

# ACCESSING INFORMATION

## When Private Sector Performs Public Functions





## ABOUT THE SOUTH AFRICAN HISTORY ARCHIVE

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

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

- Creating awareness about the right of access to information and its power as an enabling right that can be used to protect, promote and fulfil other human rights
- Empowering individuals and organisations to understand and utilise the Promotion of Access to Information Act, 2000 (PAIA) as a strategic tool
- Creating awareness about the need for, and value in, transparency and accountability
- Empowering government officials to ensure realisation of the right of access to information
- Increasing compliance with PAIA

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SAHA gives permission for this guide to be used and reproduced, with acknowledgement, by all those seeking to better understand, utilise and comply with PAIA.

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FOR SOUTH AFRICA**

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## BACKGROUND AND CONTEXT

The Promotion of Access to Information Act, 2000 (PAIA) gives effect to the constitutional right of individuals and organisations to access information held by public and private bodies in South Africa. The South African History Archive (SAHA) has developed this guide to assist individuals and organisations with how to use PAIA to obtain information that relates to public functions but in the hands of private bodies. The guide situates this analysis within the context of an examination of transparency in public-private partnerships.

This guide is designed to be used with other guides on using PAIA developed by SAHA. These SAHA guides, along with training materials, can be downloaded, free of charge, from the following website:

- The **PUBLICATIONS** section of the SAHA website (<http://www.saha.org.za>)
- The **RESOURCES** section of SAHA's Freedom of Information Programme website

### THIS GUIDE PROVIDES:

- An overview and understanding of how the right to information and PAIA can be used to address issues related to advocating for developments that are meant to benefit the public;
- Practical advice on how to make an access to information request under PAIA;
- An outline of the record keeping responsibilities of the public and private bodies within a public-private partnership, in terms of National Treasury Regulation 16 and other laws;
- Practical examples of how to exercise the right of access to information when the information relates to a public function performed by a private body in terms of a public-private partnership;
- Guidance on the next steps in the PAIA process of making requests for information, such as making internal appeals, with practical tips on seeking information;
- Advice on the commonly claimed grounds for refusing information with suggested wording for challenging refusals to provide information; and
- Case studies showing how SAHA has used PAIA to access records related to public-private partnerships.

You will know when to refer to other SAHA PAIA resources when you see the following icons:

**RK** The **PAIA Resource Kit** provides step by step instructions on how to complete the forms required to submit a PAIA request.

**WG** The **PAIA Workshop Guide** provides a comprehensive training manual for people wanting to learn how to use and practically engage with PAIA.

**CS** The **PAIA Case Studies from Civil Society DVD and Guide** is an interactive training tool which outlines key issues around PAIA. The DVD shows how ordinary citizens have used PAIA as a strategic advocacy tool.

**PU** **PAIA Unpacked – A Resource for Lawyers and Paralegals** provides a reference which sets out the key legal requirements of PAIA and how those requirements have been interpreted and applied by the courts.

**AA** **Activating PAIA for Advocacy** is a guide to using PAIA to advocate for the realisation of human rights, and provides a framework to analyse the information needed to actively advocate for change on human rights, and issues.

**ED** **Accessing Information for Better Basic Education** seeks to assist the public by providing practical assistance and advice on how and when to make an access to information request, by providing examples of how PAIA can be used to address basic education issues and to advocate for the right to a basic education for all South Africans.

**HU** **Using PAIA to Promote Housing Rights** is a guide to using PAIA to advocate for access to adequate housing.

## **INTRODUCTION:**

# **The role of access to information (ATI) in holding to account partners in public-private partnerships**

### **What are public-private partnerships?**

Public-Private Partnerships (PPPs) are essentially collaborations between the public sector and private sector. In terms of the collaborations the public sector partner makes certain public resources available to the private sector partner, which in turn carries out a public function on behalf of the public sector partner. Examples include the construction of a high speed railway line (the Gautrain) meant to alleviate traffic congestion and develop essential infrastructure and the construction, refurbishment, operation and management of hospitals for public benefit (such as the Port Alfred and Settlers hospitals). These kinds of collaborations usually arise from the urgent need to develop key sectors, or infrastructure, relating to basic service delivery. The private sector often has greater resources when it comes to skill, specialist knowledge and market share which can be used by the state through PPPs. Thus the idea of the PPP is to place the risk of developing key sectors squarely on to the shoulders of the private party.

Generally the only form of input the public body provides is either use of its land or building, whereas the private body must provide the rest of the material resources.<sup>1</sup> One may ask what the benefit is for the private institution. The short answer is that they have access to the public resources that they would not have had access to as a private company, and are allowed in terms of the PPP agreement the ability to run the public institution as if they were a part of government, and bank the profit generated until they hand over the public institution back to the relevant government department. The time-frames for handover of the assets back to government are not regulated, however, judging from National Treasury's current list of PPPs, the hand over process on average takes place after approximately 10 – 25 years.<sup>2</sup>

### **Why is transparency in this relationship important?**

PPP agreements are commercial transactions that often take place behind closed doors. This is problematic firstly, because they relate to the use of state resources on which there should be public accountability. Secondly, they relate to the delivery of services which the state has a duty to provide, which means the quality and cost of that service affects ordinary South Africans. As such, all information – generated at any stage of the PPP process – should be publicly accessible, and in fact should be made proactively available without the need for a person to formally request it.

Unfortunately the information is not – for the most part – made proactively available and you will usually need to use PAIA to access information relating to PPPs.

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<sup>1</sup> <http://www.treasury.gov.za/documents/national%20budget/2017/review/Annexure%20E.pdf>.

<sup>2</sup> <http://www.ppp.gov.za/Documents/Signed%20PPP%20Project%20List%202013.pdf>.

## ACCESSING INFORMATION USING PAIA

PAIA is a law that gives effect to the constitutional right of access to information. PAIA not only makes it possible to request information from the state, but also makes it possible to request information from another person or organisation, (known in PAIA as a 'private body'). Information can however only be requested from a private body if that information is required in order to make it possible for someone to exercise or protect another right, such as their right of access to health care services or a contractual right. PAIA provides only for access to information that has been recorded in some form or another (for example if it is written down in a document, saved on a disc or a hard drive or recorded in a sound file, photograph, painting or drawing). In this guide when we refer to 'information' we are referring to such recorded information, also known as 'records'.

PAIA sets out the steps that need to be taken to ask for information in a public or private body's possession, and the requirements for how and when that body must respond to such a request. PAIA also sets out the type of information that a public or private body can or may refuse to give you access to.

### How to tell whether a body is a public body or a private body

Before making a PAIA request you will need to identify the correct body to send your request to. You therefore need to start by finding out which person, organisation or department has the information that you need. Once you know who has the information you have to figure out whether they are a public body or a private body, under PAIA. This is because PAIA requests to public bodies must be made by filling in a specific form (called 'Form A'), whereas requests to private bodies must be made by filling in a different form (called 'Form C'). Different steps are also followed when requests are made to private bodies than when requests are made to public bodies. For example, requests must be submitted to the information officer or deputy information officer of a public body, but to the head of a private body.

Generally when you ask for information from the government, you are requesting information from a 'public body'; this includes all national and provincial government departments, all municipalities and all government bodies created by law. Examples of national and provincial government departments include the National Treasury, the Department of Science and Technology and the provincial Departments of Health. Examples of bodies created by law include the Auditor General and state owned companies like Eskom Holdings (SOC) Ltd (Eskom) and Denel (SOC) Ltd (Denel).<sup>3</sup>

A 'private body' under PAIA would include a person or partnership that carries on a trade, business or profession and any and all juristic bodies (such as a company) that are not public bodies. Examples would include a plumber (who is a person carrying on a trade), a shop owner (who is a person carrying on a business), a lawyer (who is a person carrying on a profession) or a private company like Netcare Limited.



**For more information about how public and private bodies are defined in PAIA, see pages 11 – 14 of PAIA Unpacked.**

### Requesting information from private bodies using section 8 of PAIA

Sometimes however the information you are looking for, even though it is held by a body that is classified in terms of PAIA as a private body, relates to a public function carried out by that body. For example, you may be interested in getting a hold of information about social grants that are being provided by a private company on behalf of the state. Even though the company in the example is a private body in terms of PAIA the information you are seeking is related to a public function. In these cases PAIA provides in section 8 that the private body must be treated as a public body for the purposes of requesting, from them, information that has to do with the public function that they carry out. This means that you would use Form A and not Form C. This is important because Form C requires that you explain why you need the information in order to exercise or protect another right, whereas Form A has no such requirement.

<sup>3</sup> A list of some of these state owned companies is currently available at: <http://www.gcis.gov.za/content/resourcecentre/contactdirectory/government-structures-and-parastatals>.

You therefore need to make sure, when you request information from a private body that performs some public function, that you submit your request using the form (that is, Form A or Form C) that relates to the function that is performed and not the body classification. Therefore, in the example discussed so far, if you were interested in seeking information from the private company about their provision of social grants (a public function) you would make your request using Form A (the form usually used for requests to public bodies). If however you were interested in seeking information about the number of directors on their board (a private function) you would make your request using Form C (the form usually used for requests to private bodies). When requesting information from the private partner in a PPP relationship therefore, if the information being requested relates to the public function the private partner is carrying out in terms of the agreement, you will make your request using Form A.

Section 8 can also sometimes operate the other way around, but only in relation to public bodies that are created by a written law (excluding the Constitution) – like Eskom and Denel. In other words, if the information you would like to access, for example from Eskom, relates to a private function of Eskom rather than its public function you will need to make your request using Form C. This is very rare as even seemingly private functions, such as how much money is spent on rent, is related to a public function if it makes the public function possible.

One of the major challenges in requesting documents from a public or private body is working out which body might have the records that hold the information that you want. Finding the right public or private body may need some thinking and research.



## EXAMPLE

In the President's State of the Nation Address in 2016 he mentioned some projects that he referred to as PPPs. We wanted to find out more about those projects and decided to submit some PAIA requests. Although the President had mentioned the projects, we determined, when we did some research, that the projects were actually being controlled by other national government departments. Our requests were therefore submitted to the government departments that controlled the projects and not to the Presidency. We also tried to identify the private body partners and submitted requests to them using Form A (as if they were a public body) because they are performing a public function in terms of the relevant PPP agreement. (For more information see the case studies below.)

## Using the PAIA Manual to help you find out the what and the where

To help you with submitting a PAIA request, every public body is, and most private bodies are, expected to produce a manual – called a PAIA manual – which they must make publicly accessible. The manual must:

- explain what kinds of information (or records) that body holds (this will help you figure out what to ask for); and
- give the contact details of the person (the ‘head’, ‘information officer’ or ‘deputy information officer’) to whom PAIA requests for their organisation should be sent (this will help you figure out where to send your request).

