

ACCESSING INFORMATION IN THE LGBTI SECTOR

A guide to using the Promotion of Access to Information Act to advance the position of lesbian, gay, bisexual, transgender and intersex (LGBTI) persons in South Africa



ACKNOWLEDGEMENTS

The material in this guide was developed by the Freedom of Information Programme at the South African History Archive (SAHA) as part of a long-term strategy aimed at building the capacity of individuals and organisations to understand and utilise the Promotion of Access to Information Act 2 of 2000 (PAIA) as a strategic advocacy tool.

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The development of this guide was informed by a consultative process involving members of African Men for Sexual Health and Rights, Free Gender, Forum for the Empowerment of Women, Gay and Lesbian Memory in Action, Gender Dynamix, Inclusive and Affirming Ministries, Intersex South Africa, Lesbian and Gay Equality Project, People Opposing Women Abuse, OUT and USIZO whose involvement in, and subsequent feedback from, the FOIP Capacity-Building Project has informed the contents of this resource.

This guide was made possible through the generous support of the Open Society Foundation for South Africa and Atlantic Philanthropies.



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INTRODUCTION

The Promotion of Access to Information Act (PAIA) governs the right of individuals and organisations to access information held by public and private bodies in South Africa. This guide is designed to assist persons in the lesbian, gay, bisexual, transgender and intersex (LGBTI) sector to recognise the important role that access to information can play in the achievement of their advocacy goals. The guide will also help people in the LGBTI sector to make PAIA requests, by providing information on some of the more challenging aspects of using PAIA.

The guide provides examples of how PAIA can be used to address issues facing the LGBTI sector, outlines the responsibilities of key public bodies in terms of these issues and provides contact details for making PAIA requests to those bodies. The guide also provides the LGBTI sector with assistance in making requests to private bodies by providing practical examples of rights that LGBTI persons may be exercising in requesting records. The most commonly claimed grounds for refusing information are explained and possible grounds for appealing such refusals are discussed. Case studies demonstrating the use of PAIA to benefit the LGBTI sector are also provided.

This guide is designed to be used in conjunction with other PAIA materials developed by SAHA:

RK The *PAIA Resource Kit* provides step by step instructions on how to complete the forms required to submit a PAIA request and can be downloaded, free of charge, from the SAHA website: http://www.saha.org.za/publications/paia_resource_kit.htm

WG The *PAIA Workshop Guide* is a comprehensive training manual that details all relevant information to persons wanting to learn how to use PAIA. It also serves as a table top reference guide for anyone trying to practically engage with PAIA. The Workshop Guide can be downloaded, free of charge, from the SAHA website: http://www.saha.org.za/publications/paia_workshop_guide.htm

CS The *PAIA Case Studies from Civil Society DVD and Guide* is an interactive training tool which outlines the key issues around PAIA. The DVD demonstrates how ordinary citizens have utilised PAIA, bringing to life the reality and possibilities of PAIA as a strategic advocacy tool. The DVD can be viewed online and guide downloaded, free of charge, from the SAHA website: http://www.saha.org.za/publications/paia_case_studies_from_civil_society_dvd.htm

WHY IS PAIA IMPORTANT TO THE LGBTI SECTOR?

South Africa has one of the most progressive and inclusive constitutions in the world. It was the first to expressly prohibit discrimination on the basis of sexual orientation. Since its ratification in 1996, the Constitution has given LGBTI people a sound basis from which to advocate for a range of rights. These include rights in relation to parenting responsibilities, immigration, pension fund and medical aid benefits, life partnerships and same-sex marriage. As a result, South Africa has seen profound changes to the law as it relates to sexual orientation over the last 15 years.

However, the changes to the law have not filtered down to the level of everyday life. In reality, only a relatively small number of LGBTI people have been able to enjoy the benefits of these hard won changes to the law. The vast majority of LGBTI people in South Africa are still shut off from accessing their rights because of deep economic inequality, social isolation and cultural exclusion. Public attitudes have not kept pace with legislative changes. In communities across South Africa the concept of same-sex conduct as 'un-African' remains dominant and repressive. The situation is compounded by the fact that South African society is dominated by heterosexist and homo-prejudice sources of information and representation and it remains particularly difficult for the majority of LGBTI people and their allies to find relevant information.

Access to information can be used to bridge the gap between the theoretical legal position and the everyday reality for LGBTI persons. Access to information can be used to inform evidence-based advocacy campaigns for change. In this way, PAIA can be a vital tool for the LGBTI sector by providing a unique mechanism for gathering evidence that can inform substantive demands for change. PAIA can also be used to assist individuals in the LGBTI community to obtain information necessary to access their individual rights.



EXAMPLES OF HOW THE LGBTI SECTOR CAN USE PAIA IN ORDER TO ACCESS OTHER RIGHTS

Information is power. Through using PAIA we are empowered to solve problems.

TREATMENT OF LGBTI VICTIMS OF SEXUAL ASSAULT

If you are concerned about the poor treatment of LGBTI victims of sexual assault by police officers, you can submit a PAIA request to the South African Police Service requesting:

- A copy of any procedure for filing complaints against the police.
- Records detailing the number of complaints that have been made against police officers relating to discrimination against, and mistreatment of, LGBTI victims of sexual assault.
- Records detailing any disciplinary action taken against police officers in relation to such complaints.
- Records detailing any training provided to police officers regarding the appropriate treatment of LGBTI victims of sexual assault.
- A copy of any policies of the South African Police Service in dealing with victims of sexual assault and any such policies that specifically relate to LGBTI victims.

How will this information empower you?

Accessing this information will allow you to independently assess the extent of the problem, as it has been reported to the police service, and the extent to which the police service is taking action to educate its officers and address the problem.

