

21ST Floor
ISIVUNO HOUSE
North West
Cnr of Madiba and
Lilian Ngoyi Streets,
Pretoria
South Africa
www.armscomm.org.za



ARMS PROCUREMENT COMMISSION

Transparency, Accountability and the Rule of Law

Private Bag X02
The Tramshed
South Africa
Pretoria
0126
Tel: 012 358 3999
Fax: 012 358 3969
Email: admin@armscomm.org.za

10 July 2014

For attention: Mr David Cote
Lawyers for Human Rights
Strategic Litigation Programme
Kutlwanong Democracy Centre
357 Visagie Street
PRETORIA
0002

Dear Sirs

RE: REQUEST FOR ACCESS TO DOCUMENTS

1. We refer to your letter dated the 17th of June 2014 in connection with the above. We thought it prudent to first seek the comments of the custodians of the documents requested before responding to your request. So far only the Department of Defence (DoD) has furnished us with a full response and copy of a letter dated 25th June 2014, from their attorneys, Bowman Gilfillan, is annexed hereto. We are in broad agreement with their comments, save that we take a somewhat different approach to the matter as will become evident shortly.
2. We do not intend to deal with each and every averment made in your letter under reply but will comment only on those aspects that we consider call for our response.
3. Whilst we agree with the views expressed in paragraph 3 of your letter, we point out that the Commission obtains the relevant information for the purpose of its investigations and not for the benefit of third parties. The terrain for the testing and assessment of the information so obtained is the Commission's public hearings and it is the Commission that must test and assess such information, and not interested parties. The Commission cannot be expected to make all the information it obtains available to interested parties. For this reason, the Regulations give the Chairperson of the Commission power to control access

Commissioners: LW Seriti JA (Chairperson); HTM Musi JP;

Head of Secretariat: P.N Luphondo



ARMS PROCUREMENT COMMISSION

Transparency, Accountability and the Rule of Law

to and dissemination of the information in its possession. Nonetheless, the Commission acknowledges that it has a duty to assist people earmarked to testify before it and to provide them with the information that will assist them in this regard. But the information requested must be relevant to the evidence that the witness will give. It certainly cannot be all the information in the Commission's possession.

4. We agree with the sentiments expressed in the first sentence of paragraph 4 of your letter and it is perfectly legitimate for interested parties to make suggestions to the Commission as to the documents which should be obtained and to indicate, if possible, where these can be sourced. As a matter of fact, paragraph 33 of the Directives issued by the Chairperson envisages such a situation. Regarding the averment that the parties who were involved in the arms procurement would have produced only the documents that favored their versions, we have to point out that each witness testifying before the Commission is required to produce only the documents that are relevant to his/her evidence. None of the witnesses who have already testified before the Commission were required to produce documents that were not relevant to their testimony. The same would apply to your clients. Otherwise, the Commission has been provided with many other documents which were not relevant to the evidence of the witnesses who have already testified. And the Commission will not hesitate to demand production of a document which may contradict the evidence of a witness if it becomes aware of the existence of such a document.
5. Since the name of Advocate Aboobaker SC is raised, we put on record that his departure from the Commission has nothing to do with the fact that he had been allocated to lead your clients and he was not stopped from consulting with them, he was merely requested to give priority to preparing the witnesses that had been assigned to him to lead during the first phase of the hearings. Another team of evidence leaders has now been assigned to lead your clients and you are aware of their names. The programme of the second phase of the hearings, including the dates on which your clients are to appear, has also been forwarded to you and has published in the media and you are aware of it.
6. We now deal with the list of documents requested.
 - 6.1. In the first place, many documents have been provided to you relating to various matters dealt with in the public hearings, including the reports compiled by the Department of Trade and Industry's Industrial



ARMS PROCUREMENT COMMISSION

Transparency, Accountability and the Rule of Law

Participation Secretariat, regarding the NIP obligations of the winning bidders. Included, are also minutes of the meetings of the various bodies mentioned in Item 1 of Annexure A. In this regard, we refer to paragraph 5 of the letter from Bowman Gilfillan.

- 6.2. Secondly, some of the documents listed in Annexure A are already in your clients' possession, in particular, the documents listed in Items 2 and 3.
- 6.3. Of particular interest is your clients' request to be furnished with the documents listed in Items 6 and 7 as well as the mutual legal assistance requests, responses thereto and related correspondence. The question that arises is for what purpose do your clients need these documents. The answer is to be found in the third column of Annexure A. In a nutshell, and in the words of your clients, it is to investigate and to probe the allegations of corruption and fraud as per Commission's Terms of Reference. That seems to be the reason for the request of all the documents set out in Annexure A.
- 6.4. In this regard, we endorse the views expressed by the DoD's attorneys in paragraph 9.1.3 of their letter. Quite clearly your clients do not require the information because it is relevant to their testimony. Rather they need the information and the documents for their own parallel investigations into the same subject matter of the Commission's mandate. This is tantamount to usurping the functions of the Commission and is untenable and unacceptable. Your clients are not expected to conduct any investigations on behalf of the Commission but to merely provide the Commission with information about matters within their knowledge. And of course they may provide the Commission with documents that are not relevant to their evidence but are otherwise relevant to the Commissions' Terms of Reference and they may also point to the Commission where possible relevant information may be found. And if they have investigated any relevant matters there would be at liberty to share their findings with the Commission.
- 6.5. Apart from the fact that many of the documents requested under Items 1, 2 and 4 have already been disclosed and are in the Commission's public records, the rest of the documents requested are not required for their relevance to the evidence that your clients may provide but rather for the purposes of their own investigations.

21ST Floor
ISIVUNO HOUSE
North West
Cnr of Madiba and
Lilian Ngoyi Streets,
Pretoria
South Africa
www.armscomm.org.za



ARMS PROCUREMENT COMMISSION

Transparency, Accountability and the Rule of Law

Private Bag X02
The Tramshed
South Africa
Pretoria
0126
Tel: 012 358 3999
Fax: 012 358 3969
Email: admin@armscomm.org.za

-
- 6.6. The document requested under Item 5 of Annexure A is not in the Commission's possession and we are requesting it from the Department of Trade and Industry and will revert to you about it as soon as it is to hand. You will, however, appreciate that if it is classified the necessary declassification process would have to be undertaken first before it is made available.
 7. Finally, we advise that the list of witnesses to be called in the second phase is not exhaustive and further witnesses will be added at a later stage. In particular, the evidence relating to the investigations conducted by the Directorate of Special Operations and other State Agencies will be dealt with.
 8. We once again call upon your clients to make themselves available for proper consultations with our designated evidence leaders in order to identify the issues that they wish to canvas in their evidence and for preparation of their statements. The consultations will enable the evidence leaders to identify further documents that may be relevant to your clients' evidence and to make them available.

Adv F Mdumbe
Head of Legal Division