



## FORM H

### ENFORCEMENT NOTICE

(In terms of section 77J of Promotion of Access to Information Act 2 of 2000, as amended)

REF NO:	CI 16/23
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To: Adv. Makhosini Msibi

E-mail: [REDACTED]

Dear Adv. Msibi

NAME OF COMPLAINANT	Organisation Undoing Tax Abuse ("OUTA")
NAME OF THE RESPONDENT (PUBLIC BODY)	The Road Traffic Management Corporation ("RTMC")

1. **BE PLEASED TO TAKE NOTICE** that the Information Regulator (Regulator), after having considered the report of the Enforcement Committee, hereby;

- 1.1 *Set aside the decision of the Information Officer of the public body to refuse access to the requested record, namely, "Copy of the RTMC internal document setting out the composition of the fees published in the RTMC Regulations on 14 January 2022" on the basis that the requested record falls within the grounds of refusal as contemplated in Chapter 4 Part 2 of Promotion of Access to Information Act 2 of 2000 (PAIA) and specifically in terms of section 44(1)(a)(ii), and*

- 1.2 *directs the Information Officer of the public body to grant the complainant access to: "Copy of the RTMC internal document setting out the composition of the fees published in the RTMC Regulations on 14 January 2022" and to disclose the said records to the complainant.*

## **2. REASONS FOR THE NOTICE**

- 2.1. The complainant in this matter is the Organisation Undoing Tax Abuse ("OUTA"). The complainant is a registered non-profit civil society organisation that focuses, inter alia, on transparency, good governance and accountability within government structures and state-owned entities. In these proceedings, the complainant is represented by Ms Stefanie Fick, in her capacity as Executive Director of the Accountability and Public Governance Division of the organisation.
- 2.2. The complaint relates to the refusal of access to a record held by a public body, namely, the Road Traffic Management Corporation ("RTMC"), established in terms of section 3 of the Road Traffic Management Corporation Act, Act 20 of 1999. The objectives of the RTMC are to provide, in the public interest, for co-operative and coordinated strategic planning, regulation, facilitation and law enforcement in respect of road traffic matters across national, provincial and local spheres of government.
- 2.3. The request was in relation to *"Copy of the RTMC internal documents setting out the composition of the fees published in the RTMC Regulations on 14 January 2022."*
- 2.4. The response by the public body was that access to the internal documents in terms of Section 44(2) of PAIA is refused, as the documents requested constitute a record that contains an account of consultation, discussions, or deliberations that have occurred for the purpose of assisting to take a decision in the exercise of a power conferred or imposed by law.
- 2.5. Subsequently, the public body made an admission that its reliance on section 44 (2) as a ground for refusal was misplaced and based its reliance for refusal on section 44(1)(a)(ii) of PAIA.

- 2.6. Section 44 (1)(a)(ii) provides that:
- 2.7. ***“Subject to subsections (3) and (4), the information officer of a public body may refuse a request for access to a record of the body-***
- (a) If the records contains-***
- (ii) an account of a consultation, discussion or deliberation that has occurred, including, but not limited to, minutes of a meeting”.***
- 2.8. Furthermore, the public body responded that the 2022 RTMC Regulations were, as required, published for public comments on two occasions in 2021 and that OUTA indeed provided its comments, which comments were duly considered by the National Department of Transport before the Regulations were finalised and came into force.
- 2.9. On 20 February 2023, the complainant lodged an internal appeal against the decision of the Deputy Information Officer to refuse access to the record *“Copy of the RTMC internal documents setting out the composition of the fees published in the RTMC Regulations on 14 January 2022”.*
- 2.10. In terms of section 74(1)(a) of PAIA, a complainant / requester may lodge an internal appeal against a decision of the Information Officer of a public body referred to in paragraph (a) of the definition of “public body” in section 1. A public body in terms of section 1 of PAIA is limited for purposes of an internal appeal and means – “(a) any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government.” The RTMC is excluded from the definition of “public body” for purposes of an internal appeal as it is not a national or provincial department or municipality. This committee notes that the Regulator did not disregard this and proceeded to consider the various submissions made during the internal appeal process.
- 2.11. In its internal appeal, the complainant contended that the public body’s refusal to grant access to the requested record referred to in paragraph 2.3. is unjustified and based on an arbitrary application of section 44(1) of PAIA. Further, that section 46 of PAIA placed an obligation on the public body to disclose the requested record as the “disclosure of the requested 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 that the public interest in the disclosure of the record clearly outweighs the harm contemplated in section 44(1) of PAIA.”

