PAIA UNPACKED

A RESOURCE FOR LAWYERS AND PARALEGALS

ABOUT THE SOUTH AFRICAN HISTORY ARCHIVE

The South African History Archive (SAHA) is an independent human rights archive dedicated to documenting, supporting and promoting greater awareness of past and contemporary struggles for justice in South Africa.

Through its Freedom of Information Programme (FOIP) SAHA aims to extend the boundaries of freedom of information in South Africa by:

- creating awareness of the right to information and its power as an enabling right that can be used to protect, promote and fulfill other human rights
- empowering individuals and organisations to understand and utilise the Promotion of Access to Information Act (PAIA) as a strategic advocacy tool
- increasing compliance with, and the use of, PAIA

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In 1975, South Africa and Israel entered into a confidentiality agreement regarding the exchange of supplies for the development of South Africa's nuclear weapons programme. The agreement was designed to prevent disclosure of information regarding their relations. This document was released to SAHA under PAIA in 2006 and is now archived at SAHA as AL2878: The Freedom of Information Programme Collection - A03.2.1.

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A RESOURCE FOR LAWYERS AND PARALEGALS

A guide for lawyers and paralegals to making and processing requests for information under the Promotion of Access to Information Act.

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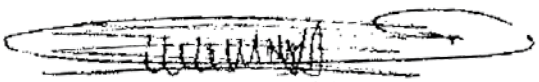
FOREWORD

With the advent of constitutional democracy about two decades ago in South Africa, the adopted Constitution promised to transform and pave the way for the realization and protection of everyone's human rights to address some of the devastating legacies of apartheid on the majority of South Africans. The right of access to information forms an important part of the realization and protection of our constitutional human rights as well as the promotion of social accountability. This makes it possible to recognize the right to information as a resource for everyone rather than for a few privileged who have the luxury to assert their rights.

When the right of access to information is asserted by members of the public, this changes the balance of power between the State and ordinary citizens such that the ordinary South African can hold the government to account, as to how the government is delivering on their service delivery obligations. The right of access to information viewed as a form of empowerment for all South Africans, challenges public officials who are responsible for implementation to see it as a pro-active right that enables the pursuit of social and economic equality of all South Africans. The advantage brought about by the right to information is that it can be used to enforce social justice; it creates an extra platform for engagement between the people and the government. The scope of the right also extends to the private sector to ensure values of probity and transparency cut across all spheres of society.

The objectives of the right of access to information to assist people to protect other human rights, promote transparency and accountability can be achieved through education and awareness-raising, as well as, through a sound understanding and interpretation of the enabling law, the Promotion of Access to Information Act (PAIA). The guide developed by the South African History Archive to serve as a resource for lawyers and paralegals on the scope, application and interpretation of PAIA is a useful one. With practical tools such as the interpretation of important provisions of PAIA by the courts, the guide is a comprehensive resource material that will be very useful to any legal practitioner. It is an important tool that will help users in maximising the true potential that the use of PAIA can achieve in promoting and protecting the ideals of our democracy.



Lawrence Mushwana
Chairperson,
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CHAPTER 1
INTRODUCTION

Access to information is an essential element of any well-functioning democracy. When implemented effectively, it facilitates transparency, accountability and good governance. It is a leveraging right that, in principle, enables people the opportunity to access information that can be used to protect, promote and fulfil other human rights.

However, despite the passage of more than a decade since the introduction of the Promotion of Access to Information Act (PAIA) to give effect to this right, knowledge of PAIA remains worryingly low in South Africa.

As part of our commitment to fostering an open information culture, SAHA has developed this guide as a tool for lawyers and paralegals interested in using PAIA, or supporting others in exercising their constitutional right of access to information. It outlines the key requirements of PAIA when making and processing a request for access to a record and examines how those requirements have been interpreted and applied by the judiciary.

PAIA unpacked is not intended as a substitute for reading PAIA itself, but instead aims to provide an accessible reference that will enable requesters and information holders to more easily identify the applicable provisions of PAIA and the relevant case law.

The guide does not provide commentary on how the provisions of PAIA may be interpreted by courts in the future, but aims only to consider how they have been interpreted to date.

For those interested in a more extensive commentary on the PAIA provisions see: *Currie & Klaaren, Commentary on the Promotion of Access to Information Act, 2002*.

How to use this guide

Where the substantive text of the guide relates to a provision of an act, a regulation, government notice or similar, the relevant provision will be denoted in the margin on the outer edge of the page, to allow readers to easily identify, and if necessary, access the relevant provision.

Where the guide identifies a test established by case law to assist in the interpretation of PAIA, this icon will appear in the margin on the outer edge of the page: ✓.

Discussion of the practical application of provisions of PAIA by the courts is included in text boxes with this icon in the margin.

CHAPTER 2
WHAT IS THE BACKGROUND TO ACCESS TO INFORMATION LEGISLATION IN SOUTH AFRICA?

2(a) Constitution

The interim constitution, passed in 1993, entrenched the right of access to information. Section 23 of the interim constitution provided that:

Every person shall have the right of access to all information held by the state or any of its organs at any level of government in so far as such information is required for the exercise or protection of any of his or her rights.

The Constitution, passed in 1996, included a bill of rights that comprehensively set out social,

economic, cultural, civil and political rights, including the right of access to information.

Section 32 of the Constitution 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 that is required for the exercise or protection of any rights.
2) *National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.*

2(b) Promotion of Access to Information Act (PAIA)

In 1994, the Deputy President, Thabo Mbeki, convened a task group on open democracy which developed a set of policy proposals recommending the enactment of an Open Democracy Act. The intention was to create legislation which would cover access to information, privacy, whistle blowing and open meetings of public bodies.

The Open Democracy Bill was introduced to Cabinet in 1998, where it remained until 2000. Cabinet substantially watered down the bill to remove all chapters other than those relating to access to information. Provisions in relation to the creation of an Open Democracy Commission and Information Courts were also removed and the name of the bill was changed to the Promotion of Access to Information Bill. (Note: the whistle blowing chapter was extracted to form a separate statute: the Protected Disclosures Act. Privacy legislation is currently being considered in the form of the Protection of Personal Information Bill.)

The Promotion of Access to Information Act (PAIA) was enacted in 2000 and came into operation on 9 March 2001. It constitutes the legislation enacted to give effect to the constitutional right of access to information in accordance with section 32(2) of the Constitution.

2(c) Relationship between the Constitution and PAIA

The right to information under PAIA is more limited than that under section 32 of the Constitution. The limitations in PAIA and the accompanying regulations are such limitations as Parliament deemed reasonable in light of section 36 of the Constitution, which permits reasonable and justifiable limitations on the rights in the bill of rights, and the power in section 32(2) of the Constitution to provide reasonable measures to alleviate the administrative and financial burden on the state.

The relationship between a constitutional right and the resulting legislation which gives practical effect to that right was considered by the Constitutional Court in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and others*. In that case the court considered the relationship between the right to lawful, reasonable and fair administrative action under section 33 of the Constitution and the national legislation passed to give effect to that right: the Promotion of Administrative Justice Act. The court found that when legislation exists to give effect to constitutional rights, such legislation must be interpreted and applied; the legislation cannot be bypassed to grant direct access to the Constitution.

The same conclusion was drawn by the Cape of Good Hope Provincial Division of the High Court (now the Western Cape High Court) in *Institute for Democracy in South Africa v African National Congress and others* in respect of the relationship between section 32 of the Constitution and PAIA. In that case the court found that section 32 of the Constitution is not capable of serving as an independent legal basis or cause of action for enforcement of the right of access to information where no challenge is directed at the validity or constitutionality of any of the provisions of PAIA. Accordingly, the court found that unless a requester is challenging the

constitutionality of any provision of PAIA, any legal challenge regarding the application of the right must be within the confines of PAIA.

The reasoning of the court in *IDASA v ANC* and others was subsequently adopted and applied by the North Gauteng High Court in *Kerkhoff v Minister of Justice and Constitutional Development and others*, where the applicant was found to be unable to rely on the constitutional right to information and was instead obliged to seek access to information in accordance with PAIA.

CHAPTER 3

HOW SHOULD THE PROVISIONS OF PAIA BE INTERPRETED?

3(a) Objectives of PAIA

[s. 2 PAIA]

The provisions of PAIA must be interpreted consistently with the objectives of the Act.

[s.9 PAIA]

The objectives of PAIA include:

- to give effect to the constitutional right of access to information, subject to justifiable limitations and in a manner that balances the right with other rights;
- to give effect to the constitutional obligations of the state of promoting a human rights culture and social justice by allowing people to request information from private bodies, including doing so in the public interest;
- to establish procedures which allow people to access records of public and private bodies as swiftly, inexpensively and effortlessly as reasonably possible;
- to promote transparency, accountability and effective governance of all public and private bodies, including by empowering and educating everyone to understand and exercise their rights under PAIA; to understand the functions and operation of public bodies; and to effectively scrutinise, and participate in, decision-making by public bodies that affects their rights.

3(b) Relationship between PAIA and other legislation

[s.5 PAIA]

PAIA and other legislation that restricts access to information

PAIA applies to the exclusion of any provision of any other legislation that:

- prohibits or restricts the disclosure of a record of a public or private body; and
- is materially inconsistent with an object or specific provision of the Act.

The restrictions placed on the right to records in PAIA are therefore the only applicable substantive restrictions on that right. Non-substantive restrictions in other legislation that are broadly consistent with PAIA, such as procedures for requesting access to information, may continue to apply.

[ss. 6 & 86 PAIA]

PAIA and other legislation that grants access to information

While PAIA is the supreme legislation governing restrictions on the right of access to records, it does not replace provisions in any other legislation that provide for access to information.

The Minister for Justice and Constitutional Development was required to introduce a bill by 8 March 2002 specifying legislation, other than PAIA, that provided for access to records of public bodies and private bodies and to add those to the schedule in PAIA (which currently only includes a reference to the National Environmental Management Act). Unfortunately the

Minister has failed to do so and instead in January 2011 released a draft Promotion of Access to Information Amendment Bill for public comment. The bill proposed to remove the obligation on the Minister to produce the schedule of legislation. A number of civil society organisations, including SAHA, made submissions objecting to the amendment and as at the time of publication that amendment has not been introduced to parliament, though nor has the Minister prepared the required schedule. Accordingly, there is no available schedule of legislation which provides access to information outside PAIA.

CHAPTER 4

WHAT IS THE EXTENT OF THE RIGHT TO INFORMATION UNDER PAIA?

4(a) Who can request records?

[s. 1 PAIA]

A person requesting information under PAIA is termed a 'requester'. A requester may be:

- a natural person (the person does not need to be a South African citizen or resident in South Africa);
- a juristic person (such as a company or association); or
- a person acting on behalf of a natural or juristic person.

A public body may be a requester for the purpose of requesting information from a private body. However, public bodies that are national, provincial or municipal departments or a person or institution exercising a power or performing a duty in terms of the Constitution or a provincial constitution (see further categories 1 and 2 in the definition of public body below), are excluded from requesting information from other public bodies.

4(b) What entities can people request records from?

[ss. 11 & 50 PAIA]

PAIA allows information to be requested from public and private bodies.

Public bodies

[s. 1 PAIA]

There are three categories of public bodies:

1. national and provincial departments and municipalities;
2. a person or institution exercising a power or performing a duty in terms of the Constitution or a provincial constitution; or
3. a person or institution exercising a public power or performing a public function in terms of any legislation.

Category 1 and 2 public bodies

The first two categories are relatively straight forward. The first category includes national departments such as the Department of Health and the South African Police Service; provincial departments such as the Gauteng Office of the Premier and Gauteng Education department; and municipalities such as the City of Johannesburg or the Emfuleni Local Municipality. The second category includes chapter nine institutions such as the South African Human Rights Commission, the Public Protector and the Auditor-General.

Category 3 public bodies

[s. 8 PAIA]

It is more difficult to identify the kind of bodies that fall within the final category; a person or institution exercising a public power or performing a public function in terms of any legislation. Such a body may not be a public body in respect of all its powers and functions but exercise powers and perform functions as both a public and private body. In such cases the public body

provisions of PAIA will apply to the records created through the powers or functions it is performing as a public body and the private body provisions of PAIA will apply to the records created in respect of all the other powers and functions exercised by the body.

In *IDASA v ANC and others* the Cape of Good Hope Provincial Division of the High Court (now the Western Cape High Court) found that when determining whether a body is a public or private body for the purpose of PAIA, consideration may be given to the source, nature and subject-matter of the power the body is exercising and whether it involves the exercise of a public duty.

How such a determination may be reached was considered further by the Supreme Court of Appeal in *Mittalsteel (formerly ISCOR) v Hlatshwayo*, where the court identified two tests that could be used; the control test and the function test.

✓ *The control test*

The elements of the control test are:

- whether the body has any discretion of its own; if it has, what is the degree of control by the executive over the exercise of that discretion;
- whether the property vested in the body is held by it for and on behalf of the government; and
- whether the body has any financial autonomy.