By reading the PAIA manual, you should be able to tell if the public or private body might have the records you need and how to submit your request to that body. The PAIA manual is often on the public or private body’s website, but if it is not you can ask for it directly from the body.

## [PAIA S14 AND S51] LOOKING AT THE LAW

### What is a PAIA manual?

Sections 14 and 51 of PAIA makes it mandatory for every public and private body to publish a manual which must explain to the public how to use PAIA to access information (or records) that they hold. The Minister of Justice however has to power to, by Regulation, exclude certain bodies, for a certain period, from complying with these sections. For many years now the Minister has exercised this discretion to exclude all private bodies except large companies.<sup>4</sup>

### What information must be included in the PAIA MANUALS of PUBLIC BODIES:

Section 14 of PAIA requires that all public bodies publish a manual that contains, amongst other things, information about the following:

- the structure and function of the body;
- the contact details of the information and deputy information officers;
- the records that the body makes automatically available;
- the subjects on which the body holds records and the categories of records held on each subject;
- the types of services the body makes available to the public and how those services can be accessed;
- how members of the public can make representations to the body about the formulation of policy and about the exercise of power or performance of duties by the body.

### What information must be included in the PAIA MANUALS of PRIVATE BODIES:

Section 51 of PAIA requires that all private bodies publish a manual that contains, amongst other things, information about the following:

- the contact details of the head of the private body;
- the records that the body makes automatically available;
- the records that are available in terms of another law; and
- the subjects on which the body holds records and the categories of records held on each subject.

**TIP:** Sometimes, even though it should be there, the PAIA manual is not actually available on the body’s website. If the PAIA manual is not available on their website, you may need to ask for it directly from the body by calling their head office. Even if there is a PAIA manual it is worth phoning to find out if it is still up to date. If they do not have a PAIA manual then ask for the contact details of the executive head of their organisation and send your request to that person.<sup>5</sup>

<sup>4</sup> The whether a company is large or small is determined with reference to the number of employees and the annual turnover. For more information see the Regulations issued in terms of PAIA, available from the Department of Justice’s website, here: <http://www.justice.gov.za/paia/paia.htm>.

<sup>5</sup> Alternatively SAHA’s extensive Requestee database, with contact details for close to 600 public and private bodies, can be accessed at: <http://foip.saha.org.za/requestee/search>.



For more information on how to make a request to a public body, see chapter 2 of the PAIA Workshop Guide, pages 17 – 24 of the PAIA Resource Kit and the Visual Training Tool in Activating PAIA for Advocacy.



For more information on how to make a request to a private body holding information related to a private function, see chapter 2 of the PAIA Workshop Guide, pages 37 – 43 of the PAIA Resource Kit and pages 15 – 19 of PAIA Unpacked.

While it is always best to try and send your request to the correct public body in order to get a quick response, do not worry if you do not send your PAIA request to the right public body. PAIA requires that a public body transfer a request, incorrectly sent to it, to the correct public body.

## [PAIA - S20] LOOKING AT THE LAW

### When does a public body have to transfer my request?

According to section 20 of PAIA if you make PAIA request to a public body and:

- that public body does not hold the record containing the information you are requesting, but another public body does; or
- that public body does hold a copy of the record containing the information you are requesting, but another public body is in a better position to make a decision on whether access should be granted to the record

then the public body to which you sent the request originally must transfer your PAIA request to the other public body.

### What to do if your request is transferred

The original public body does not have to request your permission to transfer a request, but they must tell you that they have transferred your request. When they tell you that they have transferred your request they must also tell you:

- which public body the request was transferred to;
- what the contact details are of the information or deputy information officer that will now be processing your request;
- why the transfer was made; and
- when the decision on whether you can get access to the requested information must be provided to you, under section 20(5) of PAIA, by the other public body.

If the public body that has transferred your request has not given you any of this information you should follow-up with them asking them to give it to you. This is because this information will help you to follow up on the request if there is a delay or confusion about the transfer.

**IMPORTANT:** Unlike public body requests, PAIA does NOT require a private body to transfer your request to any other body, if you send it to the wrong body.

**TIP:** If you send your PAIA request to the wrong private body, you will need to send a new PAIA request to the right body.

## CHECKLIST FOR PREPARING A PAIA REQUEST FOR A PUBLIC AND PRIVATE BODY:

- Figure out whether the information you are looking for (and therefore the records that will hold that information) relate to a public function of a private body (or a private function of a public body that has been created by a written law other than the Constitution)**

If the information (or record) you are looking for is held by a public body that is not created by a written law other than the Constitution (such as all the national and provincial departments, all the municipalities, and all the institutions created by the Constitution), submit your request using Form A.

If the information (or record) you are looking for is held by a public body that is created by a written law other than the Constitution, and the information relates to a public function of that public body submit your request using Form A. If you are not sure whether the information you are looking for relates to a private function of that public body submit your request using Form A.

If the information (or record) you are looking for is held by a public body that is created by a written law other than the Constitution, and you are certain the information relates to a private function of that public body, submit your request using Form C. If you are not sure whether the information you are looking for relates to a private function of that public body submit your request using Form A.

If the information (or record) you are looking for is held by a private body then submit your request using Form C, unless the information relates to a public function performed by that private body, then submit your request using Form A instead.

- Find the contact details for the information officer (or deputy information officer)**

You should first check to see whether the body to which you want to send a request has a PAIA manual. If they do it might be worth double checking, by contacting them, that the manual is up to date.

If the body has an up to date PAIA manual, get the contact details of the head of the private body or the information or deputy information officer of the public body from the manual. Alternatively contact the body's head office and ask for the contact details of the executive head of the organisation.

**TIP:** Ask to speak to someone from the legal department if the telephone operator is not able to or does not want to assist you. If there is no answer, check the public body website and try call again later.

- Complete the PAIA request using the prescribed form**

Use Form A to submit your request if:

- the request is for information (or records) held by a public body that is not created by a written law other than the Constitution (in other words, if your request is to any national or provincial department, any municipalities or any institution created by the Constitution, use Form A);
- the request is for information (or records) held by a public body created by a written law other than the Constitution (such as Eskom or Denel for example) and you are certain the information (or records) relates to a public function performed by that body;
- the request is for information (or records) held by a public body created by a written law other than the Constitution (such as Eskom or Denel, for example) and you are not sure whether the information (or records) relates to a public or a private function performed by that body;

- the request is for information (or records) held by a private body, and the information (or records) relates to a public function performed by that private body.

Use Form C to submit your request if:

- the request is for information (or records) held by a private body and the information (or records) are not related to any public functions that are performed by that private body; or
- the request is for information (or records) held by a public body created by a written law other than the Constitution (such as Eskom or Denel, for example) and you are certain the information (or records) relates to a private function performed by that public body.

When you fill in these forms (Form A and Form C) you have to give details about:

- the body you are sending the request to;
- who you are and where you can be contacted;
- *if you are making the request on behalf of someone else*, their details;
- the information (or records) you are requesting to see or hear or receive copies of;
- whether you should be exempt from paying the prescribed request and access fees;<sup>6</sup>
- whether you only want to see or hear the information (or record) or whether you want copies;
- whether you have a preferred language in which you would like to access the record (if it is available in that language); and
- whether you wish to be notified of the outcome of your request in any specific way (such as by telephone). This is in addition to the written response you must be provided.

**IN ADDITION Form C requires** that you explain which right the information (or record) will assist you to exercise or protect, and why that information (or record) will assist you with exercising or protecting that right.

**TIP:** the right you rely on when making a request using Form C does not have to be a constitutional right, it can be any right, such as, for example, a right you have because of a contract (or agreement).

You should be provided with a copy of Form A or Form C by the relevant public or private body if you ask for it. Alternatively you can download these forms in a Microsoft Word format from SAHA's website (under the PAIA Resource Kit tab under the heading 'the PAIA forms').<sup>7</sup>



**For examples of descriptions of requests to private bodies, for records relating to their private functions, see page 11 of Accessing Information for Better Basic Education and pages 12 – 14 of Using PAIA to Promote Housing Rights.**



**Ask for PAIA fees to be waived (but only if your request is for personal information, if you are unemployed or if you are a low income earner)**

Fees are usually charged for the administration of the request (called the 'request fee' – which is R35 if your request is to a public body and R50 if your request is to a private body). Fees are also usually charged for the granting of access (these fees are calculated separately as they depend for example on the amount of time spent looking for the information and the way in which access is granted). The exact amounts that can be charged both for the request and the access fee are prescribed in the Government Gazette, and you can ask when you are told to pay a request or access fee that the relevant body explain to you how they calculated the amount payable.

<sup>6</sup> The Regulations to PAIA provide that persons who are requesting access to a record containing their personal information are exempt from paying the request fee. In relation to requests for personal information made to public bodies there is a further exemption from paying access fees. Also any or persons that earn less than R14,712 annually (if single) or R27,192 annually (if married or have a life partner) are exempt from paying access fees to public bodies.

<sup>7</sup> This section of the website is accessible here: [http://www.saha.org.za/publications/paia\\_resource\\_kit.htm](http://www.saha.org.za/publications/paia_resource_kit.htm).

There are however instances when fees are not payable. If those apply to you, you should make a note on the Form A or Form C, to explain why you should not be charged any fees for your request. Fees are not payable if:

- If you are asking for information about yourself. In such a case you should make a note that you should be exempt from paying fees because you are requesting your own personal information; or
- If you earn less than R14,712 per year, as a single person, or, less than R27,192 per year, together with your spouse / life partner as a couple, and your request is to a public body. You should therefore make a note in the request form that you should be exempt from paying access fees because you are indigent. You should also state the amount you earn per year, either as a single person or if married or in a life partnership then as a couple. In determining the amount you earn you are allowed to deduction from you annual income:
  - Income tax deducted over the year from your pay, by your employer, and paid to SARS;
  - Contributions you pay over the year (usually also deducted from your pay, by your employer) to the Unemployment Insurance Fund;
  - Compulsory contributions you make over the year to a group insurance fund in terms of a court order or your employment contract;
  - Medical aid contributions you make over the year to a registered medical aid, if those contributions are also allowed to be deducted from your income for tax purposes; and
  - Contributions to a pension fund that your employer deducts over the year from your pay (and / or makes on your behalf) and pays over to a pension fund administrator.

**Submit your Form A or C by email, fax or post or by delivering it to the office**

Try to keep a record of when and how you send your form, or who you gave it to. It's even better if you can get them to sign a second copy writing out their name in full, along with the date and time they received their copy.