- 2.12. The complainant's reliance of section 46 is that, in its view, every decision of the public body has a direct or indirect effect on the public and every record produced as a result is produced in the execution of a public mandate and for the public interest. Put plainly, according to the complainant, the public body, in terms of section 46 of PAIA, is duty bound to disclose the record because it is in the interest of the public. In other words, section 46 of PAIA allows for a public interest override, and as such, disclosure of the requested record therefore becomes mandatory. If this interpretation is correct, it would mean that the onus would shift to the complainant to demonstrate that the disclosure of the requested record would reveal evidence of a substantial contravention or failure to comply with the law or an imminent and serious public safety or environmental risk. The complainant failed to specify whether it relied on sections 46(a)(i) and (ii) or 46(b). In any event, section 46 expressly operates after it has been decided that a record may legitimately be withheld under, inter alia, sections 44(1)(a) and (b). These provisions are part of Chapter 4 of PAIA, which deals with the grounds upon which it is permissible to refuse access to a record.
- 2.13. On 24 March 2023, and in response to the internal appeal lodged by the complainant, the Chief Executive Officer ("the CEO") of the public body confirmed the decision to refuse access to the requested record, based on section 44(1)(a)(ii) of PAIA. The CEO of the public body further explained that the requested record informed, inter alia, the rationale for and the ultimate promulgation of the Road Traffic Management Corporation Regulations of 2022, by the Minister of Transport.
- 2.14. The CEO of the public body interprets the complainant's grounds as set out in its internal appeal also to mean that the complainant relies on section 46(b) of PAIA as the complainant did not make any allegations or provide any information as to whether 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. In terms of section 46(b) of PAIA, and despite any grounds of refusal, the Information Officer of a public body must grant access to a record if the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question. The CEO of the public body correctly points out that the complainant's reliance on section 46 attracts the onus of demonstrating that the disclosure sought, would reveal evidence of a crime or public safety risk. Obviously, the onus would be on the complainant.

- 2.15. The central issue in this matter is the public body's refusal to grant the complainant access to the requested record on the basis that the requested record falls within the scope of section 44(1)(a)(ii) of PAIA.
- 2.16. It was against this backdrop that a formal complaint was lodged with the Regulator on 26 April 2023, in terms of section 77A of PAIA, against the decision of the Information Officer of the public body to refuse access to the aforesaid record based on section 44(1)(a)(ii) of PAIA.

**A SYNOPSIS OF THE REASONS FURNISHED BY THE PUBLIC BODY FOR ITS RELIANCE ON SECTION 44(1)(a)(ii) AS A GROUND FOR REFUSAL.**

- 2.17. In its initial response to the complainant's request, the public body presented the following reasons:

***"The Corporation hereby withholds access to the internal documents in terms of Section 44(2) of PAIA, as the documents requested constitutes a record that contains an account of consultation, discussions, or deliberations that has occurred for the purpose of assisting to take a decision in the exercise of a power conferred or imposed by law."***

- 2.18. The public body went further and explained that:

***"The Corporation wishes to remind OUTA that the 2022 RTMC Regulations were, as required, published for public comment on two occasions in 2021 and that OUTA indeed provided its comments, which comments were duly considered by the National Department of Transport before the Regulations were finalised and came into force."***

- 2.19. As indicated herein above, the complainant's reliance on section 46 which formed part of its internal appeal request is misplaced and will not be considered for purposes of examining the public body's response to the internal appeal. The complainant indicated in the prescribed form, Form 4, that the internal appeal was lodged against the public body's "Refusal of request for access".
- 2.20. It must be highlighted that one of the jurisdictional requirements to establish authority for an investigation by the Regulator, is the public body's refusal to grant access to the requested record. The public body confirmed its decision to refuse access to the requested record in its letter of 24 March 2023.
- 2.21. The assessment of the public body's response to the internal appeal will therefore be restricted to its submissions and reasons furnished in relation to section 44(1)(a)(ii) as a ground for its refusal of the requested record. The reasons for refusal can be summarised as follows:
- 2.21.1. Access to the requested record was refused as the record or information contained an account of consultation, discussions, or deliberations that has occurred for the purpose of assisting to take a decision in the exercise of a power conferred or imposed by law.
- 2.21.2. The requested record informed amongst others, the rationale for and the ultimate making of the Road Traffic management Corporation Regulations of 2022 by the Minister of Transport.
- 2.21.3. What the public body did in its response to the internal appeal was basically to recite the provisions of section 44(1)(a)(ii).

**Did the complainant comply with the procedural requirements prescribed in PAIA, relating to the request for access to the record held by the public body.**

- 2.22. The Regulator is satisfied that the complainant has complied with the procedural requirements of PAIA, and that it, has jurisdiction to investigate the complaint. In this regard:
- 2.22.1. The applicable PAIA request form, Form 2, was duly submitted to the Information Officer of the public body, in accordance with section 18(1) of PAIA.

- 2.22.2. The Information Officer of the public body made a decision to refuse access to the record based on section 44(1)(a)(ii) of PAIA and duly notified the complainant of such a decision.
- 2.22.3. The complainant lodged an internal appeal in terms of section 75 of PAIA and submitted the prescribed form, Form 4, within 60 days of the decision.
- 2.22.4. The internal appeal was dismissed by the Information Officer of the public body.
- 2.22.5. The complainant has exhausted all internal processes.
- 2.22.6. The complainant did not apply to Court for appropriate relief regarding the matter under investigation.
- 2.22.7. The complaint was lodged with the Regulator on the prescribed form, Form 5 of Annexure A to the PAIA Regulations and
- 2.22.8. The complaint was lodged with the Regulator within the prescribed period of one hundred and eighty (180) days.

**Did the Information Officer of the public body correctly refuse access to the requested records in terms of any grounds contemplated in terms of Chapter 4 of Part 2 of PAIA.**

- 2.23. The Information Officer of the public body refused access to the record on the basis that the requested record constituted a record that contained an account of consultation, discussions or deliberations that has occurred for the purpose of assisting to take a decision in the exercise of a power conferred or imposed by law, as envisaged