UNFAIR DISCRIMINATION

If you are concerned that a particular public or private body is unfairly discriminating against LGBTI employees or applicants for employment you can submit a PAIA request to the relevant body requesting:

- A copy of any employment policies and practices of that body to eliminate unfair discrimination.
- A copy of any complaint or grievance procedure available to employees or applicants for employment in respect of allegations of unfair discrimination.
- Records detailing the number of complaints made which relate to allegations of unfair discrimination on the basis of gender, sex or sexual orientation and the nature of those complaints.

How will this information empower you?

Accessing this information will allow you to assess whether the public or private body is complying with its legal obligations, under the Employment Equity Act, not to unfairly discriminate against LGBTI persons, by determining whether it has put policies in place to prevent such discrimination and the extent to which those policies are being complied with.

APPROPRIATE HEALTH CARE

If you are concerned about the extent to which public health services address the specific needs of LGBTI persons you can submit a PAIA request to the national and provincial departments responsible for health care as well as to individual hospitals and health care institutions requesting:

- A copy of any policies or directives that guide or assist health care professionals in treating LGBTI patients.
- Records detailing any training provided to health care professionals in relation to treating LGBTI patients.
- Records detailing strategies, programmes or awareness raising activities undertaken, or to be undertaken, by the institution that were specifically aimed at the health care needs of LGBTI persons, including the amount of funding allocated.

How will this information empower you?

Accessing this information will allow you to identify whether health care professionals are receiving the necessary training to identify the specific health care needs of LGBTI persons and to ensure that they do not provide health care services in a heterosexist manner. It will also allow you to assess the extent to which the state is taking responsibility for ensuring the health care needs of LGBTI people are met and whether there are gaps in this that either need to be filled by the LGBTI sector or which the LGBTI sector should lobby to ensure the state meets.

PROSECUTION OF 'CORRECTIVE RAPE' OFFENDERS

If you are concerned about the prevalence and prosecution of incidents of 'corrective rape'¹ you could submit a PAIA request to the South African Police Service, the National Prosecuting Authority and/or the Department of Justice requesting:

- Records detailing the number of alleged sexual assaults where the victim is female and her statement to the police includes mention that the sexual assault was related to or motivated by her homosexuality.
- Records detailing the number of alleged sexual assaults where the victim is female and her statement to the police includes mention of her homosexuality.
- Records detailing the percentage of alleged sexual assaults prosecuted in a specified period.
- Records detailing the percentage of alleged sexual assaults prosecuted within the same specified period where the victim is female and her statement to the police includes mention that the sexual assault was related to or motivated by her homosexuality.
- Records detailing the percentage of alleged sexual assaults prosecuted within the same specified period where the victim is female and her statement to the police includes mention of her homosexuality.

How will this information empower you?

Accessing this information will allow you to assess the extent of the problem of corrective rape, as reported to the police. It will also enable you to assess the prosecution rates of corrective rape cases compared with other sexual assaults. Once the prevalence of the problem is clear, you then have substantive evidence on which to campaign the government to take action to prevent further incidents. If the public bodies are not keeping records of this nature, you will be able to demonstrate that the problem of corrective rape is not adequately measured and therefore not understood by public bodies.

¹ The term 'corrective rape' is commonly used in South Africa to refer to the rape of a lesbian in order to 'make' her heterosexual. The LGBTI sector is seeking to end the use of the term. Instead, in the future, such offences will be referred to as gender-based violence on the basis of sexual orientation. While SAHA recognises and supports the sector in its attempts to end the use of the term 'corrective rape', it has used the term here because of its current recognition value.

REQUESTING INFORMATION FROM PUBLIC BODIES

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For information on how to make a request to a public body see chapter 2 of the *Workshop Guide* and pages 17 to 24 of the *Resource Kit*.

You can request access to any records that you want from a public body; there is no restriction on what you can ask for. The challenge in requesting documents from a public body is working out which public body may have the records that you want.

Which body may have the information you want?

Before making a PAIA request you need to work out which body to send your request to. It can sometimes be difficult in the government sphere to work out which public body may hold the information you are looking for. This potential difficulty is addressed in PAIA by obliging public bodies to create a PAIA manual, and to transfer your request to the correct public body, if necessary.

Creating a PAIA manual

Section 14 of PAIA requires all public bodies to publish a manual which includes information about:

- the structure and function of the body;
- the contact details of the information and deputy information officers of the body; and
- the subjects on which the body holds records and the categories of records held on each subject.

Unfortunately only a small number of public bodies have complied with this requirement and many of those public bodies that have prepared manuals do not update them regularly so often the information is out of date, particularly the contact details of information and deputy information officers. You should therefore phone a public body to check the contact details of the information or deputy information officer before submitting a request.

Obligation to transfer your request

It is always best to try and submit your PAIA request to the right public body as this will ensure the fastest response to your request. However, do not worry if after some research you are not sure if you are submitting your request to the right public body - if you make your PAIA request to the wrong public body they are required to transfer it to the correct body. This obligation is contained in section 20 of PAIA.

And don't forget - if it seems that more than one body may have the information you want, you can submit the same request to different bodies.

Responsibilities and contact details of key public bodies (as of March 2012)

Information about the key areas of responsibility for public bodies that may hold records relevant to the LGBTI sector and the contact details of their deputy information officers is provided below. Remember these contact details may change from time to time so you should always check the details before submitting a request.