**Pay the section 22 or 54 notice (the notice of a request fee payable) when issued with one by the public or private body**

PAIA prescribes that the information officer or deputy information officer of the public or private body must acknowledge receipt of your request and issue you with a notice requesting the payment of a prescribed request fee. The amount that is payable is prescribed by the Minister of Justice in the Government Gazette and is currently R35 for requests to public bodies and R50 for requests to private bodies.

### **How long do I have to wait before receiving a response?**

Both private and public bodies have 30 days to respond to a PAIA request. The body can take more time, up to a maximum of another 30 days, if they say, before the end of the first 30 days, that they need more time. The body can therefore take a maximum of 60 days to respond to a PAIA request, but only if the extra time is needed to (a) search a large number of records, (b) search records in another town, (c) consult within the body, or (d) if you consent in writing to the extra days.

If 30 days have passed and you have not received a notice of extension of time and you also have not received a decision letter (saying that you can or cannot be given access, or saying the records do not exist or cannot be found) then PAIA says it is as if you received a letter in which you were told you are not allowed access. We say they are 'deemed to have refused' your request. You can therefore proceed to take the next step to challenge the refusal of access. In other words, you can now submit an internal appeal to the public body, if your request was to a public body, or you can lodge a complaint with the Information Regulator or go to court if the request was to a private body.

Similarly, if you received a notice of extension of time within the first thirty days, and the additional time (to a maximum of another 30 days) has passed without you having received a decision letter, PAIA says it is as if you received a letter in which you were told you are not allowed access. They are deemed to

have refused your request. You can therefore proceed to take the next step to challenge the refusal of access, as explained in the previous paragraph.

## MAKING AN INTERNAL APPEAL

If you do not receive a response to your PAIA request within the statutory time-frame or if your PAIA request for information has been refused, your next step is to make an internal appeal. However, you can only appeal against a PAIA request made to a public body.

There is no right of internal appeal where a private body does not give access to requested information. Accordingly, if a private body refuses your PAIA request for information (or fails to provide you with a decision, within time – as explained above) you can make a complaint to the Information Regulator, for their intervention, or appeal to a court.<sup>8</sup>

Unfortunately the absence of the right to internally appeal decisions of a private body does not change when the request is submitted in terms of section 8 of PAIA; despite the request being made on a Form A and for records that are related to a public function of the private body. The only available appeal mechanism in these cases is to approach the Information Regulator, or a court.

If a public body does not give you access to requested information, PAIA allows you to appeal this decision (or deemed refusal). While you will send your appeal form (Form B) to the same person to who you sent your request form (Form A), they will have to send the appeal to a new, more senior decision-maker within the public body, known as the 'relevant authority'. The relevant authority is the relevant:

- (i) Minister (for a national government body);
- (ii) Member of Executive Council (for a provincial government body); or
- (iii) Mayor or Speaker (for a municipal government body).

The relevant authority is required to respond to a PAIA internal appeal within 30 days of the appeal being provided to the public body. PAIA does not allow the relevant authority to extend the time for a response on an internal appeal at all. If you have not heard anything in relation to your internal appeal and the decision is not made in 30 days, the relevant authority is considered to have refused your request. We say they are 'deemed to have dismissed' your appeal.

When the relevant authority makes a decision on your request they can agree or disagree with the original decision. This might mean your PAIA request is still denied, or you might get some or all of the records you requested.

If the relevant authority still refuses to give you the records you asked for from the public body after your internal appeal, you can consult with the Information Regulator to ask for their help, or you can appeal to a court of law.<sup>9</sup>



**For more information about making an internal appeal about your PAIA request, see page 30 and Chapter 4 of the PAIA Workshop Guide, and pages 25 – 35 of the PAIA Resource Kit.**

### How to appeal if your request has been ignored

If a body fails to provide you with a decision on your request for information within 30 days (or 60 days if the time was extended), then, according to PAIA, the body has, in effect, refused your request. This is called a '**deemed refusal**'.

<sup>8</sup> At the time of writing this guide the Information Regulator had not been completely set up despite Commissioners having been appointed. Once the Information Regulator – which is established in terms of the Protection of Personal Information Act, 2013 – is completely set up complaints will have to be submitted to them. Until then complaints can be submitted instead to the South African Human Rights Commission.

<sup>9</sup> See footnote 8 above.

## [PAIA S27 & S58] LOOKING AT THE LAW

### Appealing a deemed refusal

Section 27 of PAIA for public bodies and section 58 of PAIA for private bodies says that if no decision is provided on your request, within the prescribed time, your request is deemed refused. You can challenge this refusal by submitting an internal appeal (if your application was to a public body), or by submitting a complaint to the Information Regulator or applying to a court (if your application was to a private body).<sup>10</sup>

### CHECKLIST FOR MAKING AN INTERNAL APPEAL WHERE THERE HAS BEEN NO DECISION FROM A PUBLIC BODY:

- Check it is more than 30 days (or 60 days if there was an extension of time) from the day the public body received your PAIA request**

**TIP:** Count the day after the public body received the PAIA request as day one. Count for 30 days and then the 30th day is the day the response to the PAIA request is due, unless that is a Sunday or public holiday, in which case the 30th day will be the next day that is not a Sunday or public holiday.

- Complete the internal appeal Form B explaining that there has been no response to your PAIA request**

*You should be provided with a copy of Form B by the public body, if you ask for it. Alternatively you can download this form in a Microsoft Word format from SAHA's website (under the PAIA Resource Kit tab under the heading 'the PAIA forms').<sup>11</sup>*

**TIP:** Your internal appeal form (Form B) should be sent to the information officer or deputy information officer (in other words to the same person to whom you sent your request form). It is worth again checking the contact details of the information officer or deputy information officer, before sending in the internal appeal. The information officer must send your Form B to the relevant authority within 10 days of receiving it from you.

The words in the box below can be adapted and inserted, where they are relevant, into the 'grounds for appeal' section of Form B.

<sup>10</sup> At the time of writing this guide the Information Regulator had not been completely set up despite Commissioners having been appointed. Once the Information Regulator - which is established in terms of the Protection of Personal Information Act, 2013 - is completely set up complaints will have to be submitted to them. Until then complaints can be submitted instead to the South African Human Rights Commission.

<sup>11</sup> This section of the website is accessible here: [http://www.saha.org.za/publications/paia\\_resource\\_kit.htm](http://www.saha.org.za/publications/paia_resource_kit.htm).



1. On *[insert the date you sent the PAIA request]*, *[insert the name of the person or organisation that made the PAIA request]* made a request for information under PAIA to *[insert the name of the public body]* ("the public body"). A copy of the request is attached to this appeal *[remember to attach a copy]*.
2. *[Insert details of any further contact – for example: On [insert the date of any follow up you made about your original PAIA request], [insert the name of the person or organisation that made the PAIA request] [wrote/spoke] to the [information officer/deputy information officer] of the public body 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. 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 provide a decision on this request.]*
3. 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. In accordance with section 11 of PAIA, *[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 under PAIA (including under sections 34 to 45 of PAIA) for refusing access to the requested records. The public body has therefore unlawfully refused access to the requested records, and *[insert the name of the person or organisation that made the PAIA request]* must be given access to the records requested from the public body.
6. Furthermore, no justifiable basis has been provided on which the public body could refuse access to the requested records.
7. *[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 a new decision for the information officer's original decision.



**For more information about lodging an internal appeal against the deemed refusal of a PAIA request, including how to complete the required Form B, see page 70 of the PAIA Workshop Guide, pages 25 – 35 of the PAIA Resource Kit and pages 42 – 44 of PAIA Unpacked.**

## HOW TO APPEAL IF YOUR REQUEST HAS BEEN ACTIVELY REFUSED

**Checklist for making an internal appeal where there has been a decision from a public body that does not provide all the information that you requested:**

- Read the decision carefully and consider the reasons given for not providing the records requested**

**TIP:** If sections of PAIA are given in the decision, look the sections up in the PAIA legislation to see if you agree that the sections of PAIA used by the body really do mean that you should not be given the records you have requested.<sup>12</sup>

- Complete the internal appeal Form B explaining why you disagree with the decision and why you think that the records and information requested in your PAIA request should be given to you**

*You should be provided with a copy of Form B by the public body, if you ask for it. Alternatively you can download this form in a Microsoft Word format from SAHA's website (under the PAIA Resource Kit tab under the heading 'the PAIA forms').<sup>13</sup>*

**TIP:** The internal appeal form (Form B) should be sent to the information officer, or deputy information officer, (in other words: to the same person to whom you sent the request form). It is worth again checking the contact details of the information, or deputy information, officer before sending in the internal appeal form to them. The information officer must send your internal appeal form to the relevant authority within 10 days of receiving it.



**For more information about lodging an internal appeal, including how to complete the required internal appeal Form B, see Chapter 4 of the PAIA Workshop Guide, pages 25 - 35 of the PAIA Resource Kit and pages 42 - 44 of PAIA Unpacked.**

The words in the box below can be adapted and inserted, where they are relevant, into the 'grounds for appeal' section of internal appeal Form B

<sup>12</sup> PAIA is available online here: [http://www2.saflii.org/za/legis/consol\\_act.DEL/poatia2000366/](http://www2.saflii.org/za/legis/consol_act.DEL/poatia2000366/) and here: <http://www.justice.gov.za/legislation/acts/2000-002.pdf>.

<sup>13</sup> This section of the website is accessible here: [http://www.saha.org.za/publications/paia\\_resource\\_kit.htm](http://www.saha.org.za/publications/paia_resource_kit.htm).

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1. On *[insert the date you sent the PAIA request]*, *[insert the name of the person or organisation that made the PAIA request]* made a request for information under PAIA to *[insert the name of the public body]* ('the public body'). A copy of the request is attached to this appeal *[remember to attach a copy]*.
  2. By letter dated *[insert the date of the letter or email 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 decision letter is attached to this appeal.
  3. *[Insert the name of the person or organisation that made the PAIA request]* contests the refusal and submits this appeal.
  4. *[Insert grounds of appeal – consider the examples detailed in this guide below and amend and then insert any grounds of appeal that are relevant to the refusal you received from the public body.]*
  5. *[Insert the name of the person or organisation that made the PAIA request]* 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 a new decision, for the information officer's original decision.

### Reasons for refusing access to information

PAIA provides that if you request access to information, you must be given access to the records you request unless:

- Your request is to a private body and you have not explained, or not adequately explained, which right you would like to exercise or protect and why the information requested will assist you to exercise or protect that right; or
- One of the reasons described in PAIA that public and private bodies are allowed to use to refuse your request for access to information applies. These are usually called the '**grounds for refusal**', which means they are the reasons given for the refusal.



