

Taxpayers retain the right to privacy - ConCourt

 By [Graeme Palmer](#)

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Taxpayer information is defined as any information provided by a taxpayer or obtained by Sars in respect of the taxpayer, including biometric information. Section 69 of the Tax Administration Act, 2011 (TAA) requires Sars officials to preserve the secrecy of taxpayer information. Such is the importance of the secrecy provision, that a contravention is a criminal offence that could see a person liable for a fine or imprisonment for a period not exceeding two years. In the *Public Protector v CSARS*, the Constitutional Court (ConCourt) had to decide whether the Public Protector's subpoena powers trumped those of Sars obligations to keep taxpayers' information secret.



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A complaint was lodged with the Public Protector in 2017 after the publication in a book that former President Zuma had received a salary from a security company for four months after becoming president. During her investigation, the Public Protector issued a subpoena to Sars for the former president's tax records.

The Public Protector Act gives the Public Protector powers to subpoena persons to produce documents relevant to her investigations. Further, failure to comply with a subpoena without just cause is a criminal offence. It is these powers which the ConCourt had to weigh up against Sars' obligation to preserve the secrecy of taxpayer information.

In its judgment, the ConCourt pointed out that there are circumstances in the TAA where Sars can disclose taxpayer information, such as when the taxpayer consents to the disclosure. The former president tried to file an affidavit late in the proceedings before the High Court consenting to the disclosure of the information. But the High Court disallowed the affidavit. The ConCourt pointed out that the Public Protector could have approached the former president for his consent before issuing the subpoena. If he did not consent, she could have applied to the High Court for an order.

The Public Protector argued that her subpoena powers flowed directly from the Constitution, which meant that they were a constitutional power and not a statutory power and therefore took precedence over the TAA secrecy provision. The problem with this argument, the ConCourt said, was that it rendered section 69 as non-existent. Sars must preserve the secrecy of taxpayers' information subject to some narrow exceptions. The Public Protector's subpoena powers are not one of those exceptions. The ConCourt held that Sars officials were enjoined to withhold taxpayers' information in the face of the subpoena and to do otherwise would have been at odds with Section 69. The Public Protector could not wish Section 69 away and should have rather brought a direct frontal challenge to the constitutionality of the section, which she did not do.

ABOUT GRAEME PALMER

Graeme Palmer is a director in the commercial department of Garlick & Bousfield.

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