DEPARTMENT OF HEALTH

<p><u>KEY RESPONSIBILITIES RELEVANT TO LGBTI SECTOR</u></p> <ul style="list-style-type: none">• National HIV/AIDS and STD Programme• Health care delivery system• Preventative health care• Promoting health care <p>Note: responsibility for funding public hospitals rests with the provincial health departments</p>	<p><u>RELEVANT LEGISLATION ADMINISTERED BY THE DEPARTMENT</u></p> <ul style="list-style-type: none">• National Health Act 2004	<p><u>CONTACT DETAILS</u></p> <p>Name: Gerrit Wissing</p> <p>Position: Deputy Information Officer</p> <p>Phone: 012 395 8457</p> <p>Fax: 086 632 8511</p> <p>Email: wissing@health.gov.za</p> <p>Post: Private Bag X828, Pretoria 0001</p>
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DEPARTMENT OF SOCIAL DEVELOPMENT

<p><u>KEY RESPONSIBILITIES RELEVANT TO LGBTI SECTOR</u></p> <ul style="list-style-type: none">• Social protection and social welfare services (largely delivered through provincial government and non-profit organisations)• Social security• Development of social welfare services to reduce poverty, vulnerability and the impact of HIV/AIDS• Services to victims of crime	<p><u>RELEVANT LEGISLATION ADMINISTERED BY THE DEPARTMENT</u></p> <ul style="list-style-type: none">• Social Assistance Act 2004• Prevention and Treatment of Substance Abuse Act 2008• Domestic Violence Act 1998• Children's Act 2005	<p><u>CONTACT DETAILS</u></p> <p>Name: Dorothy Mathebula</p> <p>Position: Deputy Information Officer</p> <p>Phone: 012 312 7380</p> <p>Fax: 012 312 7569</p> <p>Email: dorothym@dsd.gov.za</p> <p>Post: Private Bag X901, Pretoria 0001</p>
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For more information about the Department of Social Development, view their PAIA manual:
<http://www.dsd.gov.za/Paia%20manual.pdf>

DEPARTMENT OF HOME AFFAIRS

<p><u>KEY RESPONSIBILITIES RELEVANT TO LGBTI SECTOR</u></p> <ul style="list-style-type: none">• Issuing identity documents• Determining immigration applications• Determining asylum and refugee applications• Registering births, deaths and marriages	<p><u>RELEVANT LEGISLATION ADMINISTERED BY THE DEPARTMENT</u></p> <ul style="list-style-type: none">• Alteration of Sex Description and Sex Status Act 2003• Immigration Act 2002• Refugees Act 1998• Civil Union Act 2006	<p><u>CONTACT DETAILS</u></p> <p>Name: Advocate Tsietsi Sebelemetja</p> <p>Position: Deputy Information Officer</p> <p>Phone: 012 810 8031/2</p> <p>Fax: 012 810 7044 or 0865 144 267</p> <p>Email: Tsietsi.Sebelemetja@dha.gov.za</p> <p>Post: Private Bag X114, Pretoria 0001</p>
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DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

<p><u>KEY RESPONSIBILITIES RELEVANT TO LGBTI SECTOR</u></p> <ul style="list-style-type: none">• Administration of justice	<p><u>RELEVANT LEGISLATION ADMINISTERED BY THE DEPARTMENT</u></p> <ul style="list-style-type: none">• All criminal legislation, including the Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007 and the Domestic Violence Act 1998	<p><u>CONTACT DETAILS</u></p> <p>Name: Advocate Witness Ndou</p> <p>Position: Acting Deputy Information Officer</p> <p>Phone: 012 357 8544</p> <p>Fax: 086 648 4563</p> <p>Email: wndou@justice.gov.za</p> <p>Post: Private Bag X 81, Pretoria 0001</p> <p>Name: Natalie-Dominique Louw</p> <p>Position: Senior Legal Administration Officer</p> <p>Email: nlouw@justice.gov.za</p>
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For more information about the Department of Justice and Constitutional Development, view their PAIA manual:

<http://www.justice.gov.za/paia/DOJCD%20Access%20to%20Information%20Manual.pdf>

SOUTH AFRICAN POLICE SERVICE

KEY RESPONSIBILITIES RELEVANT TO LGBTI SECTOR

- Crime prevention
- Investigation of crimes including family violence and sexual offences
- Investigations of complaints against police service

CONTACT DETAILS

Name: Colonel Amelda Crooks

Position: National Deputy Information Officer

Phone: 012 393 2606

Fax: 012 393 2156

Email: crooksa@saps.org.za

Post: Private Bag X94, Pretoria 0001

For more information about the South African Police Service, view their PAIA manual:

Part 1: http://www.saps.gov.za/docs_pubs/legislation/paia/english/part1.pdf

Part 2: http://www.saps.gov.za/docs_pubs/legislation/paia/english/part2.pdf

NATIONAL PROSECUTING AUTHORITY

KEY RESPONSIBILITIES RELEVANT TO LGBTI SECTOR

- Prosecution of criminal offences on behalf of the State
- Thuthuzela Care Centres - led by the NPA's Sexual Offences and Community Affairs Unit and operated in conjunction with other key departments (such as Social Development, Health and Police) the care centres are designed to provide safe environments for rape victims, reducing secondary victimisation and improving conviction rates.

CONTACT DETAILS

Name: Theodore Leeuwschut

Position: Deputy Information Officer

Phone: 012 845 6000

Fax: 012 804 7335

Email: tleewschust@npa.gov.za

Post: Private Bag X752, Pretoria 0001



REQUESTING INFORMATION FROM PRIVATE BODIES

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For information on how to make a request to a private body see chapter 2 of the *Workshop Guide* and pages 37-43 of the *Resource Kit*.

Unlike public bodies, from which you can request any information, the right to information from private bodies is restricted. You can only ask a private body for information if it *is required for the exercise or protection of any right*.

The form for requesting information from a private body (form C) therefore requires requesters to:

- (a) indicate which right they are exercising or protecting; and
- (b) explain why the record requested is required for the exercise or protection of that right.

What right are you exercising and why is the information required for the exercise or protection of the right?

There are many rights afforded to LGBTI persons that you may be exercising or protecting by requesting information under PAIA. Once you have established the right you are exercising or protecting it is then necessary to explain why you need the records that you are requesting to exercise or protect that right.

