

Advisory: Compliance with the Promotion of Access to Information Act (“PAIA”)

Applies to	All ISPA members
Summary	The Promotion of Access to Information Act or PAIA imposes obligations on South African entities to compile a manual, detailing information records which they hold and to consider requests for access to these records. PAIA is not specific to ISPs but applicable to all private and public bodies.
Last revised	May 2023
Disclaimer	Disclaimer: This advisory is provided for informational purposes only. Its purpose is to familiarise ISPA members with the main provisions of the Promotion of Access to Information Act 2 of 2000.

Contents

Overview	1
Introduction to the Act	2
Immediate Requirements:	2
Appointment of an Information Officer.....	2
Publication of a PAIA Manual.....	2
General Information.....	3
Access to Records.....	3
Grounds for Refusal	4
Non-compliance with the Act	4
Challenges facing Private Bodies.....	4

Overview

This Advisory consists of:

- An introduction to the Promotion of Access to Information Act 2 of 2000 (“PAIA”/“the Act”);
- A guide to the practical requirements of the Act;
- Useful general information on how the Act works in practice;
- A guide to drafting the required Section 51 or PAIA Manual (Annexure A); and
- A template Section 51 or PAIA Manual (Annexure B).

Commented [VS1]: Explanatory note:
Both the link to the Record Access forms and the current fees, are now provided in the body of the document.

Introduction to the Act

The Promotion of Access of Information Act 2 of 2022 (“PAIA”/“the Act”) gives effect to section 32 of the Constitution, which provides that everyone has the right to access any information held by the State or any information that is held by another person, where such information is required for the exercise or the protection of any rights.

The Act creates mechanisms to facilitate access to records held by public and private bodies irrespective of their size and the nature of their business.

To facilitate such access, the Act sets out various procedures to be followed by persons requesting information (called “Requesters”) and the “head”/delegated Information Officer of private bodies (referred to for convenience as the “Information Officer”).

Any person may request access, including an employee, the public, government or competitors.

The Act requires a Requester to be permitted access to information if:

- the information is needed for that person to protect or exercise any rights;
- the Requester has followed all the procedures laid down in the Act; and
- there is no “ground for refusal” (see below) which would allow such request to be refused.

Immediate Requirements:

Appointment of an Information Officer

Information officers are appointed automatically in terms of PAIA. What this means is that every public and private body has an information officer by default and no one is exempt.

In a private body, the person responsible for dealing with requests for information and facilitating such requests on behalf of that private body is the head of the private body.

Accordingly, for the following persons, the head will be:

- Individuals and sole traders: the individual or sole trader or any person authorised by them;
- Partnerships: any partner or other person authorised by the partnership to act as such;
- Corporations: the CEO or equivalent (e.g. managing member) or any person authorised by them.

Note that it makes sense to ensure that the same person in your organisation acts as the information officer for the purposes of both PAIA and the Protection of Personal Information Act 2013 (the “POPI Act”).

Publication of a PAIA Manual

From 1 January 2022 all public and private bodies must have a Promotion of Access to Information Manual (PAIA Manual”), which must contain, specific content dictated by the Act and also the POPI Act.

For the purposes of the Act, the manual must contain:

- details about the public or private body and its information officer;

- a description of the guide on how to use the Act, referred to in section 10 of the Act, and how to obtain access to it;
- a description of the subjects on which the private body holds records and the categories of records held on each subject, specified with sufficient detail to facilitate a request for access to a record;
- a description of the records of the body, which are available in accordance with any other legislation; and.
- sufficient detail to facilitate a request for access to a record of the body.

For the purposes of the POPI Act, the manual must contain:

- the purpose of the processing;
- a description of the categories of data subjects and of the information or categories of information relating thereto;
- the recipients or categories of recipients to whom the personal information may be supplied;
- planned transborder flows of personal information; and
- a general description allowing a preliminary assessment of the suitability of the information security measures to be implemented by the responsible party to ensure the confidentiality, integrity and availability of the information which is to be processed.

A copy of the manual need no longer be sent to the Human Rights Commission.

The manual of public and private bodies and any updates thereto, must be made available:

- on its website;
- at its head office for inspection during normal business hours;
- to any person on request and the payment of a reasonable amount; and
- to the information Regulator upon request.

General Information

Access to Records

A request for access to records must be made by a requester in the prescribed form, which is available for download at <https://info regulator.org.za/paia-forms/>.

Access must be granted if:

- the procedural requirements of the Act have been fulfilled by the Requester; and
- the records are required for the protection of or exercise of any rights; and
- the public or private body is not entitled to refuse access on any of the grounds set out in the Act.