The court indicated that the control test may be used where it is necessary to determine whether functions, which by their nature might well be private functions, are performed under the control of the state and are thereby turned into public functions.

✓ *The function test*

The elements of the function test are:

- whether, but for the existence of a non-statutory body, the government would itself almost inevitably have intervened to regulate the activity in question;
- whether the government has encouraged the activities of the body by providing underpinning for its work or weaving it into the fabric of public regulation or has established it under the authority of government;
- whether the body exercises extensive or monopolistic powers.

The court indicated that the function test may be used where bodies perform what is traditionally a government function without being subject to control by any of the spheres of government and may therefore, despite their independence from control, properly be classified as public bodies.

The tests established by the court in *Mittalsteel* were applied by the South Gauteng High Court in *M&G Media v 2010 FIFA World Cup Organising Committee* where the court found that state funding was a significant factor in determining the classification of a body as public for the purpose of PAIA. The court stated “the fact that state funding is involved must always be a useful creature of any such enquiry and I suggest will incline a court to conclude that the function of the power in question is public in nature … where the funds emanate from we the people, the entity dealing in those funds is or should be performing a public function or exercising a public power.”

However, in *M&G Media v 2010 FIFA World Cup Organising Committee* the court found that it was not enough that the body perform a public function or exercise a public power, it must also do so ‘in terms of legislation’. The court found that a requirement to act in accordance with legislation was sufficient to satisfy the prerequisite.

How has the test developed by the courts been applied in practice?

Bodies that have been found by the courts to be public bodies by virtue of exercising a public power or performing a public function in terms of legislation include:

- Mittalsteel, when it was ISCOR, was found to be a public body for the purpose of PAIA by the Supreme Court of Appeal in *Mittalsteel (formerly ISCOR) v Hlatshwayo* because:
  - it was established by proclamation;
  - it could not amend its memorandum of association without an act of parliament;
  - the majority of its board were appointed by the Governor-General;
  - shares in the body could only be issued with presidential approval;
  - government exercised a controlling shareholding in the body;
  - the distribution of its dividends was prescribed by legislation;
  - some of its business (who it sold steel to) was prescribed by legislation; and
  - it was required to report annually to parliament.
- the FIFA World Cup Organising Committee was found to be a public body for the purpose of PAIA by the South Gauteng High Court in *M&G Media v 2010 FIFA World Cup Organising Committee* because:
  - eight of its board members were from government; and
  - it was in receipt of, and disbursing, government funds.
- The Industrial Development Corporation was recognised to be a pubic body for the purpose of PAIA by the Supreme Court of Appeal in *Industrial Development Corporation of South Africa v PFE International* (note that the issue was not in dispute in the case).

The Cape of Good Hope Provincial Division of the High Court in *IDASA v ANC and others* found that in receiving private donations political parties are not a public body for the purpose of PAIA because in doing so:

- they are not exercising any power or performing any function in terms of the Constitution;
- they are not exercising any power or performing any function in terms of any legislation; and
- they are simply exercising common law powers which, subject to the relevant fundraising legislation, are open to any person in South Africa

What is the significance of the different categories of public bodies?

The distinction between the different categories of public bodies is important because different obligations and rights arise in respect of the different categories. Perhaps most importantly, the right of internal appeal exists only in respect of the first category of public bodies: national and provincial departments and municipalities (see further the *right of internal appeal* below).

What bodies are excluded from the Act?

[s. 12 PAIA]

The records of some public bodies are excluded from the Act. Specifically, PAIA does not apply to a record:

- of cabinet and its committees;
- relating to the judicial functions of a court or special tribunal or a judicial officer of such a court or tribunal;
- of an individual member of parliament or of a provincial legislature, in that capacity; or
- of a decision regarding the nomination, selection or appointment of a judicial officer or any other person by the Judicial Service Commission.

[s. 1 PAIA]

Private body

There are three categories of private bodies:

- A natural person who carries or has carried on any trade, business or profession, but only in that capacity - for example, a professional such as a doctor.
- A partnership which carries or has carried on any trade, business or profession - for example, a partnership of accountants or lawyers.
- Any former or existing juristic person - for example, companies such as ABSA or AngloGold or registered trusts, such as SAHA.

Any body that falls within the definition of a public body is expressly excluded from the definition of a private body. Therefore, when a requester identifies an organisation they wish to request information from they must first assess whether the organisation is a public body. If the organisation does not fall within the definition of a public body, the requester should then consider whether the organisation is a private body.

4(c) What information are people entitled to access?

Records

The right to access information from both public and private bodies is restricted to access to 'records'. A record is defined in PAIA to mean recorded information, regardless of form or medium, in the possession or under the control of the relevant body, whether or not it was created by that body.

[s. 1 PAIA]

This definition includes records in the possession or under the control of an official of a public or private body in that capacity or an independent contractor engaged by such a body in the capacity as such.

[s.4 PAIA]

The date that a record came into existence is irrelevant for the purposes of PAIA; PAIA applies to records that came into existence both before and after the commencement of the Act.

[s.3 PAIA]

In *CCII Systems v Fakie* the Transvaal Provincial Division of the High Court (now the North Gauteng High Court) found that a record need not be original for the right of access under PAIA to apply.

The meaning of a record was further clarified in *Claase v SAA* where the Supreme Court of Appeal held that the right to records under PAIA is a right to be granted access to the record itself; a requester does not have to be content with what an information holder says is in their records.

Records PAIA does not apply to

[s.7 PAIA]

Records requested for the purpose of criminal or civil proceedings are excluded from the ambit of PAIA if they are requested after the commencement of those proceedings and the production of, or access to, the record is provided for in any other law. Any record obtained in contravention of the exclusion is not admissible as evidence in the proceeding unless the court is of the opinion that the exclusion of the record would be detrimental to the interests of justice.

The Supreme Court of Appeal in *Unitas Hospital v Wyk* found that the purpose of this exclusion was to ensure that PAIA did not have any impact on the discovery procedure in civil cases. Accordingly, "once court proceedings between the parties have commenced the rules of discovery take over".

In *CCII Systems v Fakie* the Transvaal Provincial Division of the High Court (now the North Gauteng High Court) found that the exclusion does not prevent a person from requesting records before they institute proceedings, even if they intend to institute

proceedings after receiving the record. This principle was extended by the Supreme Court of Appeal in *MEC for Roads and Public Works, Eastern Cape v Intertrade Two (Pty) Ltd* where the court found that section 7 of PAIA was not a bar to the respondent requesting access to records where an 'informal request' for records (which was made by way of letter and not in the prescribed form under PAIA) was made prior to the commencement of proceedings. The court further found that additional records requested by the respondent after the commencement of proceedings were so closely linked to those records which had previously been requested, there was no basis for distinguishing them and accordingly section 7 of PAIA did not act as a bar to obtaining access to those records.

The requirement in section 7 of PAIA that the right of access be contained 'in any other law' was considered by the Supreme Court of Appeal in *National Director of Public Prosecutions v King and subsequently in Industrial Development Corporation of South Africa Ltd v PFE International Inc (BVI) and others*. In the first case, the court found that 'any other law' in the context of section 7 refers to the body of law which includes the rules relating to discovery, disclosure and privilege. This was applied by the court in the second case and found to include the rules of court relating to subpoenas held by persons who are not parties to the litigation.

Furthermore, the court found that it is not necessary that the 'other law' provide for the production of, or access to, the record at the time when it might be obtained if the provisions of PAIA were to apply. It only requires that the 'other law' provides for production or access to the record; the timeline for obtaining the record is irrelevant.

4(d) The right to records of a public body

[s. 11 PAIA]

A public body must grant a requester access to a record if:

- the requester has complied with the procedural requirements in the Act; and
- access is not refused under one of the grounds for refusal.

Once a requester has complied with the procedural requirements of PAIA, the presumption is therefore in favour of access, limited only by the application of the refusal criteria in the Act.

There is no requirement that a requester provide the public body with the reason they are requesting access to the information. In fact, PAIA expressly provides that the right of access to records of public bodies is not affected by any reasons the requester gives for requesting the record or why the information officer believes the requester has requested access.

4(e) The right to records of a private body

[s. 50 PAIA]

A private body **must** grant a requester access to a record if:

- the record is required for the exercise or protection of any rights;
- the requester has complied with the procedural requirements in the Act; and
- access is not refused under one of the grounds for refusal.

A public body that is a national, provincial or municipal department or a person or institution exercising a power or performing a duty in terms of the Constitution or a provincial constitution (categories 1 and 2 of the definition of a public body), may request access to a record of a private body that is required for the exercise or protection of any right, other than its own, if it is acting in the public interest.

As with the right of access to records of public bodies, once the procedural requirements of PAIA have been complied with, the presumption is in favour of access. However, in the case of private bodies the limitation is two-fold:

- the record must be required for the exercise or protection of any rights; and
- access is subject to the refusal criteria in the Act.

The right to records of a private body is therefore more limited than the right to records from a public body and requires the requester to provide reasons for requesting the record.

The threshold of when a requester is entitled to access a record of a private body because it is required for the exercise or protection of a right is a difficult one. In particular requesters and private bodies have grappled with the meaning of the term 'required' and the type of rights a requester must be exercising or protecting.

When is a record 'required' for the exercise or protection of a right?

PAIA does not provide any guidance on the meaning of the term 'required' in the context of the right to records of private bodies. However, the term has been considered by the courts in a number of cases and they have attempted to clarify its meaning.

Courts have often clarified the meaning of the term 'required' in the negative, by explaining what it does not mean:

- the record does not have to be 'essential' but it must be more than 'useful' (*Shabalala v Attorney-General*)
- the term 'required' does not mean 'needs' (*Nortje and another v Attorney-General Cape Town*)
- the term 'required' does not mean 'necessity', let alone 'dire necessity' (*Clutchco (Pty) Ltd v Davis*)

However, some positive definitions of the term have been attempted. In 1995 the Full Bench of the Supreme Court in *Nortje and another v Attorney-General Cape* found that 'required' means "*reasonably required in the particular circumstances*". In 2001 the Supreme Court of Appeal in *Cape Metropolitan Council v Metro Inspection Services* found that "information can only be required for the exercise or protection of a right if it will be of assistance in the exercise or protection of the right".

The Supreme Court of Appeal subsequently expanded the definition in Nortje in 2005 when it found in *Clutchco (Pty) Ltd v Davis* that "*reasonably required in the circumstances is appropriate as long as it is understood to connote a substantial advantage or element of need*".

The test of 'substantial advantage or element of need' seems to have been accepted as appropriate by the courts, having subsequently been applied in *IDASA v ANC and others*; *UNITAS v Van Wyk*; *Claase v SAA*; and *Keylite Chemicals v Harmony Gold Mining Company*.

What constitutes a 'substantial advantage or element of need'?

In practice the courts have found that records *will be required* (meet the 'substantial advantage or element of need' test) for the exercise or protection of a right:

- where the contents of the record would be decisive in determining whether the requester has a cause of action (*Keylite Chemicals v Harmony Gold Mining Company*)
- to identify the right defendant for litigious action (*UNITAS v Van Wyk*)
- where the requester shows that there would be a significant risk of prejudice or harm should there be no disclosure of the information (*Pienaar v Jordan*)

Conversely, the courts have found that records are not required (do not meet the 'substantial advantage or element of need' test) for the exercise or protection of a right when:

- access would allow pre-discovery for the purpose of fishing expeditions (*UNITAS v Van Wyk*, *2006*; *Pienaar v Jordan*). (Although note the dissenting judgment of Cameron J in *UNITAS v Van Wyk* wherein he found that pre-discovery disclosure is important and that where access to a record can assist in avoiding the initiation of litigation or opposition to it, it is consistent with the objects of PAIA to grant access to the record.)
- the requester seeks the information as an additional aid in obtaining discovery in civil litigation where the requester is able to protect their rights sufficiently using the normal discovery procedures (*Pienaar v Jordan*)

What constitutes a 'right' for the purpose of entitling access to records of a private body?

The courts have found that the term 'rights' should be broadly interpreted. The South Gauteng High Court in *M&G Media v 2010 FIFA World Cup Organising Committee* found that the use of the word 'any' immediately prior to 'rights' in section 50 of PAIA indicates an intention on the part of the legislature to ensure the broadest possible interpretation of what qualifies as a right. In *Van Nikerk v Pretoria City Council* the court found that the term 'rights' should include all rights, and not only fundamental rights set out in the Bill of Rights.

However, in *IDASA v ANC* and others the Cape of Good Hope Provincial Division of the High Court (now the Western Cape High Court) applied a restriction on the term 'right', finding that the rights relied on for the purposes of seeking access to information of a private body must be justiciable rights; that is, the right must give rise to a legal action.

Establishing that the record is 'required for the exercise or protection of any rights'

In order to establish that a requester is entitled to records from a private body, the requester must state what right they wish to exercise or protect, the record required, and why that record is required to exercise or protect that right. This was first established by the Supreme Court of Appeal in *Cape Metropolitan Council v Metro Inspection Services WC*, on the basis of the right in section 32 of the Constitution but has since been reflected in the form for requesting a record from a private body: form C (see further *how do you access information under PAIA* below).

