

**IN THE HIGH COURT OF SOUTH AFRICA
[GAUTENG LOCAL DIVISION, JOHANNESBURG]**

CASE NO: 36248/19

In the matter between:

ORGANISATION UNDOING TAX ABUSE NPC

Applicant

and:

**SERVICES SECTOR EDUCATION AND
TRAINING AUTHORITY**

First Respondent

GRAYSON REED CONSULTING (PTY) LTD

Second Respondent

FIRST RESPONDENT'S SUPPLEMENTARY HEADS OF ARGUMENT

INTRODUCTION

- 1.** By enacting PAIA the legislature envisioned and devised an inexpensive and uncomplicated procedure for requesting the record of a public body to which access is typically given via an administrative route.

- 2.** Therefore, a court application to secure access would be the exception rather than the norm.

- 3.** Moreover, PAIA exacts peremptory compliance with its procedural requirements in accordance with section 11. What is evident from the aforesaid section is that a requester is entitled to be given access to a record of a public body and the

obligation imposed on the requester is to comply with the procedural requirements in the Act, which are formulated in peremptory terms.¹

4. The default position is that access to records must be granted unless chapter 4 of PAIA provides one or more grounds for a refusal.² Put another way, ‘the disclosure of information is the rule and exemption from disclosure is the exception’.³ It has been held by the Constitutional Court that, ‘when access is sought to information in the possession of the State, then it must be readily availed’.⁴

REASON FOR THE PARTIAL REFUSAL TO GRANTS ACCESS TO RECORDS IN TERMS OF PAIA

5. It is pertinent to sketch the contours of Promotion of Access to Information Act, Act 2 of 2000 (“PAIA”) as it applies in this present matter. PAIA was enacted to give effect to section 32(1) of the Constitution⁵, which provides inter alia that ‘[e]veryone has the right of access to . . .any information held by the state’⁶. As such, the purpose is to promote transparency⁷.

¹ *President of the RSA and Others v M&G Media Ltd* 2012 (2) SA 50 (CC) at paragraph [9]

² Section 11(1) of PAIA reads:

‘(1) A requester must be given access to a record of a public body if—

(a) that requester complies with all the procedural requirements in this Act relating to a request for access to that record; and

(b) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part.’

³ *President of the RSA and Others v M&G Media Ltd supra* at paragraph [9]

⁴ *My Vote Counts NPC v Minister of Justice and Correctional Services and Another* [2018] ZACC 17; 2018 (5) SA 380 (CC) paragraph [23]

⁵ Constitution of the Republic of South Africa, 1996. The legislative mandate in section 32(2).

⁶ This is expressed in the preamble to PAIA

⁷ This is specifically stated in the preamble:

‘...AND IN ORDER TO—

* foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information;

6. A refusal to grant access to information constitutes a limitation of the right of access to information. It is for the public body to motivate a refusal and it has the onus in this regard⁸. As a result, the First Respondent made a case out that the refusal of access to the requested records is justified⁹. The designated Information Officer¹⁰ in the case of the First Respondent as a public body was required to deal with requests for information in terms of the provisions of PAIA.

7. In this present matter the records sought from the First Respondent contained information about a third party and in this regard the Second Respondent. Moreover, due to the fact that the Second Respondent was unaware of the request, its rights might have been affected if access is given without having made representations whether or not access should be granted. It is for this reason that PAIA has been carefully crafted to ensure that such a third party is given opportunities to be heard on the request for access to information. Furthermore, our common law requires that parties must be informed if a court order affecting them might be granted:

‘because orders granted without notice to affected parties are a departure from a fundamental principle of the administration of justice, namely, the *audi alteram partem*.’¹¹

* actively promote a society in which the people of South Africa have effective access to information to enable them to more fully exercise and protect all of their rights ...’

⁸ *President of the RSA v M&G Media (Ltd)* supra at paragraph [11]..

‘PAIA places limitations on the right of access to information. It does this by exempting certain information from disclosure. PAIA recognises, in its Preamble, that there are —reasonable and justifiable limitations on the right of access to information, even in an open and democratic society. Those limitations emerge from the exemptions to disclosure contained in Chapter 4 of the Act. The purpose of Chapter 4 is to protect from disclosure certain information that, if disclosed, could cause material harm’.

⁹ In terms of s 36 of the Constitution

¹⁰ Definition of ‘information officer’ in section 1 of PAIA.

¹¹ Per Cachalia JA in *Recycling and Economic Development Initiative of South Africa NPC v Minister of Environmental Affairs* [2019] ZASCA 1; 2019 (3) SA 251 (SCA) at paragraph [46].

Therefore, the *audi alteram partem principle* finds expression in sections 47 of PAIA.