**For further information on the grounds for refusing access see pages 25 – 28 of the PAIA Workshop Guide and pages 30 – 41 of PAIA Unpacked.**

### Most common grounds for refusal claimed by public bodies

In the experience of SAHA and the Access to Information Network<sup>14</sup> (ATI Network) the most common ground for refusal of a PAIA request by public bodies is in terms of section 23 of PAIA (which is the same as section 55 of PAIA for a private body). In 2016 the ATI Network again reported that this was the most common ground for refusal of requests made by ATI Network members that year. This section provides that a request can be refused on the basis that reasonable efforts were made to find the record requested, but the body believes that the record(s):

- (i) are in its possession, but cannot be found; or
- (ii) do not exist.

The second most common ground for refusal of records reported by the ATI Network in 2016, was that the body was required to protect commercial information of a third party (section 36 for public bodies, which is similar to section 64 for private bodies). This has some overlap with the third most common ground for refusal relied on by public bodies, being on the grounds of protecting confidential information of a third party found at section 37 of PAIA (which is similar to section 65 for a private body).

<sup>14</sup> The PAIA Civil Society Network, established in 2009 and renamed the Access to Information Network in 2016, is an umbrella body of organisations working to advance the right of access to information in South Africa. In 2016 those organisations included the Centre for Applied Legal Studies (CALs), the Centre for Environmental Rights (CER), Corruption Watch, the Khulumani Support Group (KSG), the Public Service Accountability Monitor (PSAM), Equal Education Law Centre (EELC), amaBhungane Centre for Investigative Journalism, the Right2Know Campaign, the WITS Justice Project, Oxpeckers, the Open Democracy Advice Centre (ODAC) and the South African History Archive (SAHA).

The next most frequently used grounds to refuse documents were:

- (i) safety of individuals, and protection of property (section 38 for public bodies, which is similar to section 66 for private bodies). This has some overlap with refusal on the grounds that it contains personal information (section 34 for public bodies, which is the same as section 63 for private bodies);
- (ii) operation of a public body (section 44 of PAIA); and
- (iii) were requested in a manifestly frivolous or vexatious way (which refers to clearly 'silly' requests or requests that are only intended to waste time and resources), or if complying with the request will cause a substantial and unreasonable diversion of resources (section 45 of PAIA, there is no similar provision for private bodies).

### Other grounds for refusal

Some of the other, less common, grounds for refusal of a PAIA request are set out below:

- (i) the records requested are records of the South African Revenue Service (SARS) (section 35 of PAIA);
- (ii) the records requested are police dockets in bail proceedings or refusal is necessary to ensure protection of law enforcement and legal proceedings (sections 39 and 40 of PAIA for public bodies, which is similar to section 67 of PAIA for private bodies);
- (iii) giving access to the requested records will endanger the defence, security or international relations of South Africa (section 41 of PAIA),
- (iv) giving access to the requested records will endanger the economic interests or financial welfare of South Africa (section 42 of PAIA), and
- (v) the records requested consist of certain kinds of research information (section 43 of PAIA for public bodies, which is similar to section 69 of PAIA for private bodies).

### How to appeal common grounds for refusal

The most common grounds for refusal of a PAIA request are set out in detail below, with examples of grounds of appeal that you may be able to use to challenge each of these grounds for refusal when preparing an internal appeal.

**IMPORTANT:** The grounds for appeal are examples only and you will need to read the particular reasons provided by the public body carefully for each of your requests so that you can make sure you are using the best grounds for appeal for your particular request.

### S23 – records cannot be found or do not exist

Often a public body will rely on section 23 of PAIA (which is the same as section 55 of PAIA for a private body) to refuse a request on the basis that they have made reasonable efforts to find the record but believe that the record(s):

- (i) while in their possession, cannot be found; or
- (ii) do not exist.

For example, a request made by SAHA was transferred to the Department of Mineral Resources (DMR) from the Department of Planning, Monitoring and Evaluation (DPME). The request was for records relating to *Operation Phakisa*, a project mentioned by the President in his 2016 State of the Nation Address, and specifically called, in that address, a PPP. The DMR denied SAHA's request, stating that, after having taken all reasonable steps to look for the records, they had determined that the records do not exist within their offices. The DMR also confirmed this in an affidavit.

Whenever a public or private body claims that they not have, or could not find, copies of records requested in terms of PAIA, they must confirm this in affidavit or affirmation. The affidavit or affirmation must explain what steps they took to look for the records and which persons inside their organisation assisted with the search.

**TIP:** If you are told by a public or private body that you cannot be given information (or records) because it does not exist or could not be found, and you are not also provided with an affidavit or affirmation

you should ask for one. You should do so even before you put in an internal appeal (in the case of a public body) or lay a complaint or lodge an appeal with a court of law (in the case of a private body). If you have the affidavit or affirmation you should read it carefully to see if there is any reason to argue that the public body may not have conducted proper searches for the records requests.

## Examples of grounds of appeal if information is refused on the basis that the RECORDS CANNOT BE FOUND OR DO NOT EXIST

### Records cannot be found

The information requested is expected to be located within the body at *[insert details of where you have seen / read about / heard the information is located]*.



Therefore, it does not appear reasonable to conclude that the information cannot be found under section 23(1)(b)(i) of PAIA. Further searches for the record are sought as part of this internal appeal.

### Records do not exist

The information requested is expected to be located within the body at *[insert details of where you have seen / read about / heard the information is located]*.



Therefore, it does not appear reasonable to conclude that the information does not exist under section 23(1)(b)(ii) of PAIA. Further searches for the record are sought as part of this internal appeal.

### Failure to provide affidavit or affirmation

The public body has failed to provide an affidavit or affirmation, as required by section 23(2) of PAIA. In particular, the public body has failed to set out all the steps taken to *[use the most relevant of the following statements to complete the sentence:]*



- search for the record in question.
- determine whether the record requested exists.
- determine where the record requested is.

An affidavit or affirmation setting out all relevant steps taken by the body to search for the *[record/ records]* is requested under this internal appeal, in accordance with section 23(2) of PAIA.

## S36 and S42 – protection of commercial information

Another common ground for refusal of records is that the body is required to protect commercial information of (i) a third party (section 36 for public bodies, which is similar to section 64 for private bodies) or (ii) the State or public body (section 42(3) for public bodies, which is similar to section 68 for private bodies). A third party is any other person or business, other than the body to which you submitted the request.

This ground of refusal can sometimes be claimed by the public body at the same time as they refuse records on the grounds of protecting confidential information of a third party by relying on section 37 of PAIA (which is similar to section 65 for a private body).

This ground for refusal might be used by public bodies that have considered entering into a PPP agreement, but did not actually conclude the agreement, when you ask for the “value for money report” that must be prepared during the application to National Treasury for project approval. In such a case the relevant public body might argue, for example, that the information requested, contains committee members analysis of bids in respect to business strategies, specifications, financial models and ideas furnished by bidders in confidence for the purpose of bidding. They might also argue, that the release

of such information may result in breaching the duty of confidence, owed to the third parties. This can be challenged on appeal and you will need to check if the refusal is valid.

### How can you check if a refusal is valid?

Access **must be** refused where the request is for information held by a public or private body about another person or business (known as a third party) and:

- there was a **legal agreement** with a third party that the information would be kept confidential and, additionally, releasing the information would cause the third party to suffer damages for which they would have a right to claim compensation in a court of law;
- the information was **given to a public body in confidence**, and if the body disclosed the information the third party may not provide them with similar confidential information in the future. This applies to requests to public bodies only;
- the information is about a **third party's trade secrets**;
- the information **is financial, commercial, scientific or technical information** about another person or business, and if the body discloses the information this is likely to cause commercial or financial harm to the third party; or
- release of the information could be expected to negatively impact **a third party's commercial negotiations or ability to compete in a commercial market**.

Access **may be** refused if the information requested is commercial information that is held by the public or private body:

- about the body's **own trade secrets, important financial, commercial, scientific or technical information**;
- in the form of a **copyright computer program**; or
- which, if released, can be expected to negatively impact **on the commercial negotiations or commercial competition of that body**.

These requirements (for the reliance on this ground for refusal) are set out in sections 36, 37 and 42(3) of PAIA in respect of public bodies and sections 64, 65 and 68 of PAIA in respect of private bodies.

### Exceptions to this ground for refusal

PAIA also sets out a number of circumstances in which public and private bodies should still provide you with access to requested records, even though they contain information that was initially considered confidential or commercial information. This is when:

- The **public interest override** applies (the public interest override is explained later in this guide);
- The confidential or commercial information is held by a public body, and is already **publicly available** (this applies to requests to public bodies only);
- The confidential or commercial information, held by a public body, is about a third party or a public body and the third party or public body **consents** to the public body's release of that information (this applies to requests to public bodies only);
- The commercial information, about a third party, is held by a private body and the third party **consents** to the private body's release of that information (this applies to requests to private bodies only); or
- The commercial information is held by a public or private body and relates to a test or investigation that reveals a **serious public safety or environmental risk**.

### Notice requirements

Where you request a record that contains commercial information about another person or business, the body will write to the third party and tell them about your request. That business or person can consent or object to the release of the record to you. If they consent to the release the record must be provided to you. If they object the body to which you submitted the request must still decide for themselves whether all the requirements for reliance on that ground are met.

Additionally, if a record held by a public body contains confidential information about another person or business, they will write to tell them about your request. This duty to notify a third party does not apply to records held by private bodies. Again, that third party can consent or object to the release of the record to you.



## EXAMPLE

You may have requested a record from the Department of Trade and Industry (DTI), or the private body partner in a PPP relationship with the DTI, which contains information of a third party that was subcontracted to provide a particular service related to the project. That information that was submitted by the third party may well contain sensitive commercial information about the third party's business. Before deciding whether to refuse your request, the DTI or the private body must contact the third party and ask if the third party consents to the release of the information or would like to raise objections for them to consider when deciding whether to release the information to you.

The body cannot deny your request just because another person or business objects to the release of the information. The body still needs to consider:

- Whether the record falls within the ground for refusal, and
- If it does, whether the records would show a failure to comply with the law or reveal a serious public safety or environmental risk and whether the public interest in disclosure of this failure or risk outweighs the harm of releasing the information. This is known as disclosure "in the public interest" and happens in terms of sections 46 and 70 of PAIA.

In considering whether to appeal a decision that denies you access to records on the basis that it is commercial or confidential information, a number of questions should be considered:

- Is the information already **publicly available**, for example on the public body or contractor's website? If so, is PAIA the easiest and cheapest way to obtain that information?
- Has the public body indicated its **reasons** why release of the commercial information requested would cause harm to the commercial or financial interests of the contractor? Has the public body considered that some time has gone by and the original bid information is no longer the contractor's current pricing? If the public body considers that the release of the commercial information would disadvantage the body or third party in bids or negotiations for other contracts, has the public body considered whether a total or final financial amount is able to be provided (see *Transnet Limited v SA Metal Machinery Pty Ltd* [2005] ZASCA 113)? If not, it is arguable that the information does not in fact constitute commercially sensitive information in that release of the information would not harm the competitive advantage of the third party.
- Has the public body indicated its **reasons** why release of the confidential information requested was within the grounds of refusal? Has the public body set out its reasoning as to whether release of the confidential information would cause the contractor:
  - Harm to their commercial or financial interests;
  - Disadvantage in (other) contract or other negotiations; or
  - Prejudice to their commercial competition?