The South Gauteng High Court in *M&G Media v 2010 Fifa World Cup Organising Committee* held that the threshold for establishing the connection between the right and why the information is required should not be too high. This is because the requester has not seen the record and therefore is unaware of its precise content and as a result cannot be expected to demonstrate the link between the record and the right with any degree of detail or precision. Accordingly, applying the decision in *Keylite Chemicals v Harmony Gold Mining Company*, a requester need only put up facts which prima facie, though open to some doubt, establish that they have a right which access to the record is required to exercise or protect.

The test

Based on these judgments it would appear that the test to be applied in determining whether a request may be made for access to a record of a private body is whether, in the circumstances of the case, the record would prima facie afford a substantial advantage or satisfy a need of the requester in exercising or protecting any justiciable right.

How has the test been applied by the courts?

Records that have been recognised by the courts as required for the exercise or protection of a right include:

- Records related to allegations of fraud made against a party to a contract were recognised in *Cape Metropolitan Council v Metro Inspection Services WC* to be required to protect the right to a good name and reputation.
- Records related to the development of the Pebble Bed Modular Reactor for the generation of nuclear electricity were recognised in *Earthlife Africa v Eskom* to be required to exercise the constitutional right to an environment that is not harmful to a person's health or wellbeing and to protect the environment (although the records were ultimately determined to be exempt from release under various grounds for refusal).
- A record of a flight, showing the seats booked and available, were determined to be required to exercise a contractual right in *Claase v SAA*.
- Tender documents were determined to be required to exercise the constitutional right to freedom of expression insofar as the right to media freedom and the collar right of the public to receive information on matters of public interest are entrenched therein in *M&G Media v 2010 FIFA World Cup Organising Committee*. (Note that in that case the court found the respondent to be a public body for the purpose of PAIA but considered whether, in the event its finding in that regard was wrong, the applicant would have been entitled to the records on the basis of the right to information of private bodies).
- Records relating to an internal ANC investigation regarding alleged payments by a member of the ANC to journalists of Independent Newspapers in exchange for favourable coverage were recognised in *Independent Newspapers (Pty) Limited and others v the African National Congress and another* to be required to protect the right to freedom of expression and the right to reputation.
- Financial records of a company that would allow the requester to calculate the value of his 50 per cent interest in the company were recognised in *Fortuin v Cobra Promotions CC* to be required to exercise or protect a contractual right.

Records that the court has determined are not required for the exercise or protection of a right include:

- Access to the books of a company were denied to a shareholder in *Clutcho (Pty) Ltd v Davis* on the basis that the allegations that 'relatively minor errors or irregularities' had occurred or the 'whiff of impropriety' was not a sufficiently substantial foundation to establish the records were required to exercise the requesters rights as a shareholder.
- Access to the donation records of political parties was denied in *IDASA v ANC* and others on the basis that there was no rational connection between the donation records and the right to freedom of expression or freedom of association.
- Access to a report on the general nursing conditions in the ICU and the high care unit of a hospital was denied in *UNITAS v Van Wyk* on the basis that the report was not required to exercise the requester's legal right to sue the hospital for negligence. (Note the court, in its majority decision seemed to be significantly influenced by the fact that the doctor who wrote the report was assisting the respondent in her negligence claim and she therefore already had, through his personal knowledge, access to any information in the report that may be relevant (and he said there was none). Note also that Cameron J, in dissent, found that Ms Van Wyk was entitled to the report because her claim was not directed at the negligence of

an individual but the essential failing in the functioning of the hospital, which was addressed in the report and accordingly having access thereto would afford her a significant advantage in relation to the question of responsibility.)

CHAPTER 5

HOW DO REQUESTERS ACCESS RECORDS UNDER PAIA?

5(a) Form of the request

[s. 18(1) (public body) & s. 53(1) (private body) PAIA & PAIA Regulations]

Requests for access to records must be made in the prescribed form. The forms prescribed for this purpose are:

- Form A – request for records of a public body
- Form C – request for records of a private body

[s. 18(3) PAIA]

If a requester is unable to complete the form because of illiteracy or a disability, they may make the request to a public body orally. In the event that a request is made orally the information officer must fill out the form and provide a copy to the requester.

There is no corresponding duty on private bodies.

[s. 19 PAIA]

If a requester makes a request for access to a record of a public body that does not comply with the requirements for making a request, an information officer of a public body cannot refuse the request because of the non-compliance unless the information officer has:

- notified the requester of the intention to refuse the request, including the reasons for the proposed refusal;
- notified the requester that an official of the body would assist the requester to make the request in compliance with the procedural requirements;
- given the requester a reasonable opportunity to seek the assistance;
- given the requester any information that would assist them to make the request in the required form. This includes information about the records, but not information on the basis of which the records could be refused on the basis of a ground for refusal; and
- given the requester a reasonable opportunity to confirm the request or alter it so it complies.

There is no corresponding duty on private bodies.

Obtaining assistance in completing the form

[s. 19 PAIA]

If a requester wishes to make a request to a public body for access to a record, the information officer or deputy information officer must render reasonable assistance to help them complete form A.

There is no corresponding duty on private bodies.

5(b) Submitting a request

To a public body

[s. 18(1) PAIA & form A]

A request for access to a record(s) of a public body must be submitted to the information officer. The request can be submitted in person or by posting, faxing or emailing the request.

[s. 1 PAIA]

The information officer of a public body is the administrative head of that body. That is:

- the Director-General, head, executive director or equivalent officer of a national or provincial department;
- the municipal manager of a municipality; or
- the chief executive officer or equivalent of any other public body.

[s. 17 PAIA]

Information officers may delegate their powers and duties under PAIA to employees of the public body designated as deputy information officers. Therefore, where a deputy information officer has been appointed and delegated the power to receive PAIA requests, the request may be lodged with that officer. All references to 'information officers' in this guide therefore include a deputy information officer to whom the relevant power or duty has been delegated.

Deputy information officers are subject to the direction and control of the information officer.

[s. 14 PAIA]

In order to assist requesters to lodge requests with the correct officials, public bodies are required to publish information manuals which include the contact details of the information officer and any designated deputy information officers of the body. Unfortunately few public bodies have complied with this obligation and many that have do not regularly update their manual to reflect new officers or changed contact details.

[s. 16 PAIA]

Contact details of information officers and deputy information officers are also required to be made available in telephone directories and are available on the Government Communications and Information Service: http://www.gcis.gov.za/content/resourcecentre/contactdirectory

[s. 53(1) PAIA & form C]

To a private body

A request for access to a record(s) of a private body may be submitted in person or by posting, faxing or emailing the request. PAIA does not designate a particular person within a private body to whom requests must be made, although the prescribed form C addresses the request to the head of the body.

[s. 1 PAIA]

The head of a private body is:

- if the body is a natural person, that person;
- if the body is a partnership, any partner of the partnership; or
- if the body is a juristic person, the chief executive officer or equivalent.

The head of the body may authorise any other person to perform the powers or duties of the head under PAIA.

[s. 51 PAIA]

Consistent with the obligation on public bodies to publish manuals, private bodies are also required to publish information manuals that include the contact details of the head of the body, to whom a request for access to a record must be made.

[GG 34914 – 30/12/2011]

However, the Minister for Justice and Constitutional Development has exempted private bodies from complying with this obligation, in accordance with the power given to the Minister under section 51(4) of PAIA, except bodies that fall within specified categories. Those private bodies that must produce a manual are:

- public companies in terms of the Companies Act 2008;
- private companies in terms of the Companies Act 2008 that:
  - employ more than 50 employees; and
  - operate in the agricultural sector and have an annual turnover equal to or more than R2 million;
  - operate in the mining and quarrying sector and have an annual turnover equal to or more than R7 million;
  - operate in the manufacturing sector and have an annual turnover equal to or more than R10 million;
  - operate in the electricity, gas and water sector and have an annual turnover equal to or more than R10 million;
  - operate in the construction sector and have an annual turnover equal to or more than R5 million;
  - operate in the retail and motor trade and repair services sector and have an annual

turnover equal to or more than R15 million;
- operate in the wholesale trade, commercial agents and allied services sector and have an annual turnover equal to or more than R25 million;
- operate in the catering, accommodation and other trade sector and have an annual turnover equal to or more than R5 million;
- operate in the transport, storage and communications sector and have an annual turnover equal to or more than R10 million;
- operate in the finance and business services sector and have an annual turnover equal to or more than R10 million; or
- operate in the community, special and personal services sector and have an annual turnover equal to or more than R5 million.

All other private bodies are exempt from producing a manual. The exemption applies until 31 December 2015, at which time the Minister may elect to extend the exemption or not to renew the exemption, obliging all private bodies to produce information manuals.

5(c) Fee for making a request

[s. 22(1) (public bodies) & s. 53(1) (private bodies) PAIA & PAIA regulations]

Requesters are required to pay a fee for requesting access to records of both public and private bodies. The fee in respect of a public body is R35. The fee in respect of a private body is R50.

People requesting their personal information are not required to pay the request fee.

The relevant sections of PAIA state that the body must require the requester to pay the request fee before further processing the request. In their book *Commentary on the Promotion of Access to Information Act*, respected academics Iain Currie and Jonathan Klaaren suggested that the requirement meant that an information holder must only determine whether a request will be granted or refused after the request fee has been paid. This in effect would allow the 30 day period for responding to a request (see further *how do public and private bodies respond to requests for information* below) to be extended until such time as the request fee is paid (see page 74 of their book).

However, Currie and Klaaren's analysis was published in 2002, when PAIA had only been operational for a short period and therefore few examples of its practical operation existed. Since that time the practical application of PAIA has produced another view on the possible interpretation of the provision.

Section 2(1) of PAIA requires a court to prefer any reasonable interpretation of a provision that is consistent with the objectives of the Act over any alternate interpretation that is inconsistent with those objectives. The objectives of PAIA, set out in section 9 of that Act, include promoting transparency, accountability and effective governance and to allow requesters to obtain access to records of public and private bodies as swiftly, inexpensively and effortlessly as reasonably possible. Requiring a requester to lodge a request and then wait until such time as the relevant body sends them a notice requiring payment of the request fee and, from a practical viewpoint, the method(s) available for payment of that fee, before the body's obligations to respond to that request apply, allows the body to effectively deny the right to information by failing to issue the relevant notice.

If bodies moved swiftly to immediately issue the required notice then Currie and Klaaren's interpretation would allow the objectives of the Act to be met. However, in practice, many bodies take weeks to issue the relevant notice. Allowing them to effectively extend the 30 day period for responding to a request by doing so cannot have been the intention of the legislature. This position is supported by sections 26 (public body) and 57 (private body) of PAIA which set out an exhaustive list of circumstances in which the 30 day period for responding to a request may be extended and sections 25(1) (public body) and 56(1) (private body) which provide that an

information holder must respond to a request within 30 days of receiving the request.

The issue is yet to be considered by a court and until such time as it has, it would be prudent for requesters to pay request fees immediately on receiving notice to do so and for public and private bodies to calculate the time period for responding to a request from the date the request is received, not the date of payment of the request fee. It would however be reasonable for a public or private body that has issued the relevant notice regarding fees and provided the necessary payment details, to decline to provide a decision on a request until such time as the fee is paid, as in those circumstances until such time as the requester has paid the request fee they have not complied with the procedural requirements of the Act.

5(d) Compliance with the request process

In *Midi Television v DPP, Western Cape* the Supreme Court of Appeal considered the consequence of a failure to comply with the request procedure when seeking access to a record under PAIA. The court found the procedure to be mandatory and determined that the court was not authorised to bypass those procedures. Accordingly, a requester must comply with the request procedure in the Act when requesting information under PAIA.

However, in *Fourtin v Cobra Promotions CC* the Eastern Cape High Court considered the failure of the applicant to complete the request form in full, in particular to complete the right that he was exercising or protecting and why the information requested was required to do so. In that case the court found that where a body is aware or ought reasonably to have been aware of the reasons for the request a failure to complete the form will not be fatal to the request. In that case, a course of correspondence had taken place regarding the requested information prior to the applicant lodging a request under PAIA in which the necessary elements had been established.

CHAPTER 6

HOW DO PUBLIC AND PRIVATE BODIES RESPOND TO REQUESTS FOR INFORMATION?

6(a) Transferring a request

[s. 19(4) PAIA]

It will often be difficult for requesters to identify the correct public body to which to make a request, as the division of responsibilities between public bodies is complex and regularly changing. In recognition of this difficulty, PAIA requires a public body that receives a request that should have been made to another public body to either:

- assist the requester to make the request to the appropriate body; or
- transfer the request to the correct body -

whichever will result in the request being dealt with earlier.

[s. 20 PAIA]

Despite the election provided in section 19(4) of PAIA to either transfer the request or assist the requester to make the request to the appropriate body, a mandatory obligation to transfer a request is placed on the information officer of a public body in section 20 of PAIA. Such a transfer must be effected as soon as reasonably possible, but within 14 days of the request being received, where:

- the record requested is in the possession of another public body;
- the subject matter of the requested record is more closely connected with the functions of another public body; or
- the record contains commercial information in which another public body has a greater commercial interest.