8. The point of departure, in relation to the Second Respondent is section 47, headed ‘[n]otice to third parties’:

‘(1) The information officer of a public body considering a request for access to a record that might be a record contemplated in sections 34(1), 35(1), 36(1), 37(1) or 43(1) must take all reasonable steps to inform a third party to whom or which the record relates of the request. (2) The information officer must inform a third party in terms of subsection (1)—

- (a) as soon as reasonably possible, but in any event, within 21 days after that request is received or transferred; and
- (b) by the fastest means reasonably possible.

(3) When informing a third party in terms of subsection (1), the information officer must—

- (a) state that he or she is considering a request for access to a record that might be a record contemplated in sections 34(1), 35(1), 36(1), 37(1) or 43(1), as the case may be, and describe the content of the record;
- (b) furnish the name of the requester;
- (c) describe the provisions of sections 34(1), 35(1), 36(1), 37(1) or 43(1), as the case may be;
- (d) in any case where the information officer believes that the provisions of section 46 might apply, describe those provisions, specify which of the circumstances referred to in section 46(a) in the opinion of the information officer might apply and state the reasons why he or she is of the opinion that section 46 might apply; and
- (e) state that the third party may, within 21 days after the third party is informed—
 - 1. (i) make written or oral representations to the information officer why the request for access should be refused; or
 - 2. (ii) give written consent for the disclosure of the record to the requester.

(4) If a third party is not informed orally of a request for access in terms of subsection (1), the information officer must give a written notice stating the matters referred to in subsection (3) to the third party.'

9. This means that, when a request is received concerning a record which might fall under section 34(1), section 35(1), section 36(1), section 37(1), or section 43(1), the provisions of section 47 are triggered.

10. Accordingly, the First Respondent relied on section 44(1), (2) and section 36(1) in this matter. As a result of reliance on section 36(1) by the First Respondent, section 47 was therefore triggered. At this stage, it suffices to say that this means that the First Respondent took the view that the records concerned in terms of section 37(1) might contain:

1. (a) personal information whose disclosure would be unreasonable;
or
2. (b) commercial information whose disclosure may cause harm;
or
- (c) information supplied in confidence which might breach an agreed confidence or could prejudice the supply of similar information or information from the same source where the public interest requires similar information or information from the same source to be supplied in the future.

11. The Information Officer of the First Respondent firstly considered if the documents to which access was requested fell under the aforesaid sections. The threshold in

this regard is low, as denoted by the word 'might'. Thus, the First Respondent's Information Officer was of the view that the request for access to information received from the Applicant 'might' fall under section 34(1), section 35(1), section 36(1), section 37(1), or section 43(1), and as a result, the provisions of section 47 were triggered and specifically section 47(1) which required the Information Officer to 'take all reasonable steps to inform a third party to whom or which the record relates of the request'¹².

12. The notice given to the Second Respondent was in writing and it contained pertinent information, which included the right of the Second Respondent to consent or make representations on the request¹³. The Second Respondent made written representations supporting refusal to disclose the requested information by the Applicant within 21 days after being so notified. Therefore, partial consent was given by the Second Respondent and access to the partial records was thus not withheld¹⁴.

13. If a decision was made by the First Respondent to afford access to the Applicant despite representations to the contrary, notice should have been given to the Second Respondent who made representations and must state:

- '(a) adequate reasons for granting the request, including the provisions of this Act relied upon;
- (b) that the third party may lodge an internal appeal or an application, as the case may be, against the decision within 30 days after notice is given, and the procedure for lodging the internal appeal or application, as the case may be; and

¹² Section 47(1)

¹³ Section 47(3).

¹⁴ In terms of section 36(2)(b), and section 37(2)(b).

(c) that the requester will be given access to the record after the expiry of the applicable period contemplated in paragraph (b), unless such internal appeal or application with a court is lodged within that period.¹⁵

However, the aforesaid section 49(3) did not apply in the present case because the First Respondent considered the representations made by the Second Respondent and granted partial access to the request for information which was made by the Applicant.

14. It is explicitly clear from the above-mentioned provisions, that third parties have the right to be notified of a request, if reasonable steps taken by the Information Officer would achieve the purpose of the notification. A third party would thereafter have the right to make representations opposing disclosure or to consent thereto in writing. If consent is given, the Information Officer has no discretion to refuse access.

15. Even if a third party is not notified, they may make representations or so consent if they become aware of the request. If, despite representations to the contrary, the request is granted, any third party who made representations has the right to be notified of the outcome and of the right of internal appeal available to them. If that fails, the third party has the right to approach a court under s 78(3).¹⁶

¹⁵ Section 49(3).

¹⁶ The relevant parts of s 78(3) are:

'A third party—

(a) that has been unsuccessful in an internal appeal to the relevant authority of a public body;

(b) aggrieved by a decision of the information officer of a public body referred to in paragraph (b) of the definition of 'public body' in section 1 to grant a request for access ...

may, by way of an application, within 180 days apply to a court for appropriate relief in terms of section 82.'

