R1428 of 11 July 1989, having been complied with.

COMMISSIONER OF OATHS