An information officer is also obliged to transfer a request where it does not hold the record requested and where it is unsure which public body does hold the record or where the subject matter of the record is not closely connected with the functions of the body and it is not sure which body the subject matter is more closely connected with. In those circumstances the information officer must transfer the request to the public body for which the record was originally created or received by. Such a transfer must also occur as soon as reasonably possible but within 14 days of the request being received.

There is no corresponding duty in respect of private bodies as there is no expectation they will have any greater familiarity with the activities of other private bodies or public bodies than a member of the public.

Notifying the requester of the transfer

[s. 20(5) PAIA]

The public body transferring the request must notify the requester of the transfer, the reasons for the transfer and the period in which the request must be dealt with immediately upon transferring the request.

Timeframe for responding to a transferred request

[ss. 20(3) & (4) PAIA]

A public body that receives a transferred request must prioritise the processing of the request in relation to other requests. However, the 30 day time period for responding to a request (see further *how do public and private bodies respond to requests for information* below) does not begin to run until the request is received by the information officer to whom the request is transferred.

6(b) Third party notification

Who is a third party?

[s. 1 PAIA]

A third party is any natural or juristic person, other than the requester and includes, in respect of requests made to public bodies, the government of any foreign state, an international organisation or an organ of that government or organisation. However, where a request has been made for access to records of a public body, a third party does not include any other public body.

When does a third party have to be notified?

[ss. 47 (public bodies) & 71 (private bodies) PAIA]

If a requester requests access to a record of a public or private body that might be exempt from disclosure for one of the reasons set out below, the relevant officer of the body must take all reasonable steps to inform the relevant third party of the request. The circumstances in which third party notification must occur are where:

- the record contains personal information of the third party and might be exempt from release under section 34 (public bodies) or section 63 (private bodies);
- the record contains information which was obtained or is held by the South African Revenue Service for the purposes of enforcing legislation concerning the collection of revenue and might be exempt from release under section 35 (public bodies only);
- the record contains commercial information of the third party and might be exempt from release under section 36 (public bodies) or section 64 (private bodies);
- the record contains information supplied in confidence by a third party and might be exempt from release under section 37 (public bodies) or section 65 (private bodies);
- the record contains information about research being carried out by or on behalf of the third party and might be exempt from release under section 43 (public bodies) or section 69 (private bodies).

How do bodies notify third parties?

[ss. 47 (public bodies) & 71 (private bodies) PAIA]

Notification must be provided to the third party as soon as reasonably possible but within 21

days of receipt of the request. The method of notification must be the fastest means reasonably possible (including orally). The notice to the third party must include:

- a statement that the information officer is considering a request for access to a record that may contain exempt information;
- a description of the content of the record;
- the name of the requester;
- a description of the relevant exemption provision;
- a description of the public interest override provision (see further *when can access to a record be refused* below), if the official believes that it might apply, and an explanation for that belief; and
- an explanation of the right of the third party to make representations or give consent to the release of the record.

[ss. 48 (public bodies) & 72 (private bodies) PAIA]

What rights does the third party have?

The third party is entitled to make written or oral representations to the body as to why the request should be refused or to give written consent for the disclosure of the record to the requester. The third party has 21 days from the date they received notice of the request to make such representations.

[ss. 49 (public bodies) & 73 (private bodies) PAIA]

What is the effect of a submission by a third party?

If a third party consents to access being given, the public or private body must provide access unless one of the other grounds for refusal apply to the record.

If a third party makes representations as to why access should be refused, any such representations are not determinative of access, but must be given due regard by the officer considering a request. Therefore, a public or private body cannot refuse access to a record just because a third party has objected to its release. The officer of the body must still consider whether the basis and/or threshold for refusal in the relevant section has been met.

6(c) Time period for responding to a request

[ss. 25(1) (public bodies) & 56(1) (private bodies) PAIA]

Standard period for responding

Public and private bodies must notify a requester whether access to a request will be granted or refused within 30 days of receiving the request. The method of the notice must be as requested in the request form where that is reasonably possible. For example, if the requester asked to be notified of a decision by email, they should be notified in that manner.

[ss. 49(1) (public bodies) & 73(1) (private bodies) PAIA]

Where the record requested may contain third party information which obliges the public or private body to notify a third party about the request the 30 day time period for responding to a request runs from the date of informing the third party.

[ss. 26 (public bodies) & 57 (private bodies) PAIA]

Extending the period for responding

Public and private bodies may extend the period for responding to a request for no more than 30 days if:

- the request is for a large number of records or requires a search through a large number of records and compliance with the 30 day period would unreasonably interfere with the activities of the body;
- the requested records must be collected from, or searched for in, an office of the body that is not in the same town or city as the information officer of a public body or the head of a private body that cannot reasonably be completed within the 30 day period;

- consultation among divisions of the body or with another body is necessary or desirable to decide upon the request that cannot reasonably be completed within 30 days;
- more than one of the above circumstances exists in respect of the request, making compliance with the 30 day period not reasonably possible; or
- the requester consents to the extension in writing.

If a public or private body extends the period for responding to a request they must notify the requester as soon as reasonably possible, but within 30 days of receiving the request. That notice must state:

- the period of the extension;
- adequate reasons for the extension, including the provisions of PAIA relied upon; and
- that the requester may lodge an internal appeal or an application with the court (see further *the right to internal appeal* and *the right to judicial review* below) against the extension and the procedure for doing so.

While a requester is entitled to appeal a decision to extend the time period for responding to a request, in practice, there is little benefit in doing so. If the right to lodge an internal appeal exists in respect of the body, the relevant official has 30 days to determine the appeal (see further *the right to internal appeal* below), the same number of days as the maximum extension period. It is therefore unlikely that a decision on a request will be forthcoming any more quickly because of an internal appeal against a decision to extend the time for responding to a request. Similarly, the realities of the legal system mean that a court application in respect of a decision to extend the period for responding to a request is very unlikely to be heard within 30 days of lodging the application.

Calculating the number of 'days'

[s. 4 Interpretation Act]

The time period for responding to a request is measured by reference to 'days'. The term is not defined in PAIA and in the absence of such a definition must be interpreted in accordance with the *Interpretation Act* 1957. That Act provides that the time period shall not include the day on which the request is received but shall include everyday thereafter (including weekends and public holidays). If the final day for responding to a request (the 30th day or any extended period for responding, up to 60 days) falls on a Sunday or public holiday then the required date for responding shall be the following day.

This method of calculation applies to all timelines for performing an act under PAIA (such as lodging an internal appeal, responding to an internal appeal and applying to court), unless the relevant provision of PAIA specifically refers to 'working days'.

6(d) Deemed refusal

[ss. 27 (public bodies) & 58 (private bodies) PAIA]

If a public or private body fails to respond to a request within 30 days (or any extended period of time, up to 60 days) the body is deemed to have refused the request. This allows the requester to invoke the internal appeal or court procedures, as applicable.

6(e) Process when granting access

[ss. 25(2) (public bodies) & 56(2) (private bodies) PAIA]

If a public or private body grants a request for access to a record the notice to the requester notifying them of the decision must state:

- the access fee payable;
- the form in which access will be given;
- that the requester may lodge an internal appeal or court application regarding the access fee or form of access and the procedure for doing so.

[ss. 25(3) (public bodies) & 56(3) (private bodies) PAIA]

6(f) Process when refusing access

If a public or private body refuses a request for access to a record the notice to the requester notifying them of the decision must:

- state adequate reasons for the refusal, including the provisions of PAIA relied on;
- exclude from such reasons reference to the content of the record;
- state that the requester may lodge an internal appeal or court application regarding the refusal and the procedure for doing so.

The obligation of a public body refusing access to records to provide reasons for the decision was considered by the Constitutional Court in *President v M&G Media Limited*. In that case the court held that a mere bald assertion by an information officer that the requested record falls within a particular ground for refusal or the recitation of the words of the claimed ground for refusal is not sufficient to discharge the evidentiary burden of the body. Instead, the body must provide sufficient information to bring the record within the exemption claimed.

Given that the relevant provision in respect of a private body refusing access to information is the same as that of a public body, it is reasonable to assume that the court's interpretation of the public body requirement to provide reasons for refusal would apply equally to private bodies.

[ss. 23 (public bodies) & 55 (private bodies) PAIA]

6(g) Records that cannot be found or do not exist

If the relevant official of a public or private body has taken all reasonable steps to find a record and there are reasonable grounds for believing that the record is in the possession of the body but cannot be found or does not exist, the official must notify the requester that it is not possible to give access to the record.

The notice must be in the form of an affidavit or affirmation and must give a full account of all steps taken to find the record or to determine whether it exists, as applicable. That account must include all communications with every person who conducted the search on behalf of the relevant official.

The notice constitutes a refusal of access to a record for the purposes of PAIA and therefore entitles the requester to lodge an internal appeal or a court application, as applicable.

If the record is subsequently found, the requester must be given access to the record unless one of the grounds for refusal apply (see further *when can access to a record be refused* below).

In *TAC v Minister of Correctional Services* the Transvaal Provincial Division of the High Court (now the North Gauteng High Court) considered the claim of the deputy information officer of the Department of Correctional Services that a report requested by the TAC could not be found. The deputy information officer had sworn an affidavit indicating that she made enquiries about the whereabouts of the report and thereafter called an urgent meeting with the Director of Legal Services and the PAIA unit to establish the whereabouts of the requested record. The court found that the affidavit fell far short of what was required by section 23 of PAIA. Indeed, the court ultimately determined that the assertion that the report was not in the department's possession was so farfetched and untenable that it must be rejected.

CHAPTER 7

HOW IS ACCESS TO A RECORD GIVEN?

[s. 29 PAIA]

7(a) Time period for providing access

Where a requester is granted access to records of a public body the requester must be provided with the records upon payment of any applicable access fee, or if no access fee is payable,

immediately. However, if an internal appeal or an application to court has been lodged against the granting of a request for access, access to the record may only be given when the decision to grant the record to the requester is finally confirmed.

Where a requester is granted access to records of a private body, the requester must be provided with the records as soon as reasonably possible, subject to the payment of any applicable access fee.

[ss. 54(5) & 60 PAIA]

7(b) Form of access

Public body

[s. 29 PAIA]

A requester is entitled to stipulate the form in which they would like to receive any record to which a public body has granted them access. The Act provides for the following forms:

- for written or printed records
  - o arranging for inspection
  - o receiving a copy
- for visual images
  - o arranging for a viewing
  - o receiving a copy
  - o receiving a printed transcription
- for sound recordings
  - o arranging to listen to the recording
  - o a written or printed transcription of the recording
- for records held on a computer
  - o a printed copy of the record or part of it
  - o information derived from the record
- for records capable of being made available in computer readable form (e.g. on compact disc), in that form; or
- in any other case, by supplying a copy of the record.

A requester must be given access to a record of a public body in the particular form they have requested unless:

- to do so would unreasonably interfere with the effective administration of the public body;
- to do so would be detrimental to the preservation of the record;
- to do so would amount to an infringement of copyright not owned by the state or the public body; or
- supplying access in the requested form is not possible due to the need to severe exempt material from the remainder (see further *severability* below).

If a requester with a disability is unable to read, view or listen to the record in the form in which it is held by the public body because of their disability, the body must take reasonable steps to make it available in a form in which it is capable of being read, viewed or heard by the requester, if the requester asks them to.

If a record of a public body is made available for inspection, viewing or hearing by a requester, the requester may make copies of, or transcribe, the record using the requester's equipment, unless to do so would:

- unreasonably interfere with the effective administration of the public body;
- be detrimental to the preservation of the record; or
- amount to an infringement of copyright not owned by the state or the public body.

Private body

[s. 60 PAIA]

A private body must give a requester access to a record in such form as the requester

reasonably requires. If a requester does not request access in a particular form, the private body may give access in such form as the head of the body reasonably determines.

The relevant request form for requesting records from a private body, form C, provides a requester with the same options for indicating the form in which they would like to receive a record as apply in respect of public bodies.

[ss. 30 (public bodies) & 61 (private bodies) PAIA]

7(c) Special requirements for access to medical records

PAIA makes special provision for access to records that have been created by health practitioners. The purpose of the special requirements is to ensure that a requester does not receive information about their physical or mental health or well-being that may cause them serious harm without ensuring that any support structures that may be necessary to help the requester deal with the information are in place.

Accordingly, PAIA allows an official of a public or private body that believes the disclosure of a medical record to a requester might cause serious harm to their physical or mental health or well-being to consult with a health practitioner before providing access to the record. The health practitioner must be nominated by the requester.

If the health practitioner believes that the disclosure of the record would cause serious harm to the requester, the public or private body may only give the requester access to the record if the requester establishes (to the satisfaction of the official) that provision has been made for counselling or other arrangements as are reasonable practicable to limit, alleviate or avoid the harm.

The person responsible for any such counselling or arrangements must be given access to the record before the requester.