Below is a list of rights that you may be exercising or protecting and some examples of how you may need access to records to exercise or protect those rights. The list is not exhaustive; there may be other rights that you are exercising or protecting or other reasons that you need access to records to exercise or protect those rights.

THE RIGHT TO EQUAL TREATMENT

Section 9 of the Constitution recognises that everyone is equal. It prohibits unfair discrimination on a number of grounds including gender, sex and sexual orientation. The Employment Equity Act 1998 and the Promotion of Equality and Prevention of Unfair Discrimination Act 2000 have been enacted to give effect to the Constitutional right to equality. Those acts provide more specific rights and obligations which may form the basis of your request.

Why is the information required for the exercise or protection of the right?

You may believe you have been discriminated against by a private body, either as an employee, an applicant for employment or as a user of a service provided by the body. You may therefore require access to any equality plans or policies of the body, records of your interview or other interactions with the body and the grievance or complaint procedures of the body. This information would tell you how members of the body are required to behave and whether the body discriminated against you. If the body has discriminated against you, the information would enable you to lodge a complaint or grievance or take legal action in order to exercise your right to be treated equally by that body.

THE RIGHT TO FREEDOM AND SECURITY

Section 12 of the Constitution says that everyone has the right to be free from all forms of violence from public and private sources. It also recognises the right to bodily and psychological integrity, including making decisions concerning reproduction and security in, and control over, your body.

Why is the information required for the exercise or protection of the right?

You may have been mistreated by a member of a private security firm and require access to details about the assailant, policies of the security firm in relation to the treatment of members of the public and details of any complaint procedure available. This information would tell you who the security guard was and how the security guard was required to behave. If the security guard's behaviour toward you was inconsistent with the policies of the firm or if the policies of the firm were in conflict with the right to security, you could lodge a complaint or take legal action in order to exercise your right to be free from violence.

THE RIGHT TO BE A PARENT

The Children's Act gives same sex partners parental rights and responsibilities. It allows same sex partners to adopt a child and allows the same sex partner of a biological parent of a child to adopt the child. It also allows same sex couples to enter into surrogacy agreements and parental rights and responsibilities agreements.

Why is the information required for the exercise or protection of the right?

An adoption agency may have refused your request to adopt a child without providing you with any reasons for the refusal. In order to challenge their decision you may require a copy of any records the agency has about your application, including any assessment the agency undertook of your appropriateness to adopt a child and any policies of the agency in relation to adoption. This information would allow you to determine whether the agency had legitimate reasons for refusing the adoption or whether your right to be a parent had been infringed. If your right had been infringed, you could make a complaint or take legal action to protect that right.

THE RIGHT TO HEALTH CARE

Section 27 of the Constitution provides that everyone has the right to health care. Further and more specific rights regarding health care are contained in the National Health Act 2004.

Why is the information required for the exercise or protection of the right?

A hospital may refuse to treat you without providing you with any reasons for the refusal. You could request a copy of any policies or procedures that deal with the refusal of treatment to patients. If the policies or procedures allow discrimination against LGBTI patients then you may lodge a complaint with the hospital or take legal action on the basis that the hospital's policies are unconstitutional. Alternatively, if the policies and procedures of the hospital are fair but they have ignored them and refused to provide you treatment anyway, you may lodge a complaint with the hospital or take legal action on the basis that you have been discriminated against.

GROUNDS FOR REFUSING ACCESS TO INFORMATION

PAIA provides that a requester must be given access to the records they request unless one of the grounds for refusal set out in the Act applies.

MOST COMMON GROUNDS FOR REFUSAL CLAIMED

PERSONAL INFORMATION

Test for refusal

Access must be refused where the release of a record would involve the unreasonable disclosure of personal information about another person.

This requirement is contained in section 34 of PAIA in respect of public bodies and section 63 of PAIA in respect of private bodies.

When the ground may apply

You may have requested that the Department of Home Affairs provide you with details of all the people that have applied to have their sex description on their identity documents altered under the Alteration of Sex Description and Sex Status Act. This information is personal information because it would include the name and identity number of the people who made the application. The disclosure of that information to you would be a breach of the privacy of those individuals and would therefore be unreasonable. The department must therefore refuse you access to that information.

Exceptions to ground for refusal

PAIA sets out a number of instances in which the body *must provide you with access* to the records you request even though they contain personal information about someone else where:

- the information is already publicly available;
- the person was informed before they provided the information to the body that it belonged to a class of information that would or might be made available to the public;
- the information is personal information about an official of the body and relates to their job;
- the person consents to the body giving you the information;
- the information is requested by an heir of a deceased person or a carer of a child or mentally disabled person; or
- the public interest override applies (the public interest override is explained below).

Notice requirements

Where you request a record that contains personal information about someone else, the body will write to that person and tell them about your request. That person can consent or object to the release of the record to you.

Even if the person objects to the information being disclosed, the body must decide whether the disclosure would be unreasonable. They cannot deny your request just because the other person has objected.

POLICE DOCKETS IN BAIL PROCEEDINGS AND PROTECTION OF LAW ENFORCEMENT AND LEGAL PROCEEDINGS

Test for refusal

A body *must refuse* you access to a police docket relating to any crime you have been accused of at the time of any bail proceedings relating to that crime.

A body *may refuse* you access 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.

These requirements are contained in section 39 of PAIA.

When the ground may apply

You may have requested that the South African Police Service provide you with all records relating to the investigation of an assault that was committed against you and all details of the proposed prosecution of the offender. If the police believe that providing you with the information at that time may impede the prosecution of the offender, then they may refuse you access the information.