16. If the third party acts timeously in taking all of the steps to oppose access under PAIA, the records are not to be released to the requester until the submissions have been considered and a decision made.¹⁷ This applies to the initial decision, to a decision on internal appeal, to the outcome of an application under s 78(2) and the determination of any appeal or appeals from the application. Finally, if a decision is made to refuse access, and the requester proceeds with an application to court to review that decision, rule 3(5)(a) promulgated under PAIA¹⁸ requires the Information Officer or head of the body to give notice of such application to the third party concerned and to attach a copy of the application papers.¹⁹ PAIA is thus astute to afford third parties the right to *audi alteram partem* at every point of the process. All of this stems from compliance by the Information Officer with section 47.

17. Decisions on requests to which section 47 applies can be made only under section 49(1) or section 49(2). This is of critical importance. The former provides:

'The information officer of a public body must, as soon as reasonably possible, but in any event within 30 days after every third party is informed as required by section 47—

- (a) decide, after giving due regard to any representations made by a third party in terms of section 48, whether to grant the request for access;

¹⁷ Section 21, which reads:

'If the information officer of a public body has received a request for access to a record of the body, that information officer must take the steps that are reasonably necessary to preserve the record, without deleting any information contained in it, until the information officer has notified the requester concerned of his or her decision in terms of section 25 and—

- (a) the periods for lodging an internal appeal, an application with a court or an appeal against a decision of that court have expired; or
- (b) that internal appeal, application or appeal against a decision of that court or other legal proceedings in connection with the request has been finally determined, whichever is the later.'

¹⁸ The Rules of Procedure for Application to Court in terms of the Promotion of Access to Information Act 2 of 2000 GN R965 in GG 32622 of 09-10-2009.

¹⁹ Rule 3(5)(a) has since been amended.

- (b) notify the third party so informed and a third party not informed in terms of section 47(1), but that made representations in terms of section 48 or is located before the decision is taken, of the decision; and
- (c) notify the requester of the decision and, if the requester stated, as contemplated in section 18(2)(e), that he or she wishes to be informed of the decision in any other manner, inform him or her in that manner if it is reasonably possible, and if the request is–
 - (i) granted, notify the requester in accordance with section 25(2); or (ii) refused, notify the requester in accordance with section 25(3).’

18. The action which sets in motion a decision under s 49(1) is thus the informing of a third party under section 47. This is why section 49(1) refers to a third party having been ‘informed as required by section 47’. Section 49(1) also allows a decision where the third party has not been informed but has ‘made representations in terms of section 48 or is located before the decision is taken’.²⁰ This is so that the *audi alteram partem principle* is applied if a record might fall within one of section 34(1), section 35(1), section 36(1), section 37(1) or section 43(1).

19. A decision made under section 49(1) requires one or both of two actions to have taken place:

- 1. (a) A third party must have been informed ‘as required by section 47’; or
- 2. (b) A third party, despite not having been so informed, must have nevertheless made representations.

If the third party has not been so informed and if no representations have been received, the provisions of section 49(1) do not apply and the Information Officer is not empowered to make any decision in terms of that section.

²⁰ Section 49(1)(b).

- 20.** Once third parties have been informed, there are three possible courses of action open to them. They may consent in writing, in which case access must be given. If they do not consent, they may make opposing representations which must be weighed before a decision is made. Finally, they may neither consent nor make representations. A decision can still be made by the Information Officer in this instance. This is made clear by section 49(1)(a), which provides for a decision ‘after giving due regard to any representations’.
- 21.** Under section 49(1), accordingly, a decision is required if either representations have been made or if none have been made after the third party has been informed. In other words, third parties do not have a power of veto over the decision of the Information Officer. Their representations must simply be given the weight that they deserve. The only veto in the hands of a third party is to take away the power of the Information Officer to make a decision by consenting in writing. When the third party consents in writing for access to the requested records to be provided, it therefore follows that Access to the records must then be given.
- 22.** PAIA recognises, however, that it may well not be possible to inform all third parties, despite taking reasonable steps to do so. A decision must still be made in those circumstances. As a result, section 49(2) was enacted:
- ‘If, after all reasonable steps have been taken as required by section 47(1), a third party is not informed of the request in question and the third party did not make any representations in terms of section 48, any decision whether to grant the request for access must be made with due regard to the fact that the third party did not have the opportunity to make representations in terms of section 48 why the request should be refused.’

The aforesaid, provides the one exception to the requirements in PAIA which provide for the *audi alteram partem rule*. Section 49(2) empowers an Information Officer to make a decision without the third party having had an opportunity to be heard. But the exception, as with all exceptions to the *audi alteram partem* principle, must be narrowly construed. The default position at common law and under PAIA is that, if a decision is to be made which affects the rights of a person, that person must be given an opportunity to be heard on the matter.