[s. 31 PAIA (public bodies) & form C (private bodies)]

7(d) Language of access

If a record of a public body exists in more than one language, the requester must be given access in the language the requester prefers.

While there is no corresponding obligation for private bodies to provide a requester with a record in their preferred language, the relevant form for requesting access from a private body, form C, allows a requester to indicate the language in which they would refer to receive access. This indicates that the Minister (who prepared the relevant regulations containing form C) expects that a private body will also provide a requester with a record in their preferred language where the record exists in that language.

There is no obligation on either public or private bodies to translate a record into the preferred language of the requester.

[s. 24 PAIA]

7(e) Deferral of access

If an information officer of a public body has determined to grant a requester access to a record, the information officer may defer giving access to the record for a reasonable period if the record:

- is to be published within 90 days of the receipt of the request, or such further period as is reasonably necessary for printing and translating the record for the purpose of publishing it;
- is required by law to be published but is yet to be published; or
- has been prepared for submission to any legislature or a particular person but is yet to be submitted.

If access to a record is deferred, the information officer must notify the requester:

- that they may make representations as to why the record is required before such publication or submission; and
- of the likely period of deferral.

A requester has 30 days to make representations as to why they will suffer a substantial prejudice if the record is not given before the proposed deferred date.

If, after considering any representations made by the requester, the information officer believes that the requester will suffer substantial prejudice if access to the record is deferred, the information officer must give the requester access to the record.

There is no corresponding provision in respect of private bodies.

7(f) Fees for accessing records

[ss. 22(6) (public bodies) & 54(5) (private bodies) PAIA]

Fees are applicable for accessing the records of public and private bodies. These include fees in respect of reproduction and for search and preparation.

The applicable fees are prescribed in regulations and are:

[PAIA Regulations]

Public bodies

- Copy per A4 page – 60 cents
- Printing per A4 page – 40 cents
- Copy on a CD – R40
- Transcription of visual images per A4 page – R22
- Copy of a visual image – R60
- Transcription of an audio recording per A4 page – R12
- Copy of an audio recording – R17
- Search and preparation of the record for disclosure – R15 per hour or part thereof, excluding the first hour, reasonably required for the search and preparation
- Actual postage fee

Private bodies

- Copy per A4 page – R1.10
- Printing per A4 page – 75 cents
- Copy on a CD – R70
- Transcription of visual images per A4 page – R40
- Copy of a visual image – R60
- Transcription of an audio recording per A4 page – R20
- Copy of an audio recording – R30
- Search and preparation of the record for disclosure – R30 per hour or part thereof, excluding the first hour, reasonably required for the search and preparation
- Actual postage fee

[ss. 22(2) (public bodies) & 54(2) (private bodies) PAIA & PAIA Regulations]

If the relevant public body or private body considers, after completing a search for the relevant record, that the preparation of that record for disclosure would require more than 6 hours, the body must require the requester to pay a deposit of one third of the access fee which would be payable if the request is ultimately granted.

[s. 29(4) PAIA]

If a requester is not given access to a record of a public body in the form they requested, the access fee which they are charged must not exceed the fee which would have been payable if they had been given access in the form requested (except where access is given in another form because information had to be severed from the record).

[s. 29(6) PAIA]

If a requester is prevented by a disability from reading, viewing or hearing the record in the form in which it is held by a public body and the body is required to make the record available in another form, the access fee payable by the requester must not be more than the fee which he or she would have been required to pay but for the disability.

Which requesters are exempt from paying access fees?

Requesters who:

- are requesting access to a record containing their personal information; or
- earn less than R14,712 annually (if single) or R27,192 annually (if married or have a life partner) are not required to pay access fees.

CHAPTER 8

WHEN CAN ACCESS TO A RECORD BE REFUSED?

8(a) General principles

Mandatory and discretionary grounds for refusal

PAIA includes both mandatory and discretionary grounds for refusal. Mandatory grounds are denoted by the use of the word 'must' and require the officer of the relevant public or private body to refuse access if the grounds provided in the Act are established. Discretionary grounds are denoted by the use of the word 'may' and allow the officer of the relevant public or private body to use their judgment in determining whether to grant access where the grounds provided in the Act are established. Such discretion must be exercised lawfully and reasonably.

Weighing the interests of requesters and third parties

When applying a ground for refusal that is intended to protect the interests of a third party, the duty of the public or private body is to act as an "impartial steward" and not to align itself with either the third party that provided the information or with the person seeking access to it (*Biowatch v Genetic Resources*).

Basis for the refusal

The grounds for refusal can essentially be divided into two types:

1. where the ground for refusal requires only that the requested record contain a specified category of information (strict refusal); and
2. where the ground for refusal requires that the requested record contain a specified category of information and that a particular consequence would flow from the release of the record (conditional refusal).

Most conditional refusals rest on the application of one of two thresholds: whether the disclosure 'would be likely to' or 'could reasonably expected to' cause the stated harm. In *Transnet Limited v SA Machinery Company (Pty)Ltd*, the Supreme Court of Appeal considered the difference between the two standards in the context of sections 36(1)(b) and (c) of PAIA. It found that both involve a result that is probable, objectively considered, but the difference is to be measured by degree. In that context the court found that:

- 'would be likely to' means that the stated consequences *would reasonably be expected as probable if likely grounds exist for that expectation*; and
- 'could reasonably expected to' means that the stated consequences *could reasonably be expected as probable if reasonable grounds exist for that expectation*.

The phrase 'would be likely to' therefore creates a higher threshold than the phrase 'could reasonably be expected to'.

Relationship between the grounds

Each ground of refusal must be interpreted independently, without reference to, or limitation by, the other grounds for refusal.

More than one ground of refusal may apply to a record.

[ss. 33(2)(1) (public bodies) & 62(a) (private bodies) PAIA]

[ss. 33(2)(b) (public bodies) & 62(b) (private bodies) PAIA]

8(b) Specific grounds for refusal

Personal information of third parties

PAIA attempts to balance the right to information with the right to privacy, which is also a constitutionally protected right. Accordingly, PAIA provides for the mandatory protection of certain personal information of natural people. It states that public and private bodies must refuse access to a record if its release would involve the *unreasonable disclosure* of personal information about a third party who is a natural person, including a deceased person.

The ground is a conditional ground, that is, it is not enough for a public or private body to establish that personal information of a third party is contained in a record. The body must also establish that the disclosure of that information would be 'unreasonable'.

A non-exhaustive list of what constitutes personal information is included in section 1 of PAIA. It includes personal attributes (such as race, colour and gender), identity and passport numbers, medical and criminal history, and identifiers such as a personal address or telephone number.

The parliament included a number of exclusions to the ground for refusal, which indicate an assessment of what, in its view, would not amount to 'unreasonable disclosure' or to circumstances where, due to the public nature of the actions of an individual, information related thereto can no longer properly be classified as personal information to which privacy protections should apply.

Accordingly, public and private bodies cannot refuse access to a record on the basis of the personal information exemption insofar as it contains information:

- about an individual who has consented to the release;
- about an individual who was informed, before the information was given to the body, that the information belonged to a class of information that would or might be made available to the public;
- that is already publicly available;
- about the physical or mental health or well-being of a person who is under 18 years of age or who is incapable of understanding the nature of the request and is in the care of the requester, where the release of the information would be in the person's best interests;
- about a deceased individual, where the requester is the individual's next of kin or is making the request with the written consent of the individual's next of kin;
- about an individual who has been deceased for more than 20 years; or
- about an individual who is or was an official of a public or private body and which relates to the position or functions of the individual. This includes, that the individual is or was an official of the body; the title, work address, work phone number and other similar particulars of the individual; the classification, salary scale, remuneration and responsibilities of the position held or services performed by the individual; or the name of the individual on a record prepared by them in the course of their employment.

The Eastern Cape High Court in *Centre for Social Accountability v The Secretary of Parliament and others* considered what would constitute an 'unreasonable disclosure'. The court found that a three-part test should be applied:

- is the information said to be personal covered by the principle of freedom of identity;
- did the individual subjectively harbor a legitimate and reasonable expectation that such information would be protected by the right to privacy; and

- does society have an objective legitimate and reasonable expectation that the information should be protected.

The court found that if all of these criteria are satisfied then the disclosure of the information would be 'unreasonable'.

How has the ground for refusal been applied by the courts?

- In *TAC v Minister for Correctional Services* the Transvaal Provincial Division of the High Court (now the North Gauteng High Court) found that in applying the ground for refusal, the public or private body must take into account the requirement to sever the exempt information from the record (see further severability below). In that case the court said it was 'obvious' that the name of the individual could be blacked out so she could not be identified.
- In *Centre for Social Accountability v The Secretary of Parliament and others* the Eastern Cape High Court found that the respondents had failed to show that the release of the names of members of parliament on a document relating to the alleged abuses of the parliamentary travel voucher system would be 'unreasonable'. The court further found that the information related the position or functions of the parliamentarians and was therefore specifically excluded from the personal information exemption under section 34(2)(f) of PAIA.

Commercial information of third parties

Many businesses are reliant for success on the skill and know-how their business has developed. The release of such information to a competitor could disadvantage the business and damage their proprietary rights and interests in the information. However, as a necessary consequence of contracting with other parties or, in some cases, where businesses are required by law to do so, such information may be in the hands of public or other private bodies. PAIA seeks to protect such information from release by requiring public and private bodies to refuse access to certain commercial information of third parties.

[ss. 36(1)(a) (public bodies) & 64(1)(a) (private bodies) PAIA]

Trade secrets

PAIA provides that public and private bodies must refuse access to a record containing a trade secret of a third party. This is a strict ground for refusal; the very existence of trade secret information in the record requires the body to refuse access to the record - there is no need to establish that any probable harm would result from its release.

[ss. 36(1)(b) (public bodies) & 64(1)(b) (private bodies) PAIA]

Financial, commercial, scientific or technical information

Financial, commercial, scientific or technical information that does not constitute a trade secret is also protected by PAIA. However, the protection of such information is conditional. Public and private bodies are required to refuse access to records containing financial, commercial, scientific or technical information of third parties, other than trade secrets, where the disclosure of the information 'would be likely to cause harm to the commercial or financial interests of that third party'.

[ss. 36(1)(c) (public bodies) & 64(1)(c) (private bodies) PAIA]

Information supplied in confidence

Information supplied in confidence to a public or private body by a third party is also protected under PAIA. However, the protection is conditional on a reasonable expectation that the release of the information could put the third party at a disadvantage in contractual or other negotiations or prejudice the party in commercial competition.

Exclusions

[ss. 36(2) (public bodies) & 64(2) (private bodies) PAIA]

The protections afforded are not absolute. Where the commercial information is already in the public domain the need for the protection of the information no longer applies and therefore access cannot be refused to a record containing such information. Furthermore, because the reason for the refusal is to protect the interests of the third party, if that party consents to the disclosure, the reason for the refusal will also cease to exist and access must be provided. Finally, the need to protect commercially sensitive information must not prevail over public safety interests. Accordingly, PAIA provides that the commercial protections in section 36 do not protect information "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 where the disclosure of the information would reveal a serious public safety or environmental risk." This does not include the results of preliminary testing or other investigation conducted for the purpose of developing methods of testing or other investigation.

[s. 1 PAIA]

A 'public safety or environmental risk' is defined to mean harm or risk to the environment or the public (including individuals in their workplace) associated with:

- a product or service which is available to the public;
- a substance released into the environment, including the workplace;
- a substance intended for human or animal consumption;
- a means of public transport; or
- an installation or manufacturing process or substance which is used in that installation or process.

How has the ground for refusal been applied by the courts?

In *Transnet Limited and another v SA Metal Machinery* the Supreme Court of Appeal found that the pricing schedule used in the submitted tender did not meet the threshold in section 36(1)(c); it was not reasonably probable that the release of rates charged by the third party in 2001 could put the third party at a disadvantage in competition for the award of a new contract in 2005.

In *SA Airlink (Pty) Limited v The Mpumalanga Tourism and Parks Agency and others* the South Gauteng High Court found that the respondents had not shown that it was probable that the disclosure of the allegedly confidential information in the record would cause harm to the third party's commercial interests.

In *Earthlife Africa v Eskom the Witwatersrand Local Division* of the High Court (now the South Gauteng High Court) found that plans, financing arrangements and technical reports regarding progress concerning the research and development of a Pebble Bed Modular Reactor constituted trade secrets and confidential information and was protected from disclosure.

Commercial information of information holders

[ss. 42(3) (public bodies) & 68 (private bodies) PAIA]

Consistent with the right to protect commercial information of third parties, public and private bodies are also entitled to refuse access to records containing their own trade secrets; financial, commercial, scientific and technical information; and information that, if released, may disadvantage them in negotiations or prejudice them in commercial competition. Additionally, protection is afforded to copyrighted computer programs owned by the relevant body, except insofar as such a program is required to give access to a record to which access has been granted under the Act.

The ground for refusal is discretionary as obviously the body may chose to waive its own interest in the information.

The same exclusions in respect of publicly available information and public safety considerations that apply in relation to third party commercial information, also apply in respect of the body's own commercial interests.