CONFIDENTIAL INFORMATION

Test for refusal

Access *must be* refused where:

- the body has promised to another person or business that they will not disclose the information; or
- the information was given to the body in confidence and if the body disclosed the information the person may not provide them with similar confidential information in the future. It must also be in the public interest that the person continues to provide the body with similar confidential information. This applies to public bodies only.

This requirement is contained in section 37 of PAIA in respect of public bodies and section 65 of PAIA in respect of private bodies.

When the ground may apply

You may have requested that the Department of Health provide you with a copy of an agreement to purchase HIV/AIDS medication from a private company. The company may have agreed to provide the medication to the department at a discounted rate, which they do not want their other customers to know. The department may therefore have agreed to keep the rate confidential. If the department released the information to you, the company could sue the department for breaching that confidence. The department must therefore refuse to provide you with that information. >>

Exceptions to ground for refusal

PAIA sets out a number of instances in which public bodies must provide you with access to the records, even though they contain information that was initially identified as, or deemed to be, confidential:

- the information is already publicly available and has therefore lost its confidential status;
- the third party consents in writing to the disclosure; or
- the public interest override applies (the public interest override is explained below).

Notice requirements

Where you request a record that contains confidential information of another person or business, the body will write to the person or business and tell them about your request. That business or person can consent or object to the release of the record to you.

Even if the other person or business objects to the information being disclosed, the body must decide whether the record falls within the ground for refusal. They cannot deny your request just because the other person or business has objected.

OPERATIONS OF PUBLIC BODIES

Test for refusal

Section 44 of PAIA aims to protect the internal workings of government by providing that public bodies *may refuse access* to records on a number of grounds, including where:

- a record contains an opinion, advice, report or recommendation the body received or prepared to help them make 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.

When the ground may apply

You may have made a request to the Department of Justice and Constitutional Development for a copy of any advice they have received and any other documentation relating to the development of a policy on hate crimes, prior to the finalisation of the policy. If the release of the information to you at that time would hinder the capacity of the department to take a decision based on the advice or might frustrate the success of the final policy, then the department could refuse to give you the information.

Exceptions to ground for refusal

However, the body *must provide you with access* to records regarding the internal workings of government where:

- the record has been in existence for more than 20 years;
- the record contains information about why the body has decided to do something that has an important and negative impact on someone's rights;
- the public interest override applies (the public interest override is explained below).

OTHER GROUNDS FOR REFUSAL

- Commercial information (sections 36, 42(3), 64 and 68 of PAIA)
- Defence, security and international relations of Republic (section 41 of PAIA)
- Economic interests and financial welfare of Republic (section 42 of PAIA)
- Protection of research information of third party and body (sections 43 and 69 of PAIA)
- Safety of individuals and protection of property (sections 38 and 66 of PAIA)
- Legally privileged documents (sections 40 and 67 of PAIA)
- Records of the South African Revenue Service (SARS)(section 35 of PAIA)
- Manifestly frivolous or vexatious requests or substantial and unreasonable diversion of resources (section 45 of PAIA)

THE PUBLIC INTEREST OVERRIDE

Test for access

Even where one of the grounds for refusing access applies, the body *must release the information* to you (except in the case of the SARS ground of refusal in section 35 of PAIA) where:

- the record contains 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 section providing a ground for refusal.

This requirement is contained in section 46 of PAIA in respect of public bodies and section 70 of PAIA in respect of private bodies.

When the public interest override may apply

The Department of Correctional Services may have refused to provide you with a copy of an agreement related to the award of a tender to provide health services to transgender prisoners on the basis it contained confidential information. However, the agreement may also contain evidence that a public official accepted a financial payment in exchange for the award of the tender. Corruption is a serious contravention of the law and the public interest in its disclosure would outweigh any harm that may result to the private company in the release of any confidential information in the agreement. Accordingly, the department would be required to release the information to you on the basis of the public interest override.

WHAT IF THE BODY DOES NOT RESPOND TO YOUR REQUEST?

DEEMED REFUSAL

Test for refusal

If a body fails to respond to your request within 30 days (or 60 days if an extension of time has been granted), then the body is deemed to have refused your request. You can then lodge an internal appeal (if your application was to a public body) or apply to the court (if your application was to a private body) on the basis of the deemed refusal.

This requirement is contained in section 27 of PAIA in respect of public bodies and section 58 of PAIA in respect of private bodies.

INTERNAL APPEAL

Where a public body refuses you access to information PAIA allows you to lodge an appeal against the decision of the body. The appeal will be determined by the relevant authority; the Minister (in respect of a national government entity), the Member of Executive Council (in respect of a provincial government entity) or the Municipal Manager (in respect of a municipal government entity).

There is no right of internal appeal where a private body refuses access to information. If a private body refuses your request for information you must lodge an appeal with the court or make a complaint to the Public Protector or the South African Human Rights Commission.

WG **RK** Chapter 4 of the *Workshop Guide* and pages 25 to 35 of the *Resource Kit* provide general information about lodging an internal appeal, including how to complete the required form B.

The template is designed to build on that information by providing you with some practical examples of how you may appeal a decision based on the most common grounds for refusal. The grounds for appeal are indicative only and you will need to review the particular reasons provided by the public body in respect of each refusal.

GROUND FOR INTERNAL APPEAL – TEMPLATE

This template should be inserted into the 'grounds for appeal' section of form B (see the *Resource Kit* for further information).

1. On *[insert the date that you made the PAIA request]* the *[insert the name of the person or organisation that made the PAIA request]* made a request for information under PAIA. A copy of the request is attached to this appeal.
2. By letter dated *[insert the date of the letter you received from the public body refusing your PAIA request]* the public body informed *[insert the name of the person or organisation that made the PAIA request]* that the request had been refused. A copy of the letter is attached to this appeal.
3. *[Insert the name of the person or organisation that made the application]* contests the refusal and submits this appeal.
4. *[Insert grounds of appeal – consider the examples detailed in this guide and insert any of the appeal grounds that are relevant to the refusal you have received.]*
5. *[Insert the name of the person or organisation that made the application]* therefore respectfully submits that the relevant authority should order that access be given to the requested records pursuant to section 77(2) of PAIA, which empowers the relevant authority to substitute the information officer's decision with a new decision.