If not, it is arguable that the release of the information related to the sub-contractor would not lead to a successful action for damages for a breach of confidentiality – access to the information should therefore not be refused (see *Transnet Limited v SA Metal Machinery Pty Ltd* [2005] ZASCA 113).

- Alternatively, did the public body consider whether the parts of the records that contain confidential or commercial information are able to be **severed** from (or separated from) the other information in the requested records? For example, can the information that relates to the sub-contractor be provided, with just information that can cause the sub-contractor financial harm (such as a very current pricing schedule) omitted?

## Examples of grounds of appeal if information is refused on the basis that the **RECORDS CONTAIN COMMERCIAL INFORMATION**

### Publicly available information about a person or business (known as a third party)



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

Therefore, access to the information may not be refused by the public body under section 36(2)(a) of PAIA.

### Publicly available information about a public body



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

Therefore, access to the information may not be refused by the public body under section 42(5)(a) of PAIA.

### Failure to provide adequate 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 reasons under PAIA for refusing access to the information – for example, would (i) reveal a trade secret of the body or a third party; (ii) cause harm to the commercial or financial interests of the body or a third party; or (iii) disadvantage the body or third party in contractual or other negotiations or commercial competition].*

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.

No justifiable basis has been provided to support a claim that the disclosure of the information would cause the relevant harm.

### Failure to apply the test for objection by a third party



The public body refused access to the information solely on the basis that the third party, whose commercial 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. Although 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 meets the criteria for the grounds of refusal in section 36(1) of PAIA. The public body has failed to do so, and has therefore unlawfully refused access to the information.

Furthermore, no justifiable basis has been provided to support a claim that the disclosure of the information falls within the grounds of refusal.

## Failure to apply the test for objection by a public body

The public body refused access to the information solely on the basis that another public body, whose commercial 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. Although section 49(1)(a) of PAIA requires that any representation made to the public body by another public body 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 meets the criteria for the grounds of refusal in section 42(3) of PAIA. The public body has failed to do so, and has therefore unlawfully refused access to the information.

Furthermore, no justifiable basis has been provided to support a claim that the disclosure of the information falls within the grounds of refusal.

## The commercial 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 commercial information and that can reasonably be severed from any part that does, so as to provide the requester with access to the part which does not contain commercial information.



The request is for records which relate substantially to *[insert a summary of nature / subject / content of record requested]*. Accordingly, any commercial information contained in those records is secondary to the main purpose of the document and must be able to be severed.

The public body is therefore required to sever the commercial information from the record (for example, by blacking out the confidential information) and release the remainder of the record.

## Examples of grounds of appeal if information is refused on the basis that the RECORD CONTAINS CONFIDENTIAL INFORMATION

### Publicly available information

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



Therefore, access to the information may not be refused by a public body under section 37(2)(a) of PAIA.

### Failure to provide adequate 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 – for example would (i) lead to a successful action for damages for a breach of confidentiality of a third party; or (ii) prejudice the future supply of confidential information by a third party (in circumstances where accessing similar confidential information from the third party in the future would be in the public interest)]*.



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.

No justifiable basis has been provided to support a claim that the disclosure of the information would cause the relevant harm.

### Failure to apply the test for objection by a third party



The public body refused access to the information solely on the basis that the third party, 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. Although 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 meets the criteria for the grounds of refusal in section 37(1) of PAIA. The public body has failed to do so, and has therefore unlawfully refused access to the information.

Furthermore, no justifiable basis has been provided to support a claim that the disclosure of the information falls within the grounds of refusal.

### The 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, if it 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 is for records which relate substantially to *[insert a summary of nature / subject / content of record requested]*. Accordingly, any confidential information contained in those records is secondary to the main purpose of the document and must be able to be severed.

The public body is therefore required to sever the confidential information from the record (for example, by blacking out the confidential information) and release the remainder of the record.

### S44 - Operations of a public body

Another frequently used ground to refuse access to records is section 44 of PAIA, which allows for refusal of access to certain kinds of information about the operations of a public body. This section allows for the refusal of access to information that was specifically obtained in order to assist the public body with making a policy or taking a decision, but only if that policy has not yet been finalised or the decision not yet taken.



**For more information on the applicability of section 44 please see pages 37 – 38 of PAIA Unpacked.**



### EXAMPLE

A request for a feasibility study in terms of National Treasury Regulation 16.4.2 could be denied on the grounds that the record contains communications, opinions and recommendations between different departments which are confidential and could compromise the internal functioning of the public body. Provided a decision on whether to proceed to enter into the relevant PPP agreement has not yet been taken.

## [PAIA S44] LOOKING AT THE LAW

According to section 44 of PAIA, the information officer of a public body may refuse a request for access to a record of the body if:

- The record contains an opinion, advice, report or recommendation the public body obtained, or prepared, in order to help them make a policy or take a decision;
- The record contains an account of a discussion, consultation or deliberation (such as the minutes of a meeting) which was held to help make a policy or take a decision;
- Release of the record could reasonably be expected to frustrate the discussion and decision making process in a public body or between public bodies; or
- The record requested relates to a policy of the public body and its disclosure at that time would be premature and could reasonably be expected to frustrate the success of that policy.

### Exceptions to ground for refusal

PAIA sets out a number of circumstances in which public bodies should still provide you with access to requested records, even if section 44 would otherwise apply to the record. These are when:

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



### EXAMPLE

You may have read in the newspaper that the National Department of Basic Education (DBE) was considering opening up a tender process in order to enter into a PPP with a private body, which would need to provide meals at public schools. A PAIA request could be made to the DBE for records that contain information about what issues are being considered in order to decide whether to enter into such a PPP agreement. The DBE might however refuse access, arguing that the information is a record of ongoing internal discussions between its finance and operational teams, aimed at determining whether to take the decision to open up the tender process or not; and as the decision has not yet been taken, the release of the information could negatively impact on the DBE's ability to take the decision.

In considering whether to appeal a decision that denies you information on the basis that it is information about the operations of a public body, a number of questions should be considered:

- Is the information already **publicly available**, for example is information about the ongoing internal discussions between the DBE's finance and operational teams already contained in the DBE's annual report? If so, is PAIA the easiest and cheapest way to obtain that information?
- Has a **final decision** been made about all, or part, of the subject of the PAIA request (such as a policy or project)? If so, can you provide documents or statements from people to explain why you understand a final decision has been made?
- Has the public body indicated its **reasons** why release of all records would (i) discourage the formulation of policy or decision making; (ii) get in the way of open communication or deliberations; (iii) cause difficulties for success of a policy through premature disclosure; (iv) risk the effectiveness of a testing or auditing procedure or method used by the body; (v) breach an express or implied promise regarding confidentiality; or (vi) is a draft document? Do you consider that actions or involvement by you or another person or NGO at this stage will improve the success of the project? If so, why?
- Alternatively, did the public body consider whether the parts of the records that are still in draft and not finalised, are able to be **severed** (by blacking out the information that cannot be released) from the issues in the documents that have been finalised?

## Examples of grounds of appeal if information is refused on the basis that the **RECORD CONTAINS INFORMATION ABOUT THE OPERATIONS OF A PUBLIC BODY**

### Publicly available information



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

Therefore, the frustration of deliberative processes and success of policies contemplated by section 44(1)(b) of PAIA cannot be expected to arise from the release of the record.

### Final decision has been taken



A final decision on the subject matter of the PAIA request has been made *[insert details of where you have seen/read about/heard the decision has been made – attach any documents that state that the decision has been taken].*

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.

Accordingly, the frustration of deliberative processes and success of policies contemplated by section 44(1)(b) of PAIA cannot be expected to arise from the release of the record. Additionally, the record can no longer be considered preliminary, working or draft records under section 44(2)(c) of PAIA.

### 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 terms of section 44(3) of PAIA, access to the information may not be refused under section 44(1) of PAIA.

### 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 under section 5 of the Promotion of Administrative Justice Act, 2000.

Therefore, in terms of section 44(4) of PAIA, access to the information may not be refused under sections 44(1) or (2) of PAIA.

## Failure to provide adequate 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 – for example it would (i) frustrate the formulation of policy or decision making; (ii) inhibit candid communication, discussion or deliberation; (iii) frustrate the success of a policy through premature disclosure; (iv) jeopardise the effectiveness of a testing or auditing procedure or method used by the body; (v) breach an express or implied promise regarding confidentiality; or (vi) is a draft document]*.

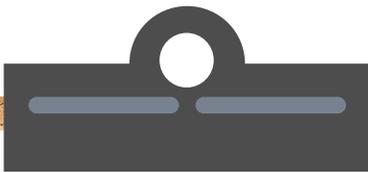
In accordance with section 81(3) of PAIA the public body carries the burden of establishing that the refusal is made in accordance with the ground contained in the Act. Accordingly, the public body must establish that the disclosure of the information would cause the relevant harm.

No justifiable basis has been provided to support a claim that the disclosure of the information would cause the relevant harm.

## Section 45 – manifestly frivolous, vexatious or a substantial and unreasonable diversion of resources

At times a public body will rely on section 45 of PAIA to refuse records on the basis that:

- (i) The request is manifestly frivolous or vexatious; or
- (ii) The work involved in processing the request would substantially and unreasonably divert the resources of the public body.



### EXAMPLE

For example, you might wish to request every single record relating to the PPP project that commenced 12 years ago. You might specifically be interested in communication about the project. But, if you asked for every single email, letter, facsimile or other record of communication that related, either directly or indirectly, to the project, it could be argued that complying with your request would amount to a substantial and unreasonable diversion of the public body's resources. Depending on specifics, such as the number of people that would have been involved in such communication, you might well be able to challenge a decision not to give you access by reason of a substantial and unreasonable diversion of resources.

In relation to claims that the resources involved in responding to the PAIA request are unreasonable, it is suggested that you consider whether you can put in a new request, narrowing the request description. You could narrow the request description by, for example, asking for records related only to a particular date or period, or a specific place or person. If you have asked for a number of different records, you could also consider putting in multiple PAIA requests that ask for one record each.

In relation to claims that the request is frivolous or vexatious, you will need to carefully read the reasoning in the decision by the public body. If no reasons are provided you will need to ask for the reasons why the request has been regarded as frivolous or vexatious. While you are not required to give reasons for your request to a public body, you may want to explain to the public body why it was reasonable to request the records requested.