23. The exception allowed under s 49(2) thus arises only if:

1. (a) All reasonable steps were taken to notify a third party; and
2. (b) Despite such steps, the third party was not informed; and
3. (c) The third party did not make representations in terms of s 48.

Only if all three of these apply is an Information Officer empowered to make a decision under section 49(2). This exception applies only where it has not been possible to give effect to the *audi alteram partem rule* despite all reasonable steps having been taken to give notice. It clearly cannot and does not apply if the Information Officer has not taken all reasonable steps to inform the third party concerned.

THE PROTECTION OF CONFIDENTIAL INFORMATION

24. Tender submissions usually contain commercially sensitive information such as the details of the technical offer, intellectual property, price structures and other proprietary information of the bidders. Bidders who participate in the tender process do so with the expectation that the contents of their bids would remain confidential and would therefore not be disclosed to their competitors.

25. Thus, Court decisions appeared to have given weight to the protection of confidential information than the right of access to information. In ***SA Metal Machinery Co Ltd v Transnet Ltd***²¹, the court held that “[a]n unrestricted right of access to documents in possession of a public body can easily lead to abuse, especially where, as here, some of the information in the documents has been furnished by third parties in the reasonable expectation that outsiders or competitors will not have unrestricted access to such information.”
26. The restriction of access to information in cases where commercial harm could ensue is also recognised in the World Trade Organisation (“WTO’s”) Government Agreement on Procurement (“GPA”). Article 19(4) states that “*confidential information provided to any Party which could impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interest of particular enterprises, public or private, or might prejudice fair competition between suppliers shall not be revealed without the formal authorization from the party providing the information.*”
27. In terms of section 36(1) (b) of PAIA an organ of state could only refuse to provide financial, commercial or scientific information if the disclosure of such information was *likely* to cause harm to the commercial or financial or commercial interests of a third party.
28. In the present matter, the First Respondent acted under section 47. The Second Respondent was informed of the request and made representations under section

²¹ *Transnet Ltd and Another v SA Metal Machinery Co (Pty) Ltd* 2006 (6) SA 285 (SCA) at paragraph []

48(1)(a) and (b)²². Prior to any decision being made by the First Respondent, the Second Respondent was afforded the *audi alteram partem rights* contained in section 47 and accordingly that was the decision which the First Respondent was obliged to do before any competent decision was made.

29. As regards the Second Respondent, it explicitly stated in the written response to the First Respondent that access to the records concerned '[constitute] commercial information of the company as contemplated in section 36(1)(b)'. Thus accordingly, section 36(1)(b) provides:

'Subject to subsection (2), the information officer of a public body must refuse a request for access to a record of the body if the record contains—

...

(b) financial, commercial, scientific or technical information, other than trade secrets, of a third party, the disclosure of which would be likely to cause harm to the commercial or financial interests of that third party...'

Therefore, there was assertion that the disclosure of information by the First Respondent would likely to cause harm to the commercial or financial interests of the Second Respondent's company. As a result, it is clear that facts that support's the aforesaid assertion were present in the documentation so withheld.

²² Accordingly, section 48 state as follows -

- '(1) A third party that is informed in terms of section 47 (1) of a request for access, may, within 21 days after the third party has been informed-
- (a) make written or oral representations to the information officer concerned why the request should be refused; or
- (b) give written consent for the disclosure of the record to the requester concerned'.

CONCLUSION

30. The information requested by the Applicant comprised mostly of accounting and corporate documentation and the documents were supplied in confidence to the First Respondent.
31. Moreover, the information was supplied in confidence and there is an unequivocal assertion to this effect by the First Respondent. The aforesaid demonstrates that the refusal by the First Respondent arose from informed consent and the decision was not guided by mere speculation without enjoying any factual basis.
32. It is thus the submission of the First Respondent that, in the absence of a compelling public interest overriding its decision, the First Respondent was justified in refusing access to the requested information by the Applicant.

COSTS

33. The question of costs must now be considered. It is the First Respondent's submission that certain Access of the records was refused because other specific records were provided.
34. As a result, there was no blanket refusal by the First Respondent in order to withhold access to records and therefore does not supports a costs order being made against it.
35. Thus, the response by the First Respondent has not bordered on the obstructive because the First Respondent has in all material times supported the purpose of

PAIA in its outworking of the provisions of the Constitution to promote openness and transparency in government.

- 36.** The approach followed by the First Respondent was and is not redolent of the dark days of apartheid, where secrecy was routinely weaponised against a defenceless population and whistleblowers whose intention is to expose corruption in government. Therefore, based on the aforesaid the costs must therefore follow the result pursued by the Applicant and a cost order should be granted in favour of the First Respondent.

Signed electronically

Adv. Dineo Gomba

Counsel for the First Respondent

5th June 2021