EXAMPLES OF GROUNDS OF APPEAL

The following text can be used as the basis of your appeal and may be inserted, as relevant, into paragraph 4 of the template grounds for appeal.

EXAMPLES OF GROUNDS OF APPEAL WHERE INFORMATION IS REFUSED ON THE BASIS THAT THE RECORD CONTAINS PERSONAL INFORMATION

Publicly available information

- The information is already publicly available. *[Insert details of where you have seen/read about/heard the information discussed].*

Therefore, in accordance with section 34(2)(c) access to the information may not be refused. >>

Official of the public body

- The information relates to the position or functions of an individual who is or was an official of the public body. *[Insert details of how the information relates to the position or function of the official of the public body. For example, it may relate to the contact details, responsibilities, salary or actions taken by the person while they held the office].*

Therefore, in accordance with section 34(2)(f) access to the information may not be refused.

WHEN THIS GROUND OF APPEAL MAY APPLY

You may have requested that the South African Police Service provide you with the name, rank, badge number and work contact details of all police officers involved in the investigation of an assault against you. Ordinarily this kind of information would be exempt from release under PAIA because it is personal information. However, because the information relates to those people in their capacity as police officers you are entitled to that information. If the South African Police Service refused to provide you with the information you could therefore lodge an appeal on the basis that the information relates to the position of an official of the body.

Failure to provide reasons

- The public body has failed to state adequate reasons for the refusal, as required by section 25(3)(a) of PAIA. In particular, the public body has failed to state why the granting of access to the information would amount to an unreasonable disclosure of personal information.

In accordance with section 81(3) of PAIA the public body carries the burden of establishing that the refusal is made in accordance with the ground contained in the Act. Accordingly, the public body must establish that the disclosure of the information would be unreasonable.

There is no justifiable basis on which the public body may claim that the disclosure of the information would be unreasonable.

Failure to apply the test for refusal

- The public body refused access to the information solely on the basis that the individual whose personal information is contained in the record objected to the release of the record. PAIA does not allow the public body to refuse access on this basis. Though section 49(1)(a) of PAIA requires that any representation made to the public body by a third party be given due regard, such representations are not to be determinative of the matter.

The public body must still demonstrate that the disclosure of the information would be unreasonable in accordance with section 34. The public body has failed to do so in this instance and has therefore unlawfully refused access to the information.

Furthermore, there is no justifiable basis on which the public body may claim that the disclosure of the information would be unreasonable.

The personal information could be severed from the document

- Section 28 of PAIA requires that the public body sever any part of a requested record that does not contain personal information and can reasonably be severed from any part that does, so as to provide the requester with access to the part which does not contain personal information.

The request in this instance is for records that relate substantially to *[insert nature/content of record requested]*. Accordingly, any personal information contained in those records is secondary to the main purpose of the document and must be able to be severed. >>

WHEN THIS GROUND OF APPEAL MAY APPLY

You may have requested that the Department of Social Development provide you with details of any complaints made by its employees that they have been unfairly discriminated against on the basis of their gender, sex or sexual orientation. The department may have refused you access to the information on the basis that it contains personal information of the complainants, such as their names and contact details. However, it would be possible for the department to sever (delete or black out) the personal information from the rest of the records and still provide them to you. This would still allow you to determine how many complaints have been made and the nature of those complaints. You could therefore lodge an appeal against the department's decision to refuse you access to the information on the basis that the personal information could be severed from the document.

Tip: Where you know a record will contain personal information and you are not seeking access to the personal information, it is useful to expressly state this in your PAIA request so that the body can immediately consider whether the personal information can be severed from the record. A simple statement such as 'personal information that may be included in the record is not requested' may avoid the need for you to lodge an internal appeal and ensure you get access to the information more quickly.

EXAMPLES OF GROUNDS OF APPEAL WHERE INFORMATION IS REFUSED ON THE BASIS THAT THE RECORD CONTAINS INFORMATION RELATED TO LAW ENFORCEMENT AND LEGAL PROCEEDINGS

Failure to provide reasons

- The public body has failed to state adequate reasons for the refusal, as required by section 25(3)(a) of PAIA. In particular, the public body has failed to state why the granting of access to the information would [*insert relevant criteria under PAIA for refusing access to the information – prejudice law enforcement methods, techniques, procedures or guidelines; impede the prosecution of the alleged offender or result in a miscarriage of justice; 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; prejudice or impede a fair trial*].

In accordance with section 81(3) of PAIA the public body carries the burden of establishing that the refusal is made in accordance with the ground contained in the Act. Accordingly, the public body must establish that the disclosure of the information would cause the relevant harm.

There is no justifiable basis on which the public body may claim that the disclosure of the information would cause the relevant harm.

WHEN THIS GROUND OF APPEAL MAY APPLY

You may have requested information regarding the prosecution of an assault against a member of your community from the National Prosecuting Authority (NPA). The NPA may have refused your request by simply stating 'the information is exempt from release under section 39 of PAIA'. It is not enough for a body to state only the section of PAIA that it believes justifies their refusal to provide you access to information. Section 25(3)(a) of PAIA requires that adequate reasons be provided by the body for the refusal. Therefore if the NPA believe that the release of the information to you would impede the prosecution of the offender, they must explain how the release of the information to you would impede the prosecution. You could therefore lodge an appeal against the NPA's decision on the basis that the NPA has failed to provide you with adequate reasons for the refusal.

