

PAIA OVERVIEW AND DEVELOPMENTS

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**INFORMATION
REGULATOR
(SOUTH AFRICA)**

*Ensuring protection of your personal information
and effective access to information*

TOPICS

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INTRODUCTION



Introduction (cont...)

The Constitution of the Republic of South Africa, 1996 (“Constitution”) states that South Africa is a sovereign and democratic state that is founded on the advancement of human rights and an accountable, responsive and transparent system of governance as part of its values.

Before South Africa became a constitutional democracy with an enforceable Bill of Rights, the system of Government in South Africa amongst others, resulted in a secretive and unresponsive culture in both public and private bodies which often led to the abuse of power and human rights violations.

Introduction (cont...)

It is in this regard that section 32(1) of the Bill of Rights in the Constitution, provides for the right of access to information held by the state; and any information held by another person that is required for the exercise or protection of any rights. Section 32(2) of the Constitution in turn provides for the enactment of national legislation that will give effect to this right, by respecting, protecting, promoting and fulfilling this right.

The Promotion of Access to Information Act, No. 2 of 2000 (PAIA), as amended, is the national legislation which was enacted in accordance with the above-mentioned section 32(2) of the constitution.

Introduction

PAIA was amended by of section 110 of POPIA, in terms of which the Information Regulator has taken over the PAIA functions, effective from 30 June 2021.

PAIA was also amended in 2019, in terms of which a political party is included in the definition of a private body, which effectively means that the leader of the political party or any person duly authorised by that leader is an information officer or head of private body. The PAIA amendment Act of 2019 now extends the right of access to any records of the political party. In terms of 2019 amendments, the private funding of political parties and independent candidates must be recorded, preserved and made available as prescribed.

THE OBJECTS OF PAIA



The Objects of PAIA

The objects of PAIA are-

- to give effect to the constitutional right of access to any information held by the State and any information that is held by another person and that is required for the exercise or protection of any rights.
- to give effect to the right of access to information, subject to justifiable limitations, and in a way which helps balance all the other rights contained in the Constitution.
- to promote a human rights culture and social justice for people, the public and the private sector.

The Objects of PAIA

The additional objects of PAIA are-

- to establish voluntary and mandatory mechanisms or procedures to give effect to the right of access to information in a manner which enables persons to obtain access to records of public and private bodies as swiftly, inexpensively and effortlessly as reasonably possible; and
- to promote transparency, accountability and effective governance of all institutions (both public and private) by empowering people to understand their access to information rights, act on them, and both scrutinise, and engage with, decision-making that affects them.

APPLICATION OF PAIA



Application of PAIA

- PAIA applies to a record of a public and private body, regardless of when the record came into existence.
- PAIA applies to the exclusion of any provision of other legislation that prohibits or restricts the disclosure of a record of a public or private body and is materially inconsistent with an object, or a specific provision of PAIA.
- PAIA does not apply to a record requested for the purpose of criminal or civil proceedings, if another law provides for the disclosure of the said record in those proceedings.

Application of PAIA

- PAIA does not apply to a record-
 - of the Cabinet and its committees;
 - relating to the judicial functions of a court, Special Tribunal (SIU Tribunal) and judicial officer of such court or Special Tribunal;
 - of an individual member of Parliament or of a provincial legislature in that capacity;
 - regarding the nomination, selection or appointment of a judicial officer or any other person by the Judicial Service Commission in terms of any law.

POWERS, DUTIES, AND FUNCTIONS OF THE INFORMATION REGULATOR

Function and Duties of the Information Regulator

The Regulator has a very important role in relation to PAIA and its functions include, to:

- promote timely and effective dissemination of accurate information by public and private bodies about their activities;
- assist any person wishing to exercise a right contemplated in PAIA, where reasonably possible to do so;
- monitor the implementation of PAIA by public and private bodies;
- investigate complaints;
- act, where appropriate, as a conciliator in relation to such complaint;

Powers of the Information Regulator (cont...)

The information Regulator has powers to-

- Issue an Information Notice, requiring the information officer or head of a private body to furnish the Information Regulator with the information specified in the notice.
- refer the complaint to the Enforcement Committee;
- Issue an Enforcement Notice, upon receipt of the recommendation of the Enforcement Committee.

WHO ARE INFORMATION OFFICERS

Who are Information Officers (cont...)

Nature of the Body	Identity of Information Officer	
Public Body, Department or Organ of State (as defined in section 239 of the Constitution)	National Department or Provincial Government Components	Director-General or the person who is acting as such.
	Presidency or a National Government Component	Director-General or the person who is acting as such.
	Provincial Department or a Provincial Government Component	Head of Department or the person who is acting as such.
	Office of a Premier or a Provincial Government Component	Director-General or the person who is acting as such.
	Municipality	Municipal Manager or the person who is acting as such.
	Public Institutions	Chief Executive Officer or the person who is acting as such.

Who are Information Officers

Private Body	Natural Person	A natural person who carries on any trade, business or profession, but only in such capacity or any person duly authorised by that natural person.
	Political Party	Leader of a Political Party or or any person duly authorised by that officer.
	Partnership	Any partner of the partnership or any person duly authorised by the partnership.
	Juristic Person	Chief Executive Officer or the Managing Director or equivalent officer of the juristic person or any person duly authorised by that officer or any person who is acting as such or any person duly authorised by such acting person; NB- only an employee can be authorised as IO.

