



## GUIDELINES

### GROUND FOR REFUSAL OF ACCESS TO RECORDS CHAPTER 4 OF THE PAIA, ACT 2 OF 2000

The information contained in this section is a summary of the grounds upon which a public body is entitled to raise, as a ground for the refusal of access to its records. The information is intended to provide a person with clarity as to the reasons why a request may be refused by the public body. The list is a summary of the grounds contained in Part 2, Chapter 4 of PAIA, and is by no means exhaustive or complete. This is merely a guideline and cannot be used in isolation from the PAIA.

It is based on a culmination of experiences and lessons derived from jurisprudence associated with PAIA requests. The guide is also aimed at creating a decision making environment that is PAIA compliant by aligning PAIA refusals for access to information into business processes of organs of state.

#### **Background**

The promotion of Access to Information Act 2 of 2000 (PAIA), the primary object of the Act is to give effect to the constitutional right of access to information held by the State by providing procedures and mechanisms for exercising and enforcing that right.

The Act also contains limitations on that right, namely grounds on which access to records of public bodies must or may be refused. However, any refusal for access to information is subject to public override, in other words if it is in the public interest that the information requested be disclosed, such limitation falls off.

#### **1. PROTECTION OF INFORMATION AGAINST DISCLOSURE**

The request for access to information must be carefully assessed to determine whether it actually requires protection from disclosure. Only where there are sound and compelling reasons as set out in Chapter 4 of PAIA which are reconcilable with an open democracy, may such information be protected from disclosure and steps be taken to ensure that such information does not come to the knowledge of persons from whom it should be kept secret.

**A. Mandatory protection of privacy of a third party who is a natural person (Section 34)**

The Information Officer of a public body must refuse a request for access to a record of that public body, if the disclosure would involve the unreasonable disclosure of personal information about a third party, including a deceased individual.

However, a record may not be refused if it consists of information:

- About a third party who has consented in writing to the disclosure of the information;
- Given to the public body by the individual to whom it relates, and that individual is informed by the public body, before it is disclosed, and the information belongs to a class of information that might already be publicly available;
- That is already publicly available;
- Relating to an individual's physical or mental health, or well – being, who is under the care of the requester, and who is under the age of 18 years or is incapable of understanding the nature of the request, and further the disclosure would be in the individual's best interests;
- About an individual who is deceased and 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 is or was an official of a public body, and the information relates to the position or functions of the individual.

**JURISPRUDENCE ASSOCIATED WITH SECTION 34 OF PAIA**

**TREATMENT ACTION CAMPAIGN V MINISTER OF CORRECTIONAL SERVICES AND JUDICIAL INSPECTORATE OF PRISONS CASE NO.: 18379/2008 TPD**

*This matter involves a request for access to information of the reports compiled by the Judicial Inspectorate of Prisons regarding its investigation into the death of an inmate at Westville Correctional Centre. The relief sought was for the provision of anti-retroviral treatment to*

*inmates at WCC who met certain criteria for receiving the treatment. The Respondent (Minister of Correctional Services) refused to grant access to such report basing his refusal on section 34 of PAIA.*

*The legal question to be decided by the High Court was whether the grant of access to such report would lead to the disclosure of personal information of each prisoner or not?*

*The High court ruled that the Applicant is entitled to access to such report because the first Respondent (Minister of Correctional Services) did not show that by handing over the report there would be an unreasonable disclosure of personal information. It was pure speculation.*

## **B. Mandatory protection of commercial information of a third party (Section 36)**

The Information Officer of a public body must refuse a request for access to a record, if it contains:

- Trade secrets of a third party;
- Financial, commercial, scientific or technical information other than trade secrets of a third party, where the disclosure thereof would be likely to cause harm to the commercial or financial interests of that third party; or
- Information supplied by a third party in confidence, and if disclosed would reasonably be expected to place the third party at a disadvantage in contractual or other negotiations, or prejudice the third party in commercial competition.

However, a record may not be refused if it consists of information:

- Already publicly available;
- About a the third party who has consented in writing, to its disclosure to the requester concerned; or
- About the results of any product or environmental testing (not preliminary testing) or other investigation carried out by or on behalf of a third party; where the disclosure thereof would reveal a serious public safety or environmental risk.