EXAMPLES OF GROUNDS OF APPEAL WHERE INFORMATION IS REFUSED ON THE BASIS THAT THE RECORD CONTAINS CONFIDENTIAL INFORMATION

Publicly available information

- The information is already publicly available. [*Insert details of where you have seen/read about/heard the information discussed*].

Therefore, in accordance with section 37(2)(a) access to the information may not be refused.

Failure to provide reasons

- The public body has failed to state adequate reasons for the refusal, as required by section 25(3)(a) of PAIA. In particular, the public body has failed to state why the granting of access to the information would [*insert relevant criteria under PAIA for refusing access to the information – constitute an action for breach of duty of confidence; prejudice the future supply of information*]. In accordance with section 81(3) of PAIA the public body carries the burden of establishing that the refusal is made in accordance with the ground contained in the Act. Accordingly, the public body must establish that the disclosure of the information would cause the relevant harm. There is no justifiable basis on which the public body may claim that the disclosure of the information would cause the relevant harm.

Failure to apply the test for refusal

- The public body refused access to the information solely on the basis that the individual whose confidential information is contained in the record objected to the release of the record. PAIA does not allow the public body to refuse access on this basis. Though section 49(1)(a) of PAIA requires that any representation made to the public body by a third party be given due regard, such representations are not to be determinative of the matter.

The public body must still demonstrate that the disclosure of the information would meet the criteria established under section 37 of PAIA. The public body has failed to do so in this instance and has therefore unlawfully refused access to the information.

Furthermore, there is no justifiable basis on which the public body may claim that the disclosure of the information would meet the relevant criteria.

Confidential information could be severed from the document

- Section 28 of PAIA requires that the public body sever any part of a requested record that does not contain confidential information and can reasonably be severed from any part that does, so as to provide the requester with access to the part which does not contain confidential information.

The request in this instance is for records that relate substantially to [*insert nature/content of record requested*]. Accordingly, any confidential information contained in those records is secondary to the main purpose of the record and must be able to be severed.

WHEN THIS GROUND OF APPEAL MAY APPLY

In the grounds for refusal section of the guide we considered a situation where the Department of Health may refuse to provide you with a copy of an agreement to purchase HIV/AIDS medication from a private company on the basis that the parties agreed to keep the discounted rate of the medication confidential. While the department may be entitled to refuse you access to the discounted rate on the basis of their confidentiality undertaking, the department must still provide you with other information that may be in the agreement that is not confidential, such as the volume of medication purchased. The department could simply sever (delete or black out) the discounted rate before providing you with the remainder of the agreement. Therefore, if the department refused you access to the entire agreement you could lodge an appeal on the basis that the confidential information could be severed from the agreement.

EXAMPLES OF GROUNDS OF APPEAL WHERE INFORMATION IS REFUSED ON THE BASIS THAT THE RECORD CONTAINS OPERATIONS OF PUBLIC BODIES

Publicly available information

- The information is already publicly available. [*Insert details of where you have seen/read about/heard the information discussed*].
Therefore, the harm contemplated by section 44 of PAIA cannot arise from the release of the record.

Record is more than 20 years old

- The record came into existence more than 20 years before the date of the request. [*Insert details of when the document was created*].
Therefore, in accordance with section 44(3) of PAIA access to the information may not be refused.

Record constitutes statement of reasons

- The record contains an account of, or the reasons for, a decision taken by a public body, which are required to be given in accordance with section 5 of the Promotion of Administrative Justice Act.
Therefore, in accordance with section 44(4) of PAIA access to the information may not be refused.

Final decision has been taken

- A final decision on the [*policy/matter/issue*] has been made and therefore the harm contemplated in section 44 cannot arise.
Section 44 aims to protect the internal workings of government to ensure that open and frank deliberation within government is not hindered by the premature release of information. Once a decision has been taken on a matter the need for the protection no longer exists.
A final decision was made on the subject matter of this request on [*insert date and any details of release of decision to public – include documentary evidence where possible*]. Accordingly, the harm claimed by the public body cannot arise from the release of the requested record.

WHEN THIS GROUND OF APPEAL MAY APPLY

In the grounds for refusal section of the guide we considered a situation where the Department of Justice and Constitutional Development may refuse you access to information about a proposed hate crimes policy, prior to finalisation, where early release would frustrate the success of the policy. While PAIA seeks to ensure the success of government initiatives by protecting information during the development stage, it is not intended to protect government initiatives from scrutiny once a decision has been taken. Therefore, once the hate crimes policy was finalised and/or released for public consultation, the department should not refuse you access to any of the advice, recommendations or debates that informed the development of the policy. Therefore, you could appeal any refusal of the department to provide you with the records on the basis that a final decision had been taken on the policy.

Failure to provide reasons

- The public body has failed to state adequate reasons for the refusal, as required by section 25(3)(a) of PAIA. In particular, the public body has failed to state why the granting of access to the information would [*insert relevant criteria under PAIA for refusing access to the information – frustrate the formulation of policy or decision making; inhibit candid communication, discussion or deliberation; frustrate the success of a policy through premature disclosure; jeopardise the effectiveness of procedure or method use by the body; breach an express or implied promise regarding confidentiality; is a draft document*]. >>

In accordance with section 81(3) of PAIA the public body carries the burden of establishing that the refusal is made in accordance with the ground contained in PAIA. Accordingly, the public body must establish that the disclosure of the information would cause the relevant harm. There is no justifiable basis on which the public body may claim that the disclosure of the information would cause the relevant harm.

GROUNDS FOR INTERNAL APPEAL – DEEMED REFUSAL TEMPLATE

If a public body fails to respond to your request within 30 days (or 60 days if an extension of time is requested), then the body is deemed to have refused your request. In those circumstances you can lodge an internal appeal.