OBLIGATIONS OF INFORMATION OFFICER

Obligations of Information Officer (cont...)

- An Information Officer must ensure that a Manual is developed, monitored, maintained (section 14 and 51 of PAIA) and made available as follows-
 - on the web site, **if any**, of the body;
 - at the head office of the body for public inspection during normal business hours;
 - to any person upon request and upon the payment of a reasonable amount; and
 - to the Information Regulator upon request. *NB- Please note that you do not have to submit your Manual to the Regulator.*

Obligations of Information Officer

NB: section 14 and 51 of PAIA requires the information officer or head of a body to compile a PAIA Manual. This means that each body, within a group, must have its own Manual.

- The Information Officer of a Public Body must render such reasonable assistance, free of charge, as is necessary to enable the requester to complete the request for access to information Form.

GROUNDS OF REFUSAL OF ACCESS

Grounds of refusal of access (cont...)

- PAIA provides a list of reasons or grounds of refusal for access to records. There are mandatory grounds of refusal and discretionary grounds of refusal of access to records.
- Mandatory grounds are those that a body is compelled to refuse access and discretionary grounds are those that a body may decide to grant or refuse access.
- Please note that a request for access can *only* be refused on the basis of any of the listed grounds for refusal of access to records.

DISCLOSURE IN PUBLIC INTEREST

Disclosure in public interest (Section 46 and 70 of PAIA)

Despite the existence of the grounds of refusal of access to records (with the exception of SARS records) the information officer of a body is compelled to grant access to a record, if-

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

COMPLAINTS TO THE INFORMATION REGULATOR



Complaints to the Information Regulator

A requester or third party may only submit a complaint to the Regulator after that requester or third party has exhausted the internal appeal procedure against a decision of the Information Officer of a national, provincial or local sphere of government.

This means that one can only submit a complaint, against a particular sphere of government to the Regulator if one is not happy with the decision of the appeal authority. Please note that the Regulator will reject the complaint if an appeal process to the relevant sphere of government has not been completed or if the matter is pending before the Court.

Complaints to the Information Regulator (Against Public Body)

In accordance with section 78(1) of PAIA, a requester or a third party has two options, either to refer a decision, to the Regulator or the Court.

Whilst one is not compelled to approach the Regulator before approaching the Court, it is advisable that one should consider approaching the Regulator, as the Regulator has extensive and quick dispute resolution mechanisms, as opposed to the Court.

A complaint to the Regulator by a requester or third party must be lodged within **180 days** of receipt of the decision from the body.

Complaints to the Information Regulator

A requester or third party aggrieved by a decision of the head of a private body may submit a complaint to the Regulator, within 180 days of the decision compliant against.

A complaint to the Regulator must be made in writing and in the prescribed form. The compliant form will be uploaded at our website as soon as the Regulations are gazetted.

INVESTIGATION POWERS OF THE REGULATOR



Investigation powers of the Regulator (cont...)

- Summon and enforce the appearance of persons before the Regulator, compel any person to give evidence and to produce any records necessary to investigate the complaint, in the same manner and to the same extent as the High Court;
- enter and search any premises occupied by a public or private body after obtaining a warrant;
- search and seize, with a warrant, any equipment and any record which is subject of investigation;

Investigation powers of the Regulator

- conduct a private interview with any person in any premises entered; and
- carry out in those premises any inquiries that the Regulator sees fit.

OFFENCES AND PENALTIES

Offences, penalties and administrative fines (cont...)

Sections of PAIA	Nature of offence	Penalty
90(1)	A person who, with intent to deny a right of access in terms of this Act,- (a) destroys, damages or alters a record; (b) conceals a record; or (c) falsifies a record or makes a false record	A fine or imprisonment for a period not exceeding two (2) years.
90(2)	The Information Officer who wilfully or in a grossly negligent manner fails to comply with the provisions of section 14 of PAIA	A fine, or imprisonment for a period not exceeding two (2) years.
90(3)	The head of a private body who, wilfully or in a grossly negligent manner, fails to comply with the provisions of section 51 of PAIA	A fine, or imprisonment for a period not exceeding two (2) years.

Offences and penalties(cont...)

Sections of PAIA	Nature of offence	Penalty
77K	Non-compliance with an Enforcement Notice	A fine or imprisonment for a period not exceeding three (3) years or to both such a fine and such imprisonment.

OFFENCES UNDER REGULATION

16	An information officer who willfully or in a grossly negligent manner charges a fee other than the prescribed fee	A fine or to imprisonment for a period not exceeding two (2) years.
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CONCLUSION



Developments (cont...)

- Due to the significance of the legislative requirement for compiling the PAIA Manual, especially the amendment of section 51 of PAIA (which come into operation on 30 June 2021), in terms of which the scope of the information that the manual must cover has been widened to include matters relating POPIA, private bodies will no longer be exempted from the obligation to compile a PAIA Manual.
- Therefore from, **1st January 2022**, every private and public body will be required to have their PAIA Manual and make them available as prescribed.

Developments

- The Regulator is in the process of finalising the PAIA Manual Templates for Public and Private Bodies.
- Due to the delay in the publication of PAIA Regulations, the Regulator may not accept complaints, as a complaint form is prescribed in the Regulations.
- The Regulator will, before the end of this financial year, publish the procedures for making information electronically available.

THANK YOU

