

GUIDE: Getting to grips with South Africa's Promotion of Access to Information Act (PAIA)

The South African Constitution stipulates that the public and media has the right of access to information.

Here is what you need to know about your right to know -

As with the right to freedom of expression, it is trite to say that access to information is fundamental to a healthy democracy.

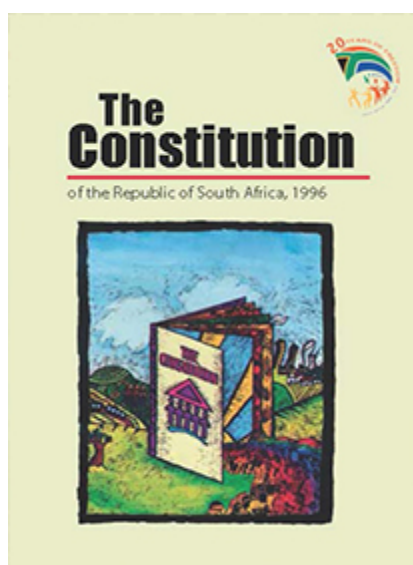
In one of the leading cases, Ngcobo CJ (for the Constitutional Court) described the importance of access to information, as well as its relationship with media freedom, as follows:

To give effect to [the] founding values [of our democracy], the public must have access to information held by the state. Indeed one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency 'must be fostered by providing the public with timely, accessible and accurate information.' [...]

[The role of the media] includes informing the public about how our government is run, and this information may very well have a bearing on elections. The media therefore has a significant influence in a democratic state. This carries with it the responsibility to report accurately. The consequences of inaccurate reporting may be devastating. Access to information is crucial to accurate reporting and thus to imparting accurate information to the public.

Many of the major media freedom battles over the past few years have concerned either access to judicial or quasi-judicial proceedings, and documents in those proceedings, or access to documents held by public and in some cases private bodies in terms of the Promotion of Access to Information Act (PAIA).

A constitutional right



Section 32(1) of the Constitution states that everyone has the right of access to “any information held by the state” as well as “any information that is held by another person and that is required for the exercise or protection of any rights”.

Section 32(2) provides that national legislation must be enacted to give effect to the right of access to information. That legislation is the PAIA.

Although the PAIA is now the pre-eminent source of access to information law, the constitutional right may still play an important role. It is arguable that section 32 can be relied upon directly to claim access to information which the PAIA does not cover, such as one of its most controversial exclusions – a record of the Cabinet and its committees.

[How the Promotion of Access to Information Act \(PAIA\) works](#)

The most important distinction which the PAIA makes is between public bodies and private bodies. This is also the first enquiry which a requester must answer – is the body which holds the record that is being requested a public or a private body?

It is strategically advantageous if the record is held by a public body, because the point of departure for such requests is that the requester does not have to justify why the document is required – the requester's entitlement to the document is presumed.

A public body must therefore disclose the record to the requester, provided that the procedural requirements in terms of the PAIA have been met and no ground of refusal applies.

With a private body, the record must be disclosed if the procedural requirements have been met, the record is required for the exercise or the protection of any right, and no ground of refusal applies.

There are also practical differences: apart from different forms which need to be completed, the access and request fees involved also vary.

[Grounds of refusal](#)



Once a requester has gone through the procedural hoops of properly completing the PAIA forms, paying the access fees and complying with PAIA's other procedural requirements, and (in the case of a request to a private body) has satisfied the threshold enquiry, the document must be released unless a ground of refusal stipulated in the PAIA applies.

Many of the grounds of refusal are the same for both public and private bodies, but some are only applicable to public bodies. In relation to all the grounds of refusal, the information officer – or appeal body if an internal appeal applies – must have relied upon sufficient evidence that the ground of refusal applies.

Here are some of those grounds that have attracted litigation and that arise more frequently in media law practice.

Privacy of a third party

An information officer is obliged to refuse access to a record if the disclosure “would involve the unreasonable disclosure of personal information about a third party, including a deceased individual”.