Grounds for Refusal

Grounds on which access to a record must be refused are where the grant of such access:

- would amount to an unreasonable disclosure of personal information;
- is likely to harm the commercial interests of a third party;
- would result in a breach of duty of confidence owed to the third party, where the private body has entered into an agreement with such third party;
- would endanger the safety of an individual or the security of a building or a system;
- is a record which is privileged from production in legal proceedings;
- constitutes research information of a third party or a private body.

The Act provides for notifying third parties of the request and allows such third parties to intervene.

Notwithstanding the above grounds of refusal, the Act provides that if the information is of such a nature that it would be in the public interest that the information be disclosed and access to the information outweighs the harm that would arise as a result of granting access to the information it must be disclosed.

Once a Requester has exhausted all avenues of internal remedy within the organisation it may approach the Courts for an order to compel disclosure.

Non-compliance with the Act

No criminal or civil liability exists for anything done in good faith in the exercise or the performance of any power or duty in terms of the Act. However, the Act contains penal provisions for the intentional and fraudulent concealment or falsification of records and provides that a person acting in such a manner is guilty of an offence and liable for a fine or imprisonment for a period not exceeding two years.

Challenges facing Private Bodies

It is foreseeable that the Act may be used to obtain information in respect of, amongst other things, the following:

- discrimination, which may involve specific information in respect of political and other affiliations, race and gender inequality and specifically relating to salary disparity, employee benefits, recruitment, promotion and procurement;
- health and safety, specifically to obtain information relating to injuries or deaths of employees and other third parties, inquests or investigation into non-compliance with local and, inter alia, International Labour Organization conventions;
- land claims, including obtaining documentation pertinent to land ownership, acquisition of mineral rights and mineral leases;
- environmental issues, including pollution, irreparable harm or damage to soil and the environment, rehabilitation of mined areas and the impact of mining on communities;

- unfair competition pertaining to dominant market position, research and development and pricing; and
- financial and commercial information, which may include possible mergers and acquisitions as well as liquidity and management issues.

SHOULD YOU RECEIVE A REQUEST AND ARE UNSURE AS TO HOW TO RESPOND OR ARE UNCOMFORTABLE ABOUT RELEASING A RECORD THEN YOU ARE ADVISED TO OBTAIN SPECIFIC LEGAL ADVICE.

Annexure A – Guide to Drafting a Section 51 Manual

Updated May 2023

Compliance vs Best Practice

The majority of South African SMEs suffer from information overload. There are simply too many information records to keep track of and this is a major reason behind the failure of many small businesses to survive. Drafting a section 51 Manual for your business is an opportunity to organise your information. While listing your information assets and classifying them in terms of their importance is often a daunting task it is crucially important step in ensuring the effectiveness of your business.

While it is reasonably simple to follow the steps below and draft a Manual so as to comply with the Promotion of Access to Information Act, we suggest that it might be preferable to take a longer-term view on the reasons behind the need for a section 51 manual, and that you use the exercise as an opportunity to take control of your information.

Six steps to drafting a Promotion of Access to Information Act Manual

- 1) Copy the Section 51 Manual Template (Annexure B to this Advisory)
- 2) Download a request for access to records form at the <https://inforegulator.org.za/paia-forms/> and the table of fees at <https://www.justice.gov.za/legislation/notices/2021/20210827-gg45057gon757-PAIAregulations.pdf> (page 32) or <https://www.justice.gov.za/legislation/notices/2021/20210827-gg45057gon757-PAIAregulations.pdf> (page 32).
- 3) Go through the template and fill in the answers. Where the answers are not immediately apparent make a note of who you need to speak to in order to clarify these – usually your accountant can be of some assistance.
- 4) Go through your information records, especially those to do with management, employment and employees, and make sure that you have specified these.
- 5) Remember that just because a business record has been specified it does not mean that you will have to make this information available to anyone who requests it if there are valid reasons for not doing so.
- 6) Consider the personal information that you might process and list the following:
 - the purposes for which personal information is or may be processed;
 - the categories of data subjects whose personal information is or may be processed;
 - the types or categories of personal information that is or may be processed; and
 - the recipients or categories of recipients to whom personal information might be supplied.
- 7) Once you have completed a draft circulate a copy to all decision-makers in your business and ask if they have any comments.

8) Once you are satisfied that the manual is complete then:

- Place a copy on your web site. Create a link to it from the home page which is clearly noticeable to visitors to your site (preferably without the needs to scroll down on a page). You can call the link "Access to Information Manual" or "Section 51 Manual".
- Keep a hard copy at your head office and other major places of business – it must be available for inspection during ordinary office hours.

Annexure B – PAIA MANUAL TEMPLATE

Updated May 2023

You can download the template in the following formats:

- Annexure B: PAIA Manual Template (Word Document)
- Annexure B: PAIA Manual Template (PDF)
- Annexure B: PAIA Manual Template (Rich Text Format)
- Annexure B: PAIA Manual Template (Zip file of all 3 formats)

Commented [VS2]: Hyperlinks still to be inserted.