## **JURISPRUDENCE ASSOCIATED WITH SECTION 36 OF PAIA**

### **BHP BILLITON PLC INCORPORATED v DE LANGE ZASCA 11 (189/2012)**

*This is an appeal against a successful application in the South Gauteng High Court in which Media 24 made a request to Eskom Holdings Ltd (Eskom) for access to information concerning two contracts concluded by Eskom with Billiton for the supply of electricity to two*

*smelters that produce aluminium one in Richards Bay and Mozal in Maputo. In terms of the contracts the two smelters were entitled to receive electricity at a lower rate than the standard tariff. Eskom refused to grant Media 24 access to some of the information and acceding to some of the information relying on section 36(1)(b)(c) and 37(1)(a) of PAIA.*

*The court had to decide whether the grant of access to such information is likely to cause harm to mandatory protection of commercial information or not.*

*The Appeal Court upheld the decision of the High Court, that the disclosure of such information as would reasonably be expected to cause commercial disadvantage in contractual or other negotiations thus prejudicing the party in commercial competition.*

**C. Mandatory protection of certain confidential information, and protection of certain other confidential information of a third party (Section 37)**

The Information Officer must refuse a request for access to a record of the public body, if the disclosure thereof would constitute a breach of a duty of confidence owed to a third party in terms of an agreement.

The Information Officer of a public body may refuse a request for access to a record of that body, if the record consists of information supplied in confidence by the third party, and if disclosed, could prejudice the future supply of similar information or information from the same source; and it is in the public interest that the information from the same source continue to be supplied.

However, a record may not be refused, if it consists of information:

- Already publicly available;
- About the third party and the third party has already consented in writing, to its disclosure to the requester.

**D. Mandatory protection of safety of individuals, and protection of property (Section 38)**

The Information Officer of a public body must refuse a request for access to a record of that body, if its disclosure could reasonably be expected to endanger the life or physical safety of an individual.

The Information Officer of a public body may refuse a request for access to a record of that body, if its disclosure would likely 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.

The Information Officer of a public body may refuse a request for access to a record of that body, if its disclosure would likely prejudice or impair the methods, systems, plans or procedure for the protection of:

- An individual under a witness protection scheme;
- The safety of the public, or any part of the public;
- The security of a building, structure, or system, including a computer or communication system, a means of transport or any other property.

### **JURISPRUDENCE ASSOCIATED WITH SECTION 38 OF PAIA**

#### **IN THE HIGH COURT OF SOUTH AFRICA: GAUTENG LOCAL DIVISION THE RIGHT TO KNOW CAMPAIGN AND OTHERS v THE MINISTER OF POLICE CASE NO.: 2013/32512**

*This is a case about whether or not the people of South Africa ought to know what places and areas are national key points. A request by Applicants for access to such information was refused by the Respondent alleging that a mere mention of such places will attract unnecessary attention. The High Court had to decide whether there has been an abuse of the power to make declarations of places as key points or whether the non-disclosure is necessary for the safety of the Republic.*

*The High Court concluded that the rationale offered for the refusal fails to meet the threshold set by PAIA. It further reasoned that the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question. It concluded that such refusal was unlawful and unconstitutional.*

#### **E. Operation of public bodies (Section 44)**

The Information Officer of a public body may refuse a request for access to a record of a public body, if the record contains an opinion, advice, report or recommendation obtained or prepared; or an account of a consultation, discussion or deliberation, including the minutes of meetings, for the purposes of assisting to formulate policy or taking a decision in the exercise of a power or the performance of a duty in terms of the law.

The Information Officer of a public body may refuse a request for access to a record of that body, 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 the candid communication of an opinion, advice report or recommendation; or the conduct of a consultation, discussion or deliberation; or if the disclosure of the record could by premature disclosure of a policy or contemplated policy, reasonably be expected to frustrate the success of that policy.

The Information Officer of a public body may refuse a request for access to a record of that public body, if:

- The disclosure of the record could reasonably be expected to jeopardise the effectiveness of a testing, examining, or auditing procedure used by a public body;
- The record contains evaluative material, whether or not the person who supplied it is identified in the record, and the disclosure of the material would breach an express or implied promise, which was made to the person who supplied the material; and the material or the identity of the person who supplied it would be held in confidence; or
- The record contains a preliminary, working or other draft of an official of a public body.

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