Given the extensive definition of “personal information” in the PAIA (for example, covering information relating to the person’s race, gender, sex, medical, criminal or employment history or identity number), an important qualification here is the word “unreasonable”. This brings into play the balancing between privacy and freedom of expression, which is well-known in South African common law.

Of course, even if some of the information in a record is personal information and disclosing it would be unreasonable, a public or private body has a duty to sever that which cannot be disclosed from the remainder of the record, and make the redacted record available.

Commercial information of a third party or of the body itself

Three other grounds of refusal that may be relied upon by the information officer are designed to protect commercial information, either of the body itself or a third party. A request for access must be refused if the record contains:

- *trade secrets* of the body or a third party;
- financial, commercial, scientific or technical information of the body or a third party which, if disclosed, is likely to cause *harm to the commercial or financial interest(s)* of the body or third party; or
- information about the body, or information supplied in confidence by a third party, the disclosure of which could reasonably be expected to put the body or the third party at a *disadvantage in contractual or other negotiations*, or prejudice the body or the third party in commercial competition.

Information provided in confidence

An information officer of a public body or a private body must refuse a request for access to a record if disclosure would constitute “an action for breach of the duty of confidence owed to a third party in terms of an agreement”.

For public bodies, a request may also be refused if the record consists of 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 is in the public interest that similar information or information from the same source *should continue to be supplied*.

But public bodies cannot hide behind confidentiality clauses which are designed to circumvent the PAIA, unless the confidentiality breach would result in a successful claim against the party.

National security

As one would expect, there are a number of grounds of refusal where public bodies are concerned which relate to national security. An information officer may refuse a request for access to records if their disclosure could reasonably be expected to cause prejudice to the defence of the Republic, the security of the Republic or the international relations of the Republic.

An information officer may also refuse to disclose a record that would reveal information supplied in confidence by or on behalf of another State or international organisation.

Operations of public bodies

An information officer of a public body may refuse a request for access in a number of circumstances where that access will impact on the operations of the public body.

One such ground for refusal is that the record contains an opinion, advice, report or recommendation obtained or prepared for the purpose of assisting in the *formulation of a policy* or taking a decision in the exercise of a power or performance of a duty conferred or imposed by law.

Another ground of refusal is available if the disclosure of the record could reasonably be expected to frustrate the deliberative process in a public body, or between public bodies, by *inhibiting candid communication* of an opinion, advice, report or recommendation.

[But... public interest overrides](#)



One of the most important provisions of the PAIA is the public interest override which provides that despite a ground of refusal applying, the information officer must grant a request for access if:

- the disclosure of the record would *reveal evidence of a substantial contravention* of, or failure to comply with, the law; *or* an imminent and serious public safety or environmental risk; *and*
- the public interest in the disclosure of the record clearly *outweighs the harm contemplated* in the ground of refusal.

The public interest override is powerful. It has the result that a ground of refusal is overridden if the two conditions set out above are met. For instance, even if an information officer determines that a record ought to be kept secret on national security grounds, the record must nevertheless be disclosed if the public interest override conditions are met.

[Frequently Asked Questions](#)

Note: The below is subject to the definition of a private body in terms of PAIA:

- A private body is defined as follows in PAIA:

“(a) a natural person who carries or has carried on any trade, business or profession, but only in such capacity;

(b) a partnership which carries or has carried on any trade, business or profession; or

(c) any former or existing juristic person”

- PAIA defines the head of a private body as: “the chief executive officer or equivalent officer of the juristic person or any person duly authorized by that office....”

General

1. Examples of private bodies in terms of PAIA?

| | | | |
|--------------------------|-----|-------------------|-----|
| Sole proprietors | Yes | Business trusts | Yes |
| Private/public companies | Yes | Schools | Yes |
| Body corporates | Yes | Churches | Yes |
| Partnerships | Yes | Foreign companies | Yes |
| Close corporations | Yes | | |

2. Can a Body Corporate be a juristic person?

A Body Corporate is a juristic entity, a community or an association of people which has an independent right of existence. A Body Corporate as a legal subject is an entity capable of holding rights, duties and capabilities. Body corporates can therefore sue and be sued in their own name, enter into contracts, incur debt, own property and transfer rights and obligations.