## Examples of grounds of appeal if information is refused on the basis that **THE REQUEST IS FRIVOLOUS / VEXATIOUS OR AN UNREASONABLE USE OF RESOURCES**

### **Request is manifestly frivolous or vexatious**



The request for information is a reasonable request *[insert details of why the request is reasonable – noting you do not have to explain your reasons for requesting the records, but you can give those reasons if you are happy to do so]*.

Therefore, it does not appear reasonable to conclude that the request was frivolous or vexatious under section 45(a) of PAIA. Further consideration of the request is sought as part of this internal appeal.

### **Request would substantially and unreasonable divert resources of the public body**



The information request is seeking access to *[insert greater detail of what records were sought under the request]* which is not a large request for a public body of the size of the Requestee.

Therefore, it does not appear unreasonable to conclude that the information could be easily identified and provided, contrary to the claim that this is a substantial and unreasonable diversion of the public body's resources under section 45(b) of PAIA. Further searches for the record are sought as part of this internal appeal.

### **Failure to provide adequate 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 *[(i) is manifestly frivolous or vexatious or (ii) would substantially and unreasonable divert resources of the public body]*.

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 provide reasons as to why this request comes within section 45 of PAIA.

## **S38 and S34 – HARM TO A PERSON OR PROPERTY AND PERSONAL INFORMATION**

A less common, but sometimes used, ground for refusal of access is that the release of the information is denied because of the need to protect people or property in accordance with section 38 for public bodies (which is similar to section 66 for private bodies).

This ground of appeal has some overlap with a public body refusing records on the grounds of protecting personal information in accordance with section 34 of PAIA (which is similar to section 63 of PAIA for a private body).

## PROTECTION OF PEOPLE OR PROPERTY

### How to test whether a refusal is valid

Section 38 of PAIA in respect of public bodies, and section 66 in respect of private bodies, states that access to a record must be refused if the release of the record could reasonably be expected to endanger the life or physical safety of an individual.

Access may be refused if the requested information is held by the public or private body and its disclosure would be likely to prejudice or impair:

- The security of:
  - a building, structure or system (including computer or communications systems)
  - a means of transport; or
  - any other property.
- Methods, systems, plans or procedures for the protection of:
  - a person in a witness protection scheme;
  - the safety of the public or part of the public; or
  - the security of a building, structure, system, means of transport or other property.

## PERSONAL INFORMATION

### How to test if a refusal is valid

According to section 34 of PAIA in respect of public bodies, and section 63 of PAIA in respect of private bodies, access must be refused if the release of a record would involve the unreasonable disclosure of personal information about another person. Importantly, PAIA specifically says that information about a person who has been dead for more than 20 years is not considered 'personal information' for the purposes of PAIA.

### Exceptions to ground for refusal

PAIA sets out a number of circumstances where the body should still provide you with access to the records you request even though they contain personal information about someone else:

- 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 or next of kin (for example, husband or wife) 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 later in this guide).

### Notice requirements

If 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 to object to the release of the record to you. If they consent, you must be given access to the record. If they object the body cannot deny your request just because they have objected, it must still decide whether the disclosure would be unreasonable.

In considering whether to appeal a decision that denies you access to information on the basis that it is personal information, a number of questions should be considered:

- Is the information already publicly available, for example on the Department's website? If so, is PAIA the easiest and cheapest way to obtain that information?
- Is the information 'personal information' as defined by PAIA? If so, is it unreasonable to disclose that personal information?
- Did the body consider whether the parts of the records that contain personal information are able to be severed from the other information in the requested records?

## Examples of grounds of appeal where information is refused on the basis that the RECORD CONTAINS INFORMATION RELEVANT TO THE PROTECTION OF A PERSON OR PROPERTY

### Publicly available information about person or property



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

Given that the information has not lead to harm to the *[select the relevant option and delete the other option:]*

person to date, it is unreasonable to expect that the release of the information would endanger the life or physical safety of an individual under section 38 of PAIA.

*[- OR -]*

property to date, it is therefore unlikely that the release of the information would lead to any prejudice or impairment under section 38 of PAIA.

### Failure by public body to provide adequate 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 – for example would (i) endanger the life or physical safety of an individual; or (ii) prejudice or impair the security of a building or means of transport or other property; or (iii) prejudice or impair the plans for the protection of a person in witness protection, the public, or a building or means of transport or other property].*

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.

No justifiable basis has been provided to support a claim that the disclosure of the information would cause the relevant harm.

### The information about the person or property 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 the information that might be necessary to ensure the protection of a person or property, where that information can reasonably be severed from any part that is necessary for such protection, so as to provide the requester with access to the part which does not contain that information.

The request is for records which relate substantially to *[insert a summary of nature / subject / content of record requested]*. Accordingly, any information that potentially could lead to the harm of a person or property, which is contained in those records is secondary to the main purpose of the document and must be able to be severed.

The body is therefore required to sever the information that cannot be released, due to the need to protect people or property, from the record (for example, by blacking out that information) and release the remainder of the record.

## Examples of grounds of appeal where information is refused on the basis that the **RECORD CONTAINS PERSONAL INFORMATION**

### Publicly available information in request to public body

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



Therefore, access to the information may not be refused by the public body under section 34(1)(c) of PAIA.

### Record is more than 20 years old

The record is about a person that has been dead for more than 20 years before the date of the request. *[Insert detail about how you know the person is deceased, as well as the date of their passing. Remember, you may have to attach proof in the form of a death certificate, obituary or newspaper article].*



Therefore, access to the information may not be refused, as the information is not 'personal information' under the definition of 'personal information' in section 1 of PAIA.

### Failure to provide adequate 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 unreasonably disclose personal information under PAIA.



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 unreasonably disclose personal information.

No justifiable basis has been provided to support a claim that the disclosure of the information would be unreasonable in all of the circumstances.

### Failure to apply the test for objection by a third party

The public body refused access to the information solely on the basis that the third party, objected to the release of the record. PAIA does not allow the public body to refuse access on this basis. Although 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 meets the criteria for the grounds of refusal in section 34 of PAIA. The public body has failed to do so, and has therefore unlawfully refused access to the information.

Furthermore, no justifiable basis has been provided to support a claim that the disclosure of the information falls within the grounds of refusal.

## 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 is for records which relate substantially to *[insert a summary of nature / subject / 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.

The public body is therefore required to sever the personal information from the record (for example, by blacking out the personal information) and release the remainder of the record.

## The public interest override

The public interest override is a very important part of PAIA because it says that there are certain kinds of information – such as evidence of corruption or threats to public safety – that the South African public has the right to know *even if one or more of the grounds for refusal would ordinarily apply*.

### How to check whether the PUBLIC INTEREST OVERRIDE may apply

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

- 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 set out in section 46 of PAIA in respect of public bodies and section 70 of PAIA in respect of private bodies.



## CASE STUDIES

### **CASE STUDY ONE: Getting the full picture – what kinds of PPPs are in existence, and which ones did not make the grade?**

In order to determine what kinds of PPP relationships exist in South Africa, SAHA visited the National Treasury's Government Technical Advisory Centre's (GTAC) website. We quickly realised that the published list of PPPs was out of date. Our first PAIA request was therefore submitted to National Treasury, as the overseer – by law – of PPPs, in order to obtain a complete list of registered PPPs. National Treasury responded to our request by releasing a record that listed the active PPPs as well as those that are registered and at various stages of the approval process. From this list we could see that there are 25 active PPPs and that these relate primarily to infrastructure development within various sectors such as transportation, health and education. Some went further than infrastructure development to include the management of the development for a time period subsequent to the completion of the development as part of the PPP agreement.

The list appeared incomplete and did not square up with some PPPs that have been reported on in the media, for example the E-education project. The E-education project aimed to transform the method of learning and teaching through information and communication technologies. SAHA made a PAIA request to the Department of Basic Education (DBE) for all records related to the project and these were released, in full, to SAHA. From the released records we were able to determine that the project did not however pass the feasibility test and was therefore discontinued. It was therefore, despite reports in the media, not an active PPP.

According to National Treasury guidelines on PPPs every PPP should be registered with National Treasury and will have the following lifecycle:

- **Phase 1 (inception)** – the phase during which the project is registered and a project officer and transaction adviser appointed.
- **Phase 2 (feasibility study)** – the phase during which, amongst other things, needs analysis and value assessment must be done. At the end of this stage all relevant documentation must be sent to Treasury for approval, before further steps can be taken.
- **Phase 3 (procurement)** – the phase during which:
  - The procurement process is created, in line with principles of fairness, equitability and transparency. The procurement process needs to be approved by Treasury, before further steps can be taken.
  - (Once the procurement process is approved) the call for proposals is advertised, bids received in response to the call are compared with each other and with the feasibility study and a preferred bidder is selected. A 'value for money report' must then be completed and submitted to Treasury for approval, before further steps can be taken.
  - Negotiations with the preferred bidder take place in order to come up with the terms of the PPP agreement. This agreement must be submitted to Treasury and can only be signed once Treasury has approved the agreement.
- **Phase 4 (development)** – the phase during which outputs are measured and monitored and performance regulated.
- **Phase 5 (delivery)** – the phase during which progress is reported, in the annual report.
- **Phase 6 (exit)** – the phase during which the project is scrutinised by the Auditor General.



## CASE STUDY TWO: Understanding how PPPs relate to delivery of basic education

The PAIA request to the DBE in the first case study formed part of 12 requests that were submitted to key players in the education sector – including private players – that are party to a PPP project. These requests were submitted in relation to projects that were presented as PPPs, irrespective of whether they were actually registered as PPPs with Treasury or not. The reason we included PPPs that are not registered (in violation of Treasury Regulation 16)<sup>15</sup> with Treasury, was two-fold. Firstly, we wanted to identify collaborations that are inconsistent with the regulatory framework for PPPs. Secondly we wanted to find out whether these collaborations, that are inconsistent with the regulatory framework, were nevertheless keeping records that would enable the public to hold them to account. Specifically we were looking to see whether records, such as feasibility studies and annual reports, that constitute minimum record creating obligations within the regulatory framework for PPPs, were being created, kept and made accessible under PAIA. The responses to these requests made for interesting observations.<sup>16</sup>

The 12 requests were all submitted using a Form A (the prescribed form used when submitting a request to a public body) irrespective of whether the request went to a public or private body.<sup>17</sup> The reason Form A was used, even for bodies that fall within the definition of ‘private body’ in section 1 of PAIA, was because of the nature of the operations to which the records related. National Treasury Regulation 16 defines a PPP as being a partnership within which a private party performs an institutional / municipal function on behalf of a public body.<sup>18</sup> Thus by entering into a PPP agreement the private body is undertaking to perform a public function on behalf of the relevant public body, every record related to the PPP is therefore a record related to a public function. This is important to know because section 8 of PAIA says that a private body must, for the purposes of making a PAIA request, be treated as a public body, if the records requested related to a public function performed or a public power exercised by that private body.

