

What are the grounds for refusing Access to Information?



The Promotion of Access to Information Act (PAIA) was promulgated in 2000 and is intended to give effect to the Constitution, granting any person or Juristic person the right to have access to information.

Any person or Juristic person may obtain information to protect or exercise his/her rights, irrespective of whether such information is in the form of hard copies or electronic records.

What is the purpose of the Promotions of Access to Information Act?

The purpose of the Act is to promote the right of access to information and to foster a culture of transparency and accountability. In terms of the Act, all information held of a person is confidential and may not be disclosed to any third party without the written consent of the person to whom the information relates. The Act provides that all entities, with the exception of those exempted by the Minister of Justice, must declare and categorise the information available in their businesses in the form of a Manual, which must be submitted to the South African Human Rights Commission, while a copy thereof must at all times be available on the entity's business premises.

Who needs to submit a manual?

The following entities are **not exempted** and are required to draft and submit a manual to the Human Rights Commission:

- Non-profit companies
- State-owned companies
- Personal liability companies
- Private companies, unless–
 - they employ fewer than 50 employees; and
 - their annual turnover is below the published industry norm, similar to the employment equity thresholds.

What are the responsibilities of an Information Officer?

Besides the peremptory requirement to compile and submit an Information Manual, enterprises must also appoint an Information Officer whose contact details must appear in the Information Manual and who will have the responsibility of considering requests for access to information.

The Act provides that any request for access to information shall be refused on the following grounds:

- **Protecting the privacy of a third party**

An Information Officer is obliged to refuse access to a record if disclosure thereof involves the unreasonable disclosure of personal information about a third party, including “deceased individuals”. The principle is that a third party him/herself should decide on disclosure of such information.

Given the broad definition of “personal information” in this Act as well as in the Protection of Personal Information (POPI) Act, balancing privacy with freedom of expression becomes very important.

- **Protecting the commercial records of a third party in terms of an agreement**

The Information Officer may refuse disclosure on the following grounds:

- Trade secrets of the business or a third party;
- Financial, commercial, scientific or technical information of the business 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 supplied in confidence by a third party and where disclosure of such information could reasonably be expected to put the business at a disadvantage in contractual or other negotiations, or prejudice the business in commercial competitions.

- **Protecting confidential information in terms of an agreement**

An Information Officer must refuse a request for access to a record if disclosure will amount to breach of a duty of confidence owed to a third party in terms of an agreement or contract.

- **Protecting the safety of a person or Juristic person**

The Information Officer must refuse to disclose information if such disclosure could compromise the safety of an individual or property. This also relates to the POPI Act, where information is seen as property.

- **Protecting information in legal proceedings**

With regard to other legislation relating to the management and disclosure of information, PAIA will supersede such legislation when the right to access is unjustifiably limited. For example, any record subject to the relationship between an attorney and their client is protected under this Act.

- **National security**

An Information Officer may refuse a request for access to records if their disclosure could reasonably be expected to prejudice the defence, security or international relations of the Republic.

What is ‘public interest override’?

One of the most important provisions of PAIA is that the public interest overrides the statutory protection provision. The Act provides that despite the fact that a ground of refusal may apply, the Information Officer must grant a request for access if the following conditions are met:

- o Does the information demonstrate a serious breach of law; or
- o Do the records contain information that poses an imminent and serious safety or environmental risk; and
- o Does the public interest in disclosing information clearly outweigh the potential harm?

In conclusion

It is important for all entities operating in the public sphere, even Non-Profit Organisations and other charity organisations such as churches, to compile and submit an Information Manual to regulate any request for information about such an entity or information of other person(s) (third parties) in the possession or under the control of such entity.

PAIA allows individuals and organisations to request records from the state and private entities, such as documents, pictures, and audio files. However, there are circumstances when specific requests will be rejected, for example in the interest of state security or to protect the privacy of a third party, irrespective of whether such information will cause harm to the business. The public interest override provision is important as the statutory ground for refusal can be suspended if the two conditions set out above are met. For instance, even if an Information Officer determines that a record should be kept secret on grounds of national security, the record must be disclosed if the public interest override conditions are present.

SERR Synergy assists businesses with compiling PAIA Manuals and submitting these to the South African Human Rights Commission annually. Our professional legal team ensures that all the information of the business, including the Information Officer's details, is provided in the Manual. The Manual also includes the different categories of information, with an indication of which information is confidential or automatically available, as required by the POPI Act. We ensure that our clients keep their PAIA Manual updated, on-site and accessible on their website.

About the Author: Retha van Zyl completed her BCom Hons (Economics and Risk Management) studies at the North West University. She joined our team in January 2016 and currently holds the title 'Information Compliance Advisor'. She specialises in POPI and PAIA compliance, which includes compiling and submitting PAIA Manuals to the Human Rights Commission. She also compiles the Data and Information Protection Report to identify risks associated with information security and drafts Information security policies for procedural compliance in each department within an organisation.

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