3. Submission of manuals for holding companies and subsidiaries?

Holding companies and each of their entities or subsidiaries must submit separate manuals.

4. Must dormant and deregistered companies also submit manuals?

Companies that are still registered in terms of the Companies Act must comply with section 51 of PAIA, even where no trade or business is currently taking place.

5. Are private bodies allowed to submit manuals in any other format other than that of the generic template?

Yes, all formats are welcome as long as the required information is in the manual.

6. What if there have been changes to contact details?

Private bodies who have submitted manuals in the past must update their information e.g. physical address, telephone numbers etc. The updated manual must be emailed to the SAHRC.

7. Must a private body still post a hard copy to the SAHRC if they have emailed the manual?

No. PAIA states that a copy must be made available to the SAHRC. Electronic submissions are therefore sufficient.

8. What if an entity submitted a manual to the SAHRC before?

Considerable waiting periods are applicable in respect of enquiries relating to old manuals. To avoid these waiting periods, we recommend that the manuals are resubmitted to the SAHRC by way of email to section51.paia@sahrc.org.za for immediate acknowledgement of receipt.

9. Are service providers responsible for what is stated in the manual or will the client be responsible for their own manual?

Issues arising between service providers and the entity do not fall within the jurisdiction of the SAHRC and are also not dealt with in terms of PAIA. The private body remains ultimate responsible for accuracy and content of the manual.

10. Is it reasonable for a service provider to charge for compiling a manual on behalf of a private body?

Every business may fix their own prices and consumer may compare services and price and elect a service provider as they deem fit. The SAHRC cannot advise in this regard.

The SAHRC does not charge a fee for receiving manuals.

11. What are the penalties for not complying?

Offences in terms of s90 are punishable by conviction to a fine or to imprisonment for a period not exceeding 2 years.

MANDATE OF THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION IN TERMS OF PAIA

In terms of PAIA, the Commission has a specific mandate to promote the right of access to information and to monitor compliance with PAIA. The Commission carries out its PAIA mandate as follows:

- Training of and assistance to Information Officers and Deputy Information Officers (public and private bodies)
- Receipt of section 32 reports and section 14 manuals from public bodies
- Receipt of section 51 manuals from private bodies
- Assistance to requesters, where reasonably possible
- Research
- Drafting publications
- Submissions on legislation, including PAIA

Compliance by public bodies

In order to comply with PAIA, public bodies must prepare and submit the following reports and manuals:

Submission of report in terms of Section 32 of PAIA

In terms of Section 32 of PAIA, ALL public bodies must submit a section 32 report to the Commission on an annual basis. The reporting period for the section 32 report is from 1 April to 31 March every year.

In addition to the statistical information listed in section 32 of PAIA, the section 32 report must clearly state:

- the name of the public body;
- the name of the deputy information officer and information officer; and
- the period for which the report is submitted

The names of public bodies not complying with PAIA will be submitted to the National Assembly of Parliament in terms of section 84 of PAIA.

Section 32 reports must be submitted to the Commission by no later than the **30 April each year**.

Only enquiries relating to section 32 of PAIA (NO submissions):

Tel: (011) 877 3608

Email addresses:

Dr. Shanelle Van Der Berg – svanderberg@sahrc.org.za

Tshepang Sebulela – tsebulela@sahrc.org.za

Section 32 reports must only be sent to the following email address: tsebulela@sahrc.org.za

Submission of manual in terms of Section 14 of PAIA

Section 14 of PAIA prescribes that every public body must have an information manual. This manual serves as a roadmap about how to request information from the public body concerned. Section 14 of PAIA sets out what information must be contained in the manual. The manual must be translated into three official languages and submitted to the Commission annually.