Five of the 12 requests were responded to with decisions to release, in full, all records requested. One of the requests was responded to with a decision to release only some of the records requested. Three requests were denied in full, with the reason for refusal provided being that the records do not exist (that is to say that, the refusal was in terms of section 23 of PAIA). On the remaining three requests no decisions were provided at all. PAIA provides that if no decision is provided within 30 days of submission of the request (or a further extended period, to a maximum of 30 additional days), every part of the request is deemed to have been refused. Such a deemed refusal can then be challenged with an internal appeal.<sup>19</sup> SAHA challenged all three deemed refusals with internal appeals. Disappointingly the appeals were also not responded to and are therefore also deemed to have been refused (PAIA provides a maximum of 30 days, that cannot be extended at all, for the provision of a decision on an internal appeal). The departments that were guilty of “double deeming” SAHA’s request (that means: failing to provide a decision on either the request or the appeal) were the Gauteng, Free State and KwaZulu-Natal provincial governments’ Departments of Education.

Some of these requests to key players in the education sector were for records related to the *School Capacity and Innovation Programme* (SCIP). With the requests related to SCIP we saw the beginning of a trend of refusing PAIA requests based on the fact that the project is not a PPP that is registered with Treasury, despite the project being hailed publicly as a PPP.<sup>20</sup> Four of the twelve requests were

<sup>15</sup> Issued in terms of the Public Finance Management Act, 1999.

<sup>16</sup> See SAHA’s PAIA Tracker © at <http://foip.saha.org.za/requestee/entry/kwazulu-natal-department-of-education> for an example of the requests submitted to the KZN Department of Basic Education.

<sup>17</sup> Section 18(1) of PAIA.

<sup>18</sup> See <http://www.ppp.gov.za/Pages/whatisppp.aspx>.

<sup>19</sup> For more information on the internal appeal see pages 13 – 15 above.

<sup>20</sup> See SAHA’s PAIA Tracker © at [http://foip.saha.org.za/request\\_tracker/search/search&keywords=School+Capacity+and+Innovation+Programme+/](http://foip.saha.org.za/request_tracker/search/search&keywords=School+Capacity+and+Innovation+Programme+/) for a closer look at these requests.



related to SCIP. Three of those four requests went to private bodies, including the Elma Foundation and Siyababula SiyaKhula. All three private bodies denied access to the requested records on the grounds that the project is not registered as a PPP with National Treasury. This is worrying, as PPPs are often held up – particularly by the state – as solutions to a number of socio-economic issues faced by South Africa. Acts, such as Public Finance Management Act, 1999 and the Municipal Finance Management Act, 2003 as well as Regulations relating to them, demand that PPP projects should be registered with Treasury. National Treasury Regulation 16 further requires that certain information, in relation to any PPP, must be recorded and stored. If the project is not a PPP (that is, if it does not meet the legislative definition of a PPP) and is not accordingly registered as such, it should never be referred to as one, as the referral automatically creates transparency and accountability expectations which the relevant private and public sector institutions cannot necessarily meet if they are not a registered PPP. Despite the refusal by the private sector counterparts, the DBE did provide SAHA with a detailed explanation as to why SCIP was not a PPP, but rather a ‘bi-lateral agreement’, entered into between the United States Agency for International Development and the DBE.

### **CASE STUDY THREE: PPPs and service delivery – as referred to in the President’s annual State of the Nation Address**

The responses to the SCIP requests prompted SAHA to start requesting records related to projects purported to be PPPs but that were not registered with Treasury in accordance with Treasury Regulation 16. In his 2016 State of the Nation Address (SONA), President Jacob Zuma specifically named *Operation Phakisa*, the *Sovereign Innovation Fund*, and *Ketlaphela* as PPPs. As these projects were very clearly being, very publicly, held up as PPPs and yet not listed as such with Treasury (according to the list released to us under Case Study One above) we decided to submit requests for records related to these projects.

In doing some background research about these three projects, prior to the submission of our PAIA requests, we learnt that there are quite a few rolling sub-projects related to each. We therefore made sure that our request description included a request for the “most recent list of projects irrespective of the stage of implementation those projects are at”. We wanted to make sure that we not only determine whether the record-keeping obligations in National Treasury Regulations were complied with, with respect to these projects, but also, that we identified any sub-projects that were actually registered with National Treasury.

The first two PAIA requests, for information about the *Ketlaphela* project and the *Sovereign Innovation Fund* project, were submitted to the Department of Science and Technology (DST) as the initiator of these projects. Unfortunately the DST is deemed to have refused our requests as it did not provide any decisions, nor even acknowledge receipt of these PAIA requests. The internal appeals against the deemed refusals were also ignored and are also deemed refused.

The third and fourth requests, for information relating to *Phakisa* project, were submitted to the Department of Planning, Monitoring and Evaluation (DPME) and Transnet (SOC) Ltd. The DPME also failed to provide a decision on SAHA’s request. When SAHA submitted an internal appeal against this deemed refusal the DPME transferred the request. The decision was to transfer every part of the request to more than one other public body, in terms of section 20 of PAIA. The transfer at that late stage was technically incorrect, as section 20 of PAIA requires that a transfer take place within the first 14 days after a request is received. SAHA could not appeal the decision to transfer as PAIA makes no provision for appealing against a decision to transfer. A further problematic issue raised by the DPME’s transfer decision was its indication that it was not in possession of any of the records sought as it is merely a ‘supervisory department’. This is rather problematic as one would expect that any state department tasked with supervision of service delivery projects would be in possession of key records related to those projects. The DPME’s decision to transfer revealed that there were actually a number of sub-projects being implemented under the project *Phakisa*.



The departments to which the DPME transferred the request (the transferees) were the Department of Environmental Affairs (DEA), the Department of Basic Education (DBE), the Department of Health (DOH) and the Department of Mineral Resources (DMR).

The DEA transferred the request, in part, to Transnet (for records relating to a sub-project being supervised by Transnet). With respect to the remainder of the request the DEA released all the requested records to SAHA. By the time this transfer took place SAHA had already obtained a decision to grant access in part from Transnet on the request submitted directly to it.

The DOH in their decision letter stressed that the sub-project of *Phakisa*, which they were responsible for (*Ideal Clinic*) was not a PPP, given that, it was funded directly from their allocated budget, and no private parties were involved. For that reason, DOH refused the request (relying on section 23 of PAIA in doing so) noting that the records requested, as records related to a PPP, did not exist.

The DMR also refused the request, also on the basis of the fact that they did not have the records requested and also relying section 23 of PAIA. PAIA requires that whenever a request is refused on the basis of section 23 (that is to say, because the records requested do not exist or cannot be found) an affidavit or affirmation must also be provided confirming that the records could not be found or do not exist and confirming the steps taken to search for the records. Several months after providing their decision, and after several follow-ups from SAHA, the DMR finally provided SAHA with a section 23 affidavit detailing the steps taken to try to locate the records in question. Their affidavit further affirmed that the records in question *were in possession of the DPME*. Subsequently SAHA wrote to the DPME explaining that the DMR has essentially rejected their transfer and requested that the DPME provide SAHA with the records or alternatively with a decision in terms of section 23 of PAIA. SAHA eventually received a section 23 affidavit from the information officer of the DPME who advised that the records do not exist because *Mining Phakisa* (the project falling under the umbrella of project *Phakisa* for which the DMR would be responsible) was not approved by Cabinet. The affidavit further illustrated that compliance with National Treasury Regulations in the implementation of *Mining Phakisa* will only commence once the project has been approved by Cabinet and it has been launched by the relevant department, being the DMR.

The DBE denied SAHA's request, citing section 44(1) of PAIA, as the reason for refusal. Section 44(1) essentially provides that access can be denied to records created to assist with the formulation of a policy, or with taking a decision in the exercise of a power or performance of a duty that is conferred by law. This section is discussed in more detail above.

Lastly, the Transnet request. Transnet acknowledged receipt of SAHA's PAIA request, which had identical wording to that submitted to DPME, and simultaneously gave notice of extension of time for the provision of a decision, in terms of section 26(1) of PAIA. Later on Transnet reverted to SAHA with a decision to release part of the requested records, while refusing access to the remainder of the requested records. In its decision letter, Transnet, similar to DBE, relied on section 44(1)(b)(i) of PAIA in its refusal of access to certain of the requested records. Refusal in terms of section 44 is not mandatory, in other words, while an information officer is entitled to refuse access to information falling within the scope of this section they need to do so and can still allow access. Basically, the section allows for the refusal of access to requested records if the disclosure of that information is likely to frustrate the deliberative process in a public body or between public bodies (this section is discussed in more detail above). SAHA was partially satisfied with the outcome of the request as the released record sufficiently addressed most questions regarding the Treasury registration and the types of procurement records which were generated and used. Amongst the released records was a PPP management plan.

It is therefore evident from the records that were released in terms of these PAIA requests that these projects function as PPPs despite not being registered with Treasury. The records also demonstrated



that the National Treasury guidelines were regularly used to manage the various sub-projects under *Operation Phakisa*, even though these sub-projects were not registered PPPs. While there was, largely, compliance with the record-creation and record-keeping obligations set in the National Treasury Regulations, these projects, as they are not registered PPPs, are not actually bound by all of the record-creation and record-keeping obligations that registered PPPs have to comply with. This is problematic as there seems to be projects that are PPPs (in the sense that they are agreements between public and private parties allowing use of public property or collection of public funds in exchange for the performance of a public function) and that should therefore, in line with National Treasury Regulations, be registered as such. These projects are clearly regarded as PPPs by all parties involved, as they are publicly called PPPs and National Treasury Regulations are to a large extent used as a guide in their management. However, there seems to be no push by Treasury to enforce its Regulations and ensure that these projects, which are in fact PPPs, are properly registered as such. This encourages a dual system where registered PPPs are required to closely follow Treasury Regulations where as non-registered PPPs are at liberty to loosely follow the Regulations, more as a guide, and therefore to make their own determinations around record-keeping.