[ss. 37(1)(a) (public bodies) & 65 (private bodies) PAIA]

Confidential information

Breach of duty of confidence

PAIA also protects information of a third party which a public or private body is contractually obliged to keep confidential. The protection is mandatory and provides for strict refusal on establishing the confidential nature of the information.

To be exempt from release the information in the record must satisfy four elements. Its release must:

- constitute an action;
- for a breach of a duty of confidence;
- owed to a third party;
- in terms of an agreement.

[s. 37(2) PAIA]

Exclusions

The protection does not apply in respect of information held by public bodies that is already publicly available or where the third party has consented to its release.

How has the ground for refusal been applied by the courts?

The provision was considered by the Supreme Court of Appeal in *Transnet Limited v SA Metal Machinery* where the court found that when a public body enters into a commercial agreement of a public character the imperative of transparency and accountability entitles members of the public, in whose interest public bodies operate, to know what expenditure such an agreement entails; "the parties to such an agreement cannot circumvent the terms of PAIA by resorting to a confidentiality clause". The court concluded that to rely on section 37(1)(a) of PAIA there needs to be a risk that if the third party sued for a breach of confidentiality the information holder would be at risk of an adverse finding as to material breach entitling cancellation of the agreement or as to an award of damages. It found that if the disclosure of the record would not be likely to cause the harm in sections 36(1)(b) and/or (c) (see further *commercial information of third parties* above) there is no basis for concluding a successful action for breach of confidence could be brought against the information holder and therefore the information will not be exempt under section 37(1)(a).

On the facts of the case, the court ultimately held that while a tender price could be protected from release on the basis of a confidentiality clause during the pre-award phase of the tender process, a confidentiality clause could not validly protect the successful tenderer's price from disclosure after the contract had been awarded; once the contract was awarded the confidentiality clause was a "spent force". The court declined to determine whether such a confidentiality clause would continue to operate after the award of the tender in respect of unsuccessful tenderers.

The reasoning in *Transnet Limited v SA Metal Machinery* was applied by the South Gauteng High Court in *SA Airlink (Pty) Limited v The Mpumalanga Tourism and Parks Agency and others* where the court also concluded that the mere inclusion of a confidentiality clause in an

agreement cannot shield the agreement from disclosure under PAIA. In that case, a failure by the respondents to explain why the breach of the confidentiality clause could result in a successful claim for damages resulted in the court concluding that the ground for refusal in section 37(1)(a) did not apply.

Prejudice to the future supply of information

[s. 37(1)(b) PAIA]

PAIA also provides public bodies with the discretion to refuse access to a record supplied to it in confidence by a third party in order to protect the future supply of information. This may, for example, be used to protect information supplied to the police service by confidential informants. For the discretion to apply a three-part test must be satisfied:

- the record must contain information supplied in confidence by a third party;
- the disclosure of which could *reasonably be expected* to prejudice the future supply of similar information or information from the same source; and
- it must be in the public interest that such information should continue to be supplied.

Exclusions

[s. 37(2) PAIA]

The protection does not apply in respect of information that is already publicly available or where the third party has consented to its release.

Research information

[ss. 43 (public bodies) & 69 (private bodies) PAIA]

Research generally involves a significant investment of time and resources which people are unlikely to invest if the material benefit or prestige that may result from such research can be damaged by the premature release of information related to the research. PAIA therefore protects records from release where the disclosure of the information may seriously disadvantage research of third parties or the information holder. In order to be protected the record must contain information that *would be likely* to expose the body (third party or information holder), a person that is or will be carrying out the research on behalf of the body, or the subject matter of the research to serious disadvantage.

Once that condition is established, the protection of such information of third parties is mandatory. The protection of such information belonging to the body itself is discretionary.

Defence, security and international relations

[s. 41 PAIA]

Prejudicial information

If the release of information could *reasonably be expected* to cause prejudice to the defence, security or international relations of South Africa, it is protected under PAIA. The ground for refusal is discretionary and requires the relevant public body to establish that the necessary condition has been met before access may be refused.

A non-exhaustive list of the type of information that may cause such prejudice is set out in the Act. Information related to defence and security includes military tactics or strategies; the quantity, characteristics, capabilities, vulnerabilities or deployment of weapons; the characteristics, capabilities, vulnerabilities, performance, potential, deployment or functions of any military force, unit or personnel; and intelligence information and the methods and equipment for collecting and processing such information.

Information related to international relations includes the positions adopted or to be adopted by South Africa or another state or international organisation in international negotiations and diplomatic correspondence. It does not include information that is more than 20 years old.

Information supplied in confidence

PAIA also allows access to be refused to information supplied in confidence by or on behalf of another state or international organisation or that is required to be held in confidence by an international agreement or customary international law. Information which falls within this category is subject to strict refusal; it is sufficient that the information is of the nature specified - no harm that would result from the release needs to be established.

Existence of the record

Due to the often very sensitive nature of such information, an information officer is permitted to refuse to confirm or deny the existence or non-existence of a record bearing on defence, security and international relations, if the disclosure of the information that the record exists will cause the harm that the ground for refusal seeks to prevent.

There is no equivalent in respect of private bodies as the matters that form the basis for the ground of refusal are exclusively within the purview of the state.

How have the courts applied the ground for refusal?

The protection of information supplied in confidence was considered by the Supreme Court of Appeal in *The President of the Republic of South Africa and others v M&G Media Limited*. The court found that the public body relying on the ground for refusal must be specific as to the body that supplied the information and the basis for claiming that the information was indeed provided in confidence.

The case concerned a report prepared by two senor judges regarding elections in Zimbabwe which had been prepared at the request of, and provided to, the President. The Presidency claimed that information provided to the judges and contained in the report was given in confidence by another state or an international organisation. The court found that information cannot be given by another state or an international organisation – it is capable of being provided by one entity to the exclusion of the other or of being provided by both, but not one or other in the alternative. The court said that it is not acceptable for a public body to apply a 'belt and braces' approach to the application of a ground for refusal; "an honest information officer who fulfils his or her duty to establish the true facts – which are not capable of occurring in the alternative – and then to apply the provisions of the Act will have no need for 'belt and braces'. Accordingly, the court considered that the Presidency should have been explicit as to the nature of the body that provided in the information in confidence.

Furthermore, the court found that the public body must lay an evidential basis for the assertion that the information was supplied in confidence. The court considered that assessing the constitutional and legal challenges pertaining to another state, as the judges were said to have done for the President, does not necessarily require that information provided to the judged would be supplied in confidence; the Presidency should have established how the judges went about their business, whom they met, what they discussed and on what terms their discussions took place.

(Note the decision was appealed by the Presidency to the Constitutional Court, which determined that the court should have reviewed the report under the 'judicial peek' power. Rather than finally determining the matter, the Constitutional Court referred the matter back to the court of first instance for the judge to review the report. That matter had not been heard at the date of publication.)

Economic interests and financial welfare of the Republic

[s. 42 PAIA]

PAIA seeks to protect the economic interests of the state by allowing public bodies to refuse access to records that contain information that if disclosed, *would be likely* to materially jeopardise:

- the economic interests or financial welfare of the state; or
- the ability of the government to manage the economy effectively and in the best interests of the state.

A non-exhaustive list of the type of information that would be likely to cause the material prejudice is included in PAIA. It includes policies substantially affecting the currency, coinage, legal tender, exchange rates or foreign investment; a decision regarding a change in credit or interests rates, duties or taxes, the regulation or supervision of financial institutions, government borrowing, or the regulation of prices of goods and services; a contemplated sale or acquisition of property; or a contemplated international trade agreement.

There is no equivalent in respect of private bodies as the matters that form the basis for the ground of refusal are exclusively within the purview of the state.

Operations of public bodies

[s. 44 PAIA]

PAIA protects the operations of government by providing that public bodies *may* refuse information that relates to the internal workings of government, including where:

- a records contains an opinion, advice, report or recommendation the body obtained or prepared to help them make a policy or take a decision;
- a record contains an account of a consultation, discussion or deliberation that has occurred (such as minutes of a meeting) to help make a policy or take a decision;
- the release of the record could reasonably be expected to frustrate the discussion and decision making process in a public body or between public bodies;
- the record requested relates to a policy of the body and its disclosure at that time would be premature and could reasonably be expected to frustrate the success of that policy;
- the release of the record could reasonably be expected to jeopardise the effectiveness of a testing, examining or auditing procedure or method used by the public body;
- the record contains a preliminary, working or other draft of an official of the body; or
- the record contains an evaluation or opinion prepared for the purpose of determining the suitability of a person for employment, promotion, scholarship or similar and an express or implied promise was made to the person to keep the information confidential.

Exclusions

Despite the grounds for refusal outlined above, a public body must grant access to a record insofar as it consists of an account or a statement of reasons required to be given in accordance with section 5 of the *Promotion of Administrative Justice Act*. That is, where the record contains information about why the body has decided to do something that has an important and negative impact on someone's rights.

There is no equivalent provision in respect of private bodies.

How have the courts applied the ground for refusal?

Section 44 has been considered by the courts on a number of occasions and in each the courts have concluded that it must be applied restrictively.

In *PSAM v Eastern Cape Provincial Government* the Eastern Cape Division of the High Court found that section 44 must be interpreted restrictively because it curtails the constitutional right

to information and accordingly curtailment of the right should be avoided where reasons are not supported by evidence. The court further stated that the section may not be used to refuse access to a record for the purpose of "convenience or because full disclosure would attract criticism, cause embarrassment or because it is believed that a sanitized version of the [record in question] would better serve the interests of all concerned"; there must be sufficient grounds to pronounce the release of a record as premature.

In *Minister for Provincial and Local Government of the Republic of South Africa v Unrecognised Traditional Leaders of the Limpopo Province (Sekhukhuneland)* the Supreme Court of Appeal considered the meaning of section 44(1)(a) of PAIA and found that the term 'obtained' must be given a restrictive meaning; it must mean "procuring information for any of the purposes referred to in the subsection". Accordingly, section 44(1)(a) must not be used to refuse access to records which are obtained for a different purpose but subsequently used for the purpose of formulating a policy or taking a decision; the record must have been initially procured for that purpose.

A narrow interpretation of the term 'obtained' was again applied by the Supreme Court of Appeal in *The President of the Republic of South Africa and others v M&G Media Limited*. In that case the court found that section 44(1)(a) of PAIA "does not render a report subject to secrecy if it is 'reasonably conceivable' that is has been of assistance in formulating policy, etc. It does not even render it subject to secrecy if it 'would have been of assistance'. Nor even if the President 'was able to utilise the report to assist him'. It is subject to secrecy only if it was obtained or prepared for that purpose."

The court further found that a public body is required to lead evidence that demonstrates the report was procured for the purpose asserted; it is not sufficient for an officer of the body to simply assert that it is within their 'personal knowledge'. (Note the decision was appealed by the Presidency to the Constitutional Court, which determined that the court should have reviewed the report under the 'judicial peek' power. Rather than finally determining the matter, the Constitutional Court referred the matter back to the court of first instance for the judge to review the report. That matter had not been heard at the date of publication.)

In *CCII Systems v Fakie* the applicant had denied access to draft versions of a report on the basis of section 44(1)(b) of PAIA in circumstances where the report had been finalised and accepted by parliament. The court found that the draft reports were of historic importance only and could not obstruct the commission in its work and were therefore no longer protected by section 44. Accordingly, by extension, section 44 of PAIA should not be used to deny access to draft reports or policies or opinions, advice or recommendations where a final report or policy has been adopted or a final decision taken.

[ss. 38 (public bodies) & 66 (private bodies) PAIA]

Safety of individuals and protection of property

Public and private bodies must refuse access to a record if its disclosure *could reasonably be expected* to endanger the life or physical safety of an individual.

Public and private bodies *may* refuse access to a record if its disclosure would be likely to prejudice or impair:

- the security of a building, structure or system, including a computer or communication system; a means of transport; or any other property; or

- methods, systems, plans or procedures for the protection of an individual in accordance with a witness protection scheme; the safety of the public, or any part of the public; or the security of a building, structure or system, including a computer or communication system.

Protection of police dockets, law enforcement and legal proceedings

[s. 39 PAIA]

A public body *must* refuse access to a police docket relating to any crime an individual has been accused of at the time of any bail proceedings relating to that crime.

A public body may refuse access to a record where the disclosure of the record *could reasonably be expected* to:

- prejudice law enforcement methods, techniques, procedures or guidelines;
- impede the prosecution of the alleged offender or result in a miscarriage of justice in that prosecution;
- prejudice the investigation of an ongoing or imminent crime;
- reveal the identity of a confidential informant;
- result in the intimidation or coercion of a witness;
- facilitate the commission of an offence, including an escape from prison; or
- prejudice or impair a fair trial.

As this provision relates to law enforcement there is no equivalent private body provision.

Legally privileged records

[ss. 40 (public bodies) & 67 (private bodies) PAIA]

Public and private bodies *must* refuse access to a record that is privileged from production in legal proceedings. This would include, for example, records subject to attorney-client privilege or doctor-patient privilege.