Section 14 Manuals must only be sent to the following email address: tsebulela@sahrc.org.za

Compliance by private bodies

1. Submission of manual in terms of Section 51 of PAIA

In terms of section 51 of PAIA, private bodies must within six (6) months of coming into existence, submit an information manual to the Commission.

To comply with section 51 of PAIA, the head of a private body must:

- compile a section 51 manual. The details that must be contained in the section 51 manual can be found in section 51 of PAIA
- after compilation, the manual must be signed by the head of your organisation (initialed on every page and a full signature on the last page) and submitted to the Commission (NO FEES are payable to the Commission for submission of your manual)
- The manual must also be made available at the company's offices and website. Section 51 Manuals must only be sent to the following email address: section51.paia@sahrc.org.za

Note: Manuals sent to any other email addresses will not be acknowledged. Considerable waiting periods are applicable where manuals are posted and / or hand delivered.

CURRENT EXEMPTION

- In terms of in [Government Gazette Notice 39504](#), certain private bodies are exempt from compiling and submitting information manuals to the SAHRC in terms of section 51 of PAIA. until **31 December 2020**.
- In terms of [Government notice no.34914](#), certain private bodies MUST still submit their manuals in terms of section 51 of PAIA to the SAHRC i.e. those private bodies which operate in specific sectors, with 50 or more employees OR operate in specific sectors and have an annual turnover equal to or exceeding specific amounts. The particular sectors and applicable turnover amounts are listed below:

REQUEST FOR ACCESS TO RECORD OF PRIVATE BODY (Section 53(1) of the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000)) [Regulation 10] A.

A. Particulars of private body

The Head/Designated Person: _____

B. Particulars of person requesting access to the record

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

Full names and surname: _____

Identity number: _____

Postal address: _____

Fax number: _____

Telephone number: _____

E-mail address: _____

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

C. Particulars of person on whose behalf request is made.

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

Full names and surname: _____

Identity number: _____

D. Particulars of record

(a) Provide full particulars of the record to which access is requested, including the reference number if that is known to you, to enable the record to be located.

(b) If the provided space is inadequate, please continue on a separate folio and attach it to this form. The requester must sign all the additional folios.

1. Description of record or relevant part of the record: _____ 2. Reference number, if available: _____ 3. Any further particulars of record: _____

E. Fees

(a) A request for access to a record, other than a record containing personal information about yourself, will be processed only after a request fee has been paid.

(b) You will be notified of the amount required to be paid as the request fee.

(c) The fee payable for access to a record depends on the form in which access is required and the reasonable time required to search for and prepare a record.

(d) If you qualify for exemption of the payment of any fee, please state the reason for exemption.

Reason for exemption from payment of fees:

F. Form of access to record

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

Disability: _____

Form in which record is required: _____

Mark the appropriate box with an X.

NOTES:

(a) Compliance with your request in the specified form may depend on the form in which the record is available.

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

1. If the record is in written or printed form: copy of record* inspection of record

2. If record consists of visual images (this includes photographs, slides, video recordings, computer-generated images, sketches, etc.): View the images copy of the images* transcription of the images*

3. If record consists of recorded words or information which can be reproduced in sound: Listen to the soundtrack (audio cassette) Transcription of soundtrack* (written or printed document)

4. If record is held on computer or in an electronic or machine-readable form: printed copy of record*

printed copy of information derived from the record*

copy in computer readable form* (stiffy or compact disc)

If you requested a copy or transcription of a record (above), do you wish the copy or transcription to be posted to you? Postage is payable. YES NO

G. Particulars of right to be exercised or protected

If the provided space is inadequate, please continue on a separate folio and attach it to this form. The requester must sign all the additional folios.

1. Indicate which right is to be exercised or protected:

2. Explain why the record requested is required for the exercise or protection of the aforementioned right:

H. Notice of decision regarding request for access

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

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

Signed at _____ this _____ day of _____ 20____

SIGNATURE OF REQUESTER /
PERSON ON WHOSE BEHALF REQUEST IS MADE