#### **CASE STUDY FOUR: Pioneering PPP and consortiums**

Before the enactment of the National Treasury Regulations, Cabinet approved an inter-departmental task team to draft policy that would enable a successful PPP environment in South Africa. As part of the preliminary investigations into the regulation of PPPs, there were case studies done on a select number of 'Pioneering PPP projects,'<sup>21</sup> which included, amongst others, the Department of Correctional Services partnering with the private sector to construct and manage two maximum security prisons. Well known to South Africans is the privately controlled Mangaung Correctional Centre which is run by G4S, the multinational security conglomerate.<sup>22</sup>

##### **PPP Unit history**

In April 1997, the South African Cabinet approved the appointment of an inter-departmental task team to develop a package of policy, legislative and institutional reforms to create an enabling environment for PPPs. Pioneering PPP projects were undertaken between 1997 to 2000 by the SA National Roads Agency for the N3 and N4 toll roads; by the Departments of Public Works and Correctional Services for two maximum security prisons; by two municipalities for water services; and by SA National Parks for tourism concessions. Drawing early lessons from these projects and from international experience, a Strategic Framework for PPPs was endorsed by Cabinet in December 1999, and in April 2000, Treasury Regulations for PPPs were first issued in terms of the Public Finance Management Act (Act 1 of 1999). By mid-2000, with technical assistance funding from USAID, GTZ and DIFID, the PPP Unit was established in National Treasury with five professional staff drawn from both the public and private sectors.

Image: Extract from National Treasury website.

The concern was that if these Pioneering PPP projects were commissioned before National Treasury Regulations were issued, what sort of regulatory framework was governing them? Also, were they registered with Treasury, and do they have to follow the same reporting requirements as registered PPP projects? In order to get answers to these questions SAHA submitted PAIA requests to the Department of Correctional Services (DCS) and G4S in relation to the management of Mangaung Correctional Centre. In these PAIA requests SAHA asked for copies of records related to the procurement process, and also for copies of the draft PPP agreements as well as the final, signed, PPP agreement.

<sup>21</sup> See Treasury website at <http://www.ppp.gov.za/Pages/About.aspx>.

<sup>22</sup> See G4S report on the Mangaung Correctional Centre at <http://www.g4s.com/~media/Files/South%20Africa/G4S%20Case%20Study%20-%20Manguang.ashx>.



Disappointingly, yet pessimistically expected, the DCS did not respond to SAHA's PAIA request, nor to SAHA's internal appeal against the deemed refusal, delivering up yet another double deemed refusal.<sup>23</sup> The engagement with G4S however, shed light on the status of consortiums, Treasury Regulations and PAIA.

G4S, despite explicitly stating that they are managing the Mangaung Correctional Centre in a published report on their website,<sup>24</sup> at first claimed that they have not been party to any contract with the DCS. This position changed when their legal department got involved. Instead of claiming, as they had done at first, that they could not comply with SAHA's request because no contractual relationship existed between G4S and DCS (and by implication that records related to such a relationship would not exist), the legal department denied they could even consider the request. This, they argued, was because SAHA had submitted the request on a Form A (the form used to request information from a public body or from a private body deemed to be public in relation to a record that relates to a public function) rather than a Form C (the form used to request information from a private body) and, as G4S was a private and not a public body, SAHA had failed to comply with the provisions of PAIA. SAHA wrote to G4S explaining that while it is not a public body by definition, G4S is, in accordance with the provisions of section 8 of PAIA, to be treated as one in relation to information requests related to their management of the Mangaung Correctional Centre. G4S responded to this claim by informing SAHA that the consortium 'Bloemfontein Correctional Contracts (Pty) Ltd' – and not G4S – is the party contracted with DCS to provide management services at Mangaung Correctional Centre. G4S is part of the consortium but relied on the fact that it did not directly enter into the PPP agreement with the DCS to refuse to process the PAIA request. Their reasons for refusing access to the requested information therefore shifted from the records not existing, because G4S is not a party to the contract in relation to which we had requested information, to there being non-compliance with PAIA (in that the request was made on Form A and not Form C), and then back to an amended version of the original position: that is, that they were not directly a party to the PPP contract (and therefore by implication, that they do not hold the records requested).

This presented SAHA with a major difficulty because almost all the registered PPP projects are projects implemented in terms of agreements between a department and a consortium created by a group of sub-contracting companies (many of whom were not even cited in the list provided to SAHA by Treasury under the request discussed in Case Study One, above). This is problematic considering:

1. It is unclear from the information available from Treasury who the sub-contractors are, due to the fact that the bid is awarded to the consortium in its name and not the names of the sub-contracting parties; and
2. Save for one or two consortiums, there is often no registered address, nor any working telephone or fax numbers, website or email address through which a PAIA request for information can be submitted to the consortium.

These problems are exasperated by the fact that there is general non-compliance, by all consortiums, with the statutory requirements in PAIA, requiring the compilation and publication of a PAIA manual setting out information required for the submission of a PAIA request to that body. All in all the relationship between the bid winning consortium, the government institution and the sub-contracting companies is murky at the very least, as it appears to be used (willingly or unwillingly we cannot tell for sure) to avoid accountability and has the effect of blocking access to information.

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<sup>23</sup> See SAHA's Requestee page, available at: <http://foip.saha.org.za/requestee/entry/departement-of-correctional-services> for more detail on DCS' overall performance with regards to PAIA compliance.

<sup>24</sup> At the time of writing up this publication the original record has been removed from G4S website (perhaps in part because of correspondence related to this PAIA request), however a copy of the publication can be viewed at <http://docplayer.net/23919355-The-inside-story-best-people-case-study-mangaung-correctional-centre-south-africa.html>.



In order to test this issue further requests were submitted to a random selection of consortiums listed as such in the Treasury list (provided to SAHA in response to the request discussed in Case Study One above). Requests were therefore submitted to Imbumba Aganang Consortium, Rainprop Consortium, Impilo Consortium and Netcare Consortium as well as to each of the contracting government departments. Again the problem of locating contact details for bid consortiums hamstrung SAHA's attempts to access information: we could not, for instance, find direct contact details for Impilo Consortium. SAHA did however manage to find the details of what appears to be the primary sub-contracting party of Impilo Consortium, Vindula Holdings, and submitted the PAIA request to them. Unfortunately Vindula Holdings failed to respond at all to SAHA's PAIA request, and is therefore deemed to have refused the request. The silver lining was that the Kwa-Zulu Natal (KZN) Department of Health (the department that had entered into the PPP agreement with the Impilo Consortium) responded to SAHA's request by granting part access to the requested records. The records released were extensive and contained details of the entire project.

In the case of the requests to the Imbumba Aganang Consortium and the Rainprop Consortium SAHA received almost identical decision letters which in summary, made two key assertions. The first assertion was that, in both instances, the relevant consortiums did not hold the requested records. Firstly, in relation to procurement no such records were held as the consortiums were not involved in the procurement process, it was stated that procurement is exclusively a government function. Secondly, in relation to the draft PPP agreements these were not held by the consortiums as the consortiums were only formed once the PPP had been entered into. This completely ignored the fact that SAHA's request was for, not only draft versions of the agreement, but a copy of the final version of the PPP agreement. The second key assertion was that, in both instances, the relevant consortiums were, by definition, private and not public bodies hence the requests were not submitted in compliance with PAIA, in so far as they were submitted on Form A and not Form C. SAHA wrote to both consortiums pointing out, in response to the first assertion, that, by their own account, these consortiums were party to the final PPP agreement hence they should provide SAHA at least with that record, even if they do not have the draft copies. SAHA further pointed out that, in so far as they did not hold some of the records, PAIA required of them to confirm this in an affidavit or affirmation in which they need to note all steps taken to confirm that the relevant records either do not exist or could not be found. As far as the second assertion, SAHA advised both consortiums that the functions they perform in terms of the PPP agreements are, by virtue of the fact that they are performed in terms of a PPP, public functions. As a result section 8 of PAIA applies to all records related to the PPP and records related to functions performed in terms of the PPP, the consortiums are therefore public bodies in relation to the records SAHA requested and as such SAHA was correct to have submitted the requests using the Form A. SAHA received a further response, from Rainprop Consortium only. In this response Rainprop conceded that they are performing a public function in performing functions in terms of the PPP agreement. However, they took the view that the records SAHA was seeking access to related to the procurement phase of the project, and that, at that time, they were not performing a public function, hence they still cannot provide any of the requested records. It became clear that without taking further legal action SAHA was not going to receive any records from either consortium, neither were we going to receive affidavits in relation to the records the consortiums claimed not to hold. Unfortunately further legal action was not viable at that stage and the matter could not be pursued further in relation to the two consortiums; the records would instead therefore be sought from the Department of Trade and Industry (DTI) and the Department of International Relations and Cooperation (DIRCO) that had contracted with the consortiums. The DTI and DIRCO granted partial access to the records after determining that full access would compromise confidentiality agreements with Rainprop and Imbumba Aganang. These reasons were not challenged by SAHA owing to resource constraints. It is clear however that should the legislature fail to address the gaps in the law, avoidance measures such as those demonstrated through these responses will have to be challenged in court.



The Netcare Consortium further confirmed our suspicion that consortiums are used as a means of avoiding transparency in terms of PAIA. Our PAIA request to the Netcare Consortium was submitted to Netcare Limited, as – once again – no registered address could be found for the Netcare Consortium. Netcare Limited responded to our request for information claiming that that “there is no ‘Netcare consortium’ business entity at all and as such the ‘Netcare consortium’ (the existences of which we deny), would not have the legal standing to enter into any contract whatsoever”. Their response further underscores that there is an urgent need for clear regulation regarding consortiums’ legal liability, as well as the record-creation, record-keeping and disclosure obligations of members of consortiums in every instance where a company or other entity enters a PPP agreement as part of a consortium.



## SCHEDULE – HELPFUL CONTACT DETAILS

### PPP OVERSIGHT BODIES:

#### **GTAC, Government Technical Advisory Centre**

240 Madiba Street  
Pretoria  
Email: [info@gtac.gov.za](mailto:info@gtac.gov.za)  
Website: <https://www.gtac.gov.za/>

#### **National Treasury**

16th Floor  
240 Vermeulen street (Cnr Andries & Vermeulen Street)  
Pretoria  
Telephone: (012) 315 5176 / 5525 / 5869

### ACCESS TO INFORMATION OVERSIGHT BODIES:

#### **Information Regulator**

SALU Building  
316 Thabo Sehume Street  
Pretoria  
Email: [info@justice.gov.za](mailto:info@justice.gov.za)  
Telephone: (012) 406 4818  
Website: [www.justice.gov.za/info@reg/](http://www.justice.gov.za/info@reg/)

#### **South African Human Rights Commission**

Braampark Forum 3  
33 Hoofd Street  
Braamfontein  
Email:  
Telephone: (011) 877 3600  
Website: [www.sahrc.org.za/](http://www.sahrc.org.za/)

This guide seeks to assist the public with requesting information, using section 8 of PAIA, in the context of public-private partnerships. This is done by providing a process checklist, which outlines the PAIA request process with respect to private companies exercising public functions, and examples and case studies from SAHA's experience.



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