1. On *[insert the date that you made the PAIA request]* the *[insert the name of the person or organisation that made the PAIA request]* made a request for information under PAIA. A copy of the request is attached to this appeal and marked "A".
2. *[Insert details of any further contact – for example - On [insert date] the [insert the name of the person or organisation that made the PAIA request] wrote to the [information officer/ deputy information officer] reminding them that in accordance with PAIA the public body was required to respond to the request within 30 days and that period had expired. A copy of this [email/letter] is attached to this appeal and marked "B"].*
3. Despite *[insert the name of the person or organisation that made the PAIA request]* reminding the public body of its obligations under PAIA, the public body has failed to respond to the request. The failure by the public body to provide a decision on the request constitutes a deemed refusal in accordance with section 27 of PAIA.
4. *[Insert the name of the person or organisation that made the PAIA request]* contests the refusal and submits this appeal.
5. Section 11 of PAIA provides that a requester must be given access to a record of a public body if the requester complies with the procedural requirements in PAIA and access to the record is not refused in terms of any ground for refusal contemplated in Chapter 4.
6. *[Insert the name of the person or organisation that made the PAIA request]* has complied with the procedural requirements of PAIA and the public body has not offered any ground for refusal in Chapter 4 for refusing access to the requested records. The public body has therefore unlawfully refused access to the requested records.
7. Furthermore, there is no justifiable basis on which the public body could refuse access to the requested records.
8. *[Insert the name of the person or organisation that made the PAIA request]* therefore respectfully submits that the relevant authority should order that *[insert the name of the person or organisation that made the PAIA request]* be given access to the requested records pursuant to section 77(2) of PAIA, which empowers the relevant authority to substitute the information officer's decision with a new decision.

CASE STUDY: PAIA AS A TOOL FOR CHANGE

Christien is a transsexual working at a public transport body. When Christien was initially employed by the body she dressed and presented as a male. However, subsequently Christien came out to her colleagues and employer as a transwoman. Christien began dressing and presenting as a female at work and taking hormones.

After Christien came out, her manager removed her from her ordinary duties and required her to undergo a psychological assessment. Her manager said that the reason for the assessment was to check that the hormones she was taking would not affect her ability to perform her duties. However, even when the psychologist confirmed that the hormones would not affect Christien's ability to perform her duties, her manager did not let her return to her ordinary work.

Christien believed her manager was unfairly discriminating against her. She therefore sought legal assistance to ensure that the public transport body would return her to her ordinary duties. Her lawyers wrote to the body but received no response.

SAHA decided to try and assist Christien by submitting a PAIA request to the public transport body. In the request SAHA sought:

- employment policies and practices of the body aimed at eliminating unfair discrimination against LGBTI employees;
- complaint or grievance procedures available to employees of the body who experience unfair discrimination;
- the number of complaints of unfair discrimination made by employees of the body in the last 5 years; and
- counselling services available to employees of the body who have suffered discrimination.

After receiving the PAIA request the CEO of the body sent an email to all staff informing them that unfair discrimination was not acceptable. The CEO also took steps to ensure that Christien was returned to her ordinary duties.

Though as at 29 February 2012 the public transport body has not responded to SAHA's PAIA request (despite the expiration of the 30 days PAIA allows to respond to requests), the action in submitting the request alerted the public body to its obligations regarding preventing unfair discrimination and the discrimination that was committed in its workplace. The PAIA request also reminded the body that its actions are subject to public scrutiny and that it would be held accountable for the way it treats its employees.



***“PAIA helped me a lot.
It gave me access to
information I didn't think
it was possible to get and
opened my legal options.”***

CASE STUDY: PAIA INFORMING YOUR ADVOCACY GOALS

LGBTI people regularly experience unfair discrimination both in the workplace and as users of public services (for examples at hospitals). This kind of discrimination is against the law.

Public bodies are required by law to take action to try and prevent this kind of discrimination.

The Promotion of Equality and Prevention of Unfair Discrimination Act requires that public bodies prepare equality plans that identify goals and objectives to eliminate unfair discrimination and measures for the achievement thereof.

The Employment Equity Act requires employers to take steps to promote equal opportunity in the workplace by eliminating unfair discrimination (which includes discrimination on the basis of gender, sex and sexual orientation) in any employment policy or practice.

SAHA requested from a number of public bodies:

- the equality plan of the body and progress reports regarding the implementation of that plan; and
- policies and practices related to the elimination of unfair discrimination.

Responses to the requests were received from the Charlotte Maxeke Johannesburg Academic Hospital, Department of Health, Department of Basic Education, Department of Higher Education, Groote Schuur Hospital and the South African Police Service.

None of the bodies provided an equality plan. The bodies either acknowledged that they were yet to prepare the plan or provided information about employment equity. This evidences that the requirements of the Promotion of Equality and Prevention of Unfair Discrimination Act are ignored or misunderstood by many government departments.

Responses to requests regarding employment equity consisted almost exclusively of the provision of employment equity plans and reports. Those plans and reports generally (and at times exclusively) focused on the affirmative action requirements of the Employment Equity Act, which relates only to the employment of black people, women and people with disabilities. Many of the bodies failed to address at all the requirements to eliminate unfair discrimination and none of the bodies released any information that indicated a plan has been enacted to eliminate unfair discrimination.

When SAHA presented the information gathered to organisations in the LGBTI sector they recognised the need and opportunity the information presented in terms of advocacy work. In particular, the group recognised the following advocacy opportunities:

- development of educational materials on the needs and rights of LGBTI people;
- undertaking workshops with public bodies explaining their legal obligations and the needs of LGBTI people;
- offering the expertise within LGBTI organisations to public bodies in order to assist them in developing equality and equity plans and ensuring other policies and practices of the public bodies adequately address the needs of LGBTI people; and
- developing a media strategy for alerting the public to the failings of our public bodies to give effect to the equality protected by the Constitution.