If the person entitled to the privilege has waived the privilege then access may be granted.

SARS records

The South African Revenue Service must refuse access to those of its records which contain information obtained or held by it for the purpose of enforcing revenue collection, unless it is information about the requester or the person on whose behalf the request is made.

Manifestly frivolous or vexatious requests, or substantial and unreasonable diversion of resources

[s. 35 PAIA]

Public bodies

A public body may refuse a request for access to a record if:

- the request is manifestly frivolous (it clearly or obviously has no serious purpose or value);
- the request is vexatious (without grounds and made purely to cause annoyance); or
- the work involved in processing the request would substantially and unreasonably divert the resources of the body.

How has the court applied the ground for refusal?

What would constitute a 'substantial and unreasonable' diversion of resources in processing a request was considered by the Transvaal Provincial Division of the High Court (now the North Gauteng High Court) in *CCII Sytems v Fakie*. In that matter the court found that given the media coverage the matter had enjoyed and the prominence of the members of the joint commission, maximum access was necessary to dispel any suspicion of a cover-up. The court therefore considered that if the body was required to employ extra staff in order to process the request, it must do so.

The request in that matter was for records acquired by the Joint Commission of Enquiry into the Strategic Defence Package during the course of its investigation into the propriety of that package, where the requester had been excluded as a supplier in respect of the package. The judgment therefore reflects the particular circumstances of the case and it is unlikely that a request that required a body to employ additional staff would be considered reasonable where it was for records that did not relate to a matter of such profile.

Public bodies

There is no equivalent ground for refusal in respect of requests made to private bodies. This reflects the additional hurdle placed on requesters when requesting information from private bodies; that the record be required for the exercise or protection of any rights (see further *what is the extent of the right to information under PAIA* above). Requests for records required to exercise or protect a requester's rights will never be frivolous or vexatious, nor would any diversion of resources to compile records required for such a purpose be unreasonable.

[s. 45 PAIA]

8(c) Severability

Before refusing access to a record, a public or private body must assess whether the part of the record containing information which may or must be refused can reasonably be severed from any part that can be disclosed. If the information can reasonably be severed, then the record must be released in redacted form. This may, for example, involve blacking out certain sections of a written document (such as the name and identity number of a person other than the requester, or a trade secret of a third party).

When a public or private body refuses access to a record they should ideally state explicitly that they have, in making such a decision, considered severability. If they merely refuse access, a requester should, when deciding to appeal such a decision, enquire whether consideration was given to the requirement of severance.

[ss. 28 (public bodies) & 59 (private bodies) PAIA]

8(d) Public interest override

PAIA provides that even where a ground for refusing access to a record exists, the public interest in certain information is paramount. Accordingly, where the public interest override test is satisfied, the record must be released, irrespective of an applicable mandatory or discretionary ground for refusal.

The test has two parts. Firstly, it needs to be established that the disclosure of the record would reveal evidence of either:

- a substantial contravention of, or failure to comply with, the law (for example corruption); or
- an imminent and serious public safety or environmental risk (for example a nuclear accident).

A 'public safety or environmental risk' is defined to mean harm or risk to the environment or the public (including individuals in their workplace) associated with:

- a product or service which is available to the public;
- a substance released into the environment, including the workplace;
- a substance intended for human or animal consumption;
- a means of public transport; or
- an installation or manufacturing process or substance which is used in that installation or process.

Secondly, after establishing the records contain one of those two categories of information, it must be established that the public interest in the disclosure of the record clearly outweighs the harm contemplated in the relevant ground for refusal.

The public interest override does not apply to records of SARS that are exempt under section 35 of PAIA.

In *Centre for Social Accountability and The Secretary of Parliament and others* the Eastern Cape High Court considered the threshold that must be met in establishing that the record would reveal evidence of either a substantial contravention of, or failure to comply with, the law or an imminent and serious public safety or environmental risk. It found that the applicant must show 'on the balance of probabilities' that the disclosure of the record would reveal the required contravention, failure or risk. The court opined that to place the threshold any higher would undermine the constitutional right to information and may call into question the constitutionality of the entire structure of PAIA.

Application of the public interest override by the courts

- In *AVUSA Publishing Eastern Cape (Pty) Ltd v Qoboshiyane NO and others* the Eastern Cape High Court granted access to a report that it found would otherwise be exempt under section 44 of PAIA (operation of public bodies) on the basis of the public interest override. The court found that the report, which was prepared in relation to concerns regarding maladministration at the Nelson Mandela Bay Metropolitan Municipality would reveal a substantial contravention of, or failure to comply with, the law and the public interest in the disclosure of that information clearly outweighed the harm to be protected under sections 44(1)(a) and (b) of PAIA. (Note: this case was heard by the Supreme Court of Appeal on 14 November 2012. No judgment had been issued at the time of publication.)
- In *De Lange and another v Eskom Holdings Limited and others* the South Gauteng High Court granted access to records revealing contracts for the supply of electricity between Eskom and BHP Billiton that it found would otherwise be exempt under section 36(1)(c) (commercial information) on the basis of the public interest override. The court found the records would reveal evidence of an imminent and serious public safety or environmental risk because the unavailability of electricity supply would lead to the use of unhealthy power supplies like coal fired stoves or braziers in households with obvious environmental and health dangers that may result in death from smoke or gas fumes and lung diseases that will increase pressure on health care facilities. The court found the information in the records therefore fell into the category of 'substances released into the environment' within the definition of 'public safety or environmental risk'. The court further found that a short supply of electricity may incapacitate rail or commuter services resulting in harm to the economy, job loss, and strike action, all of which may lead to serious public safety or environmental risks that were relatively imminent. (Note: this case was heard by the Supreme Court of Appeal on 8 November 2012. No judgment has been issued at the time of publication)
- In *Centre for Social Accountability and The Secretary of Parliament and others* the Eastern Cape High Court granted access to a record revealing the names of parliamentarians alleged to have abused the parliamentary travel voucher system. The respondent had denied the requester access to the record on the basis of section 34 of PAIA (personal information). While the court found that the record did not properly fall within the definition of section 34 it considered whether, if it were wrong in its application of section 34, the record would be subject to release on the basis of the public interest override. It found that the record fell within the criteria for the public interest override as it would reveal a substantial contravention of, or failure to comply with, the law and the public interest in the disclosure of that information clearly outweighed the harm to be protected under section 34 of PAIA.

CHAPTER 9

WHAT IF A REQUESTER IS NOT SATISFIED WITH A DECISION OF A PUBLIC BODY?

9(a) The right of internal appeal

[s. 74 PAIA]

When can a requester lodge an internal appeal?

A requester is entitled to lodge an internal appeal against a decision of an information officer of a public body to:

- refuse access to a record;
- extend the time period for responding to a request;
- charge a request fee or the amount of an access fee payable; or
- grant access in a form other than that requested by the requester.

[s. 74 PAIA]

When can a third party lodge an internal appeal?

A third party is entitled to lodge an internal appeal against a decision of an information officer of a public body to grant a request for access.

[s. 74 PAIA]

What body can an internal appeal be lodged with?

The right of internal appeal only applies to decisions made by the first category of public bodies: national and provincial departments or municipalities.

The right to appeal a decision of other categories of public bodies and private bodies is limited to the right of judicial review (see further *the right to judicial review* below).

[s. 75 PAIA]

How do requesters and third parties lodge an internal appeal?

An internal appeal must be made in the prescribed form: form B.

A requester must lodge an internal appeal within 60 days of receiving notice of the decision they are appealing. The relevant authority (see further *who determines an internal appeal* below) must allow the late lodging of an internal appeal by a requester upon good cause being shown.

A third party must lodge an internal appeal within 30 days of receiving notice of the decision they are appealing, or where no notice is required, within 30 days of the decision being taken.

An internal appeal must be lodged with the information officer of the body in person or by post, fax or email. The information officer must, as soon as reasonably possible but within 10 working days after receipt of the appeal, submit the internal appeal and their reasons for their decision being appealed to the relevant authority. If the appeal concerns a decision to refuse or grant access to a record, the information officer must also submit the names and contact details of any affected third parties to the relevant authority.

[s. 75(3)(a) PAIA]

What fees apply for lodging an internal appeal?

While the Minister is empowered to prescribe a fee for lodging an internal appeal, he has not done so and therefore there is no fee for lodging an internal appeal.

Third party notification

[s. 76 PAIA]

Notifying a third party that a requester has appealed a decision

If a requester lodges an internal appeal against a decision of an information officer to

refuse access to a record, the relevant authority must inform any relevant third parties. The requirements in respect of notification and the right to make representations are the same as those in respect of the initial request.

Notifying a requester that a third party has appealed a decision

[s. 76 PAIA]

If a third party lodges an internal appeal against a decision of an information officer to grant access to a record, the relevant authority must notify the requester. Such notification must occur as soon as reasonably possible but within 30 days after receipt of the internal appeal. A requester may make representations to the relevant authority as to why access should be granted within 21 days of receiving notice.

Who determines an internal appeal?

[ss. 1 & 77 PAIA]

The 'relevant authority' of the public body is responsible for determining an internal appeal. The relevant authority is the political head of the body:

- in the case of a national department, the minister responsible for that public body;
- in the case of a provincial department, the MEC responsible for that public body; or
- in the case of a municipality, the mayor, the speaker or any other person designated in writing by the municipal council of that municipality.

There are exceptions in the case of the Office of the Presidency and the Office of the Premier. The President or the Premier, as the case may be, is entitled to designate, in writing, a relevant authority to determine appeals in respect of those bodies.

What decision can be made on internal appeal?

[ss. 77(1) & (2) PAIA]

When determining an internal appeal, the relevant authority may confirm the original decision or substitute a new decision.

In determining an internal appeal the relevant authority must give due regard to:

- the grounds for the internal appeal provided by the appellant;
- the reasons for the original decision submitted by the information officer; and
- any representations made by the third party (where the third party cannot be found, that the third party did not have the opportunity to make representations) or, in the case of an appeal lodged by the third party, any representations made by the requester.

How does the relevant authority notify the relevant parties of their decision?

[ss. 77(4) & (5) PAIA]

Notice of a decision on an appeal must be given by the relevant authority immediately after the decision on an internal appeal. Notice must be given to the appellant, third party and/or requester, as relevant.

The notice must:

- state adequate reasons for the decision, including the provisions of PAIA relied on;
- exclude any reference to the content of the record; and
- inform the relevant party of their right to lodge an application with a court against the decision.

How long does the relevant authority have to respond to an appeal?

[s. 77(3) PAIA]

The relevant authority must determine an appeal as soon as reasonably possible but within 30 days of the information officer receiving the appeal.

If notice of an appeal by a requester is required to be given to a third party, the relevant

authority must determine the appeal as soon as reasonably possible but within 30 days of such notice being given.

If notice of an appeal by a third party is required to be given to a requester, the relevant authority must determine the appeal within five working days after the requester has made representations or, if no representations are received, within 30 days after notice is given.

[s. 77(7) PAIA]

What if the relevant authority does not respond to the request in the relevant timeframe?

If the relevant authority fails to give notice of a decision on an internal appeal within the mandated period, the authority is deemed to have dismissed the appeal, entitling the appellant to make an application to court (see further *the right to judicial review* below).

[s. 77(6) PAIA]

What is the timeframe for providing access to a record?

If the relevant authority determines to grant a requester access to a record, access must be given:

- forthwith, if notification to a third party is not required; or
- if notification to a third party is required, give the requester access to the record 30 days after the third party has been notified, unless a court application has been lodged.

[s. 78(1) & (2) PAIA]

9(b) The right to judicial review

When can a requester apply to court?

A requester may apply to the court for a review of a decision of a national or provincial department or municipality if they are not satisfied with a decision of the relevant authority of the body on internal appeal (to refuse access to information, to extend the time period for responding to request, the fees charged or the form of access) or to disallow the late lodging of an internal appeal.

The requester must exhaust the internal appeal process before lodging a court application.

A requester may apply to the court for a review of a decision of a public body (other than a national or provincial department or a municipality) or a private body to:

- refuse access to information;
- extend the time period for responding to a request;
- charge a request fee or the amount of an access fee payable; or
- grant access in a form other than that requested by the requester.

[s. 78(3) PAIA]

When can a third party apply to court?

A third party may apply to the court for a review of a decision of a public or private body to grant a request for access. Where the internal appeal procedure is available to the third party (in respect of decisions made by national or provincial departments or municipalities) the third party must exhaust the internal appeal procedure before making an application to court.

[ss. 78(2) & (3) PAIA]

How long do requesters and third parties have to apply to court?

PAIA requires an application to court to be lodged within 30 days (see sections 78(2) and (3) of PAIA). The requirement for requesters to lodge an application to court within 30 days was considered by the Constitutional Court in *Brummer v Minister for Social Development*. In that case it was held that the 30 day period in PAIA did not provide requesters with an adequate and fair opportunity to seek judicial redress and further that such a restriction was not a reasonable and justifiable limitation on the right as provided for in section 36 of the Constitution.

Accordingly, the court ordered that:

- the time period for applying to court in section 78(2) of PAIA is invalid;
- the declaration of invalidity be suspended for a period of 18 months to enable parliament to enact legislation to correct the invalidity;
- pending the enactment of legislation by parliament or the expiration of 18 months, whichever came sooner, the 30 day period referred to in section 78(2) of PAIA was extended to 180 days, to be calculated from the date when the requester received notification of the decision;
- a court shall have the power to condone non-compliance with the 180 days when the interests of justice demand.

The 180 day period was selected by the court as reasonable as it is consistent with the time period for applying to court in respect of a right under the Promotion of Administration of Justice Act.

The decision of the court was made on 13 August 2009 and since that time no legislation has been passed by parliament to correct the invalidity. Accordingly, given that more than 18 months have expired since the judgment was delivered, the 30 day period in section 78(2) of PAIA is invalid. Arguably until legislation is passed by parliament correcting the invalidity, there is no time restriction on making an application to court under PAIA. However, the court may consider that the 180 day period continues to apply or alternatively that applications must implicitly be made within a reasonable period and such reasonable period is 180 days. It would therefore be prudent for requesters and third parties to continue to make their applications within 180 days.

The National Assembly has recently passed the Protection of Personal Information Bill (see further *proposed legislative amendments* below). That bill, in its current form, includes an amendment to PAIA which replaces the 30 day period in section 78(2) with a 180 day period. Accordingly, should that provision become law, the time period for applying to court in respect of a decision under PAIA will have been finally determined to be 180 days.

The nature of proceedings under PAIA

[s. 81 PAIA]

Court applications under PAIA constitute civil proceedings and the relevant rules of evidence apply. Accordingly, the burden of proof in PAIA cases is the balance of probabilities.
The onus of proof in PAIA applications rests with the public or private body who must establish that a refusal to grant access to information or such other appealable decision by the official of the body complies with the provisions of PAIA.

What orders can the court make?

[s. 82 PAIA]

On determining an application under PAIA, the court has the power to grant any order that is just and equitable, including orders:

- confirming, amending or setting aside the decision which is the subject of the application;
- requiring the relevant official of a public or private body to take such action or to refrain from taking such action as the court considers necessary within a specified period;
- granting an interdict, interim or specific relief, or declaratory order as to compensation; or
- as to costs.

Costs

In *Claase v SAA*, the Supreme Court of Appeal found that the power to make orders under section 82 of PAIA includes the power to make a punitive costs order. In that case the court considered that the respondent had unreasonably refused to furnish the requester with the record in circumstances where it obviously should have and accordingly the court made a punitive costs order.

The issue of costs was also considered in *Biowatch v Genetic Resources*. In that case the Constitutional Court considered what should constitute the standard principles for awarding costs in constitutional litigation. It found that:

- In litigation between the government and a private party seeking to assert a constitutional right:
  - o if the government loses it should pay the costs of the private party; or
  - o if the government wins each party should bear its own costs.
- In litigation between the government and more than one private party seeking to assert a constitutional right where the state is shown to have failed to fulfill its constitutional and statutory obligations:
  - o the state should bear the costs of litigants who have been successful against it; and
  - o there should be no costs orders against any private litigants who have become involved.

The court further found that 'powerful reasons' for departing from these general principles must exist where matters of genuine constitutional import arise. However, it noted that the worthiness of an applicant's cause will not prevent an unfavourable cost order where the applicant is "frivolous or vexatious or in any other way manifestly inappropriate".

[s. 80 PAIA]

Can the court review a record to which access has been refused?

A court hearing an application under PAIA is empowered to examine any record of a public or private body to which the Act applies. Often described as a 'judicial peek', this power allows a court to review a document that a public or private body is claiming is exempt from access under PAIA in order to determine whether the ground for refusal has been appropriately applied.

A court who reviews a record using that power is not entitled to disclose it to any person, including the parties to the proceedings. Furthermore, if a public body has refused to confirm or deny the existence or non-existence of a record, as set out in PAIA, the court must not disclose information as to whether the record exists.

In so doing the court may receive representations ex parte (with only one party present); conduct hearings in camera; or prohibit the publication of information in relation to the proceedings, including the parties to the proceedings and the contents of any orders made by the court.

In *President v M&G Media* the Constitutional Court considered when a court should use section 80 of PAIA. While most members of the court (with the exception of Yacoob J) were of the view that it should be used 'sparingly' or in 'exceptional circumstances', the court was divided as to when such circumstances would arise.

Ngcobo CJ, with Mogoeng J and Mthiyane J concurring, considered that section 80 should only be used when it would be in the interests of justice to do so. The Chief Justice then considered when it may be in the interests of justice and found that it would be so where:

- there is doubt emerging from the unique limitations parties in access to information disputes face in presenting and refuting evidence as to whether an exemption is rightly claimed; requesters because they are not privy to the record they are requesting and public and private bodies because they are prevented from referring to the contents of a record in providing reasons for refusal;
- the probabilities regarding application of an exemption are evenly balanced;
- a review of the record may resolve a material dispute of fact that relates to whether the record falls within an exemption claimed; or
- severability is at issue.

Froneman J fundamentally agreed with the position of Ngcobo CJ but found that to the extent

that the decision had gone beyond the principle that the interests of justice would permit a judicial peek where either of the parties is constrained in presenting evidence in relation to the dispute or where severability is at issue, it was unnecessary for determining the case.

Cameron J, with Jafta J, Nkabinde J and Van der Westhuizen J concurring, considered that section 80 should be applied in a more limited manner and used only to amplify access. They found that it should only be applied when:

- government has laid a plausible foundation for a plea that its hands are tied; or
- government has laid a basis for claiming an exemption, but a court considers that doubt exists as to its validity.

While the Chief Justice noted in his judgment that the court should not use its powers under section 80 of PAIA as a substitute for the public body laying a proper basis for its refusal, Cameron J went further still and expressed the view that judicial examination should not be invoked to avoid an order of disclosure when government has failed to establish its case under PAIA.

Application of the 'judicial peek' provision by the courts

In *Independent Newspapers (Pty) Limited and others v The African National Congress* and another the Western Cape High Court called for a judicial peek to determine an issue of severability.

CHAPTER 10

PROPOSED LEGISLATIVE AMENDMENTS TO PAIA

10(a) Protection of Personal Information Bill

Since the introduction of PAIA in 2000 civil society activists have been campaigning for an independent, inexpensive, swift appeal mechanism to consider disputes under PAIA. It would seem that request has now been answered by amendments to PAIA proposed in the Protection of Personal Information Bill.

Introduced to Parliament in August 2009, the bill was referred to the Portfolio Committee for Justice and Constitutional Development in the National Assembly, were it went through several iterations before the committee passed the bill on 5 September 2012. The bill was subsequently passed by the National Assembly on 11 September 2012. As at the date of publication, the bill has been referred to the National Council of Provinces, where it will ultimately be considered by the Select Committee on Security and Constitutional Development. If passed through the committee and the council, the bill will be referred to the President for signature.

10(b) Effect of the bill on PAIA

Establishment of an Information Regulator

The bill establishes an Information Regulator who may receive complaints from both requesters and third parties in terms of PAIA. The Information Regulator is independent and is accountable to the National Assembly of Parliament.

Who can make a complaint to the Information Regulator?

A requester may submit a complaint to the Information Regulator in respect of a decision of a national or provincial department or municipality if they are aggrieved by a decision made by the relevant authority of the body on internal appeal (to refuse access to information, to extend the

time period for responding to request, the fees charged or the form of access) or to disallow the late lodging of an internal appeal.

The requester must exhaust the internal appeal process before submitting a complaint to the Information Regulator.

A requester may submit a complaint to the Information Regulator in respect of a decision of a public body (other than a national or provincial department or a municipality) or a private body to:

- refuse access to information;
- extend the time period for responding to a request;
- charge a request fee or the amount of an access fee payable; or
- grant access in a form other than that requested by the requester.

A third party may submit a complaint to the Information Regulator in respect of a decision of a public or private body to grant a request for access. Where the internal appeal procedure is available to the third party (in respect of decisions made by national or provincial departments or municipalities) the third party must exhaust the internal appeal procedure before submitting a complaint to the Information Regulator.

How long do people have to make a complaint to the Information Regulator?

Requesters and third parties must submit a complaint to the Information Regulator within 180 days of the relevant decision of the public or private body.

How do people make a complaint to the Information Regulator?

Requesters and third parties must submit the complaints to the Information Regulator in writing. The Information Regulator must give such reasonable assistance as is necessary in the circumstances to enable a person to put the complaint in writing.

What does the Information Regulator do with the complaints it receives?

On receiving a complaint the Information Regulator may:

- investigate the complaint;
- refer the complaint to the enforcement committee (a committee of the regulator); or
- decide to take no action if:
  - the complaint is out of time and there are no reasonable grounds for condoning the late lodging;
  - the complaint is frivolous or vexatious or not made in good faith;
  - further action is unnecessary or inappropriate.

The Information Regulator must inform the complainant and the relevant official of the public or private body to whom the complaint relates of the course of action that the Information Regulator proposes to take in respect of the complaint as soon as possible after receiving the complaint.

If the Information Regulator determines to take no action in respect of a complaint, they must inform the complainant of the decision and the reasons for it.

If the Information Regulator determines to investigate a complaint they must inform the official of the relevant body of the details of the complaint and the right of the official to submit to a written response in relation to the complaint to the Information Regulator within a reasonable period.

What powers does the Information Regulator have when investigating a complaint?

When conducting an investigation the Information Regulator has the power to:

- summon appearance and compel giving of evidence;
- administer oaths
- receive and accept any evidence or other information the regulator sees fit, whether or not it would be admissible in court;
- enter and search any premises occupied by the body that is the subject of the complaint;
- conduct a private interview with any person in the premises of the body that is the subject of the complaint;
- carry out on the premises of the body that is the subject of the complaint any inquiries the regulator sees fit.

The Information Regulator may also examine a disputed record (the 'judicial peek' power). The same obligations in respect of non-disclosure of the content of such records by the court apply to the Information Regulator.

What can the Information Regulator decide in relation to a complaint?

After receiving a recommendation from the enforcement committee, the Information Regulator can serve a public or private body with an enforcement notice confirming, amending or setting aside the decision that is the subject of the complaint and requiring the body to take action or refrain from taking action as specified in the notice.

The notice must include reasons for the decision and the entitlement to apply to court for a review of the decision.

If an information officer of a public body or head of a private body refuses to comply with an enforcement notice, the official is guilty of an offence and liable upon conviction to a fine and/or imprisonment for no more than 3 years.

Can people appeal a decision of the Information Regulator?

Decisions of the Information Regulator may be appealed to court. Court applications are to be made within 180 days of the decision.

What other powers does the Information Regulator have under PAIA?

The Information Regulator will assume all the powers and responsibilities currently performed by the South African Human Rights Commission under PAIA in respect of promotion and compliance monitoring.

The Information regulator will also be empowered to assess whether a public or private body generally complies with the provisions of PAIA insofar as its policies and implementation procedures are concerned. Such an assessment can be conducted at the initiative of the Information Regulator or at the request of the information officer of a public body, head of a private body or any other person.

Access to personal information will no longer be regulated under PAIA

Access to personal information of a requester will be governed by the relevant provisions of the bill, rather than PAIA. However, the request procedure under PAIA will continue to apply.

CHAPTER 11

RESOURCES

A copy of PAIA and the associated regulations, notices and forms can be downloaded from the Department of Justice and Constitutional Development website: *http://www.justice.gov.za/paia/paia.htm*
Legislation and case law referred to in this guide can be accessed from SAHA's Freedom of Information Programme website: *http://foip.saha.org.za/static/south-africa*
The South African Human Rights Commission is mandated to assist requesters and information holders with the use and implementation of PAIA. If you require assistance contact the PAIA unit on 011 877 3600 or online at *www.sahrc.org.za*

CHAPTER 12

INDEX OF CASE LAW

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PAIA UNPACKED

A RESOURCE FOR LAWYERS AND PARALEGALS

Access to information is an essential element of any well-functioning democracy. When implemented effectively, it facilitates transparency, accountability and good governance. It is a leveraging right that, in principle, enables people the opportunity to access information that can be used to protect, promote and fulfil other human rights.

However, despite the passage of more than a decade since the introduction of the Promotion of Access to Information Act (PAIA) to give effect to this right, knowledge of PAIA remains worryingly low in South Africa.

As part of our commitment to fostering an open information culture, the South African History Archive (SAHA) has developed this guide as a tool for lawyers and paralegals interested in using PAIA, or supporting others in exercising their constitutional right of access to information. It outlines the key requirements of PAIA when making and processing a request for access to a record and examines how those requirements have been interpreted and applied by the judiciary.

PAIA unpacked **is not intended as a substitute for reading PAIA itself, but instead aims to provide an accessible reference that will enable requesters and information holders to more easily identify the applicable provisions of PAIA and the relevant case law.**

For more information about SAHA's Freedom of Information Programme (FOIP), please visit *http://foip.saha.org.za*.

south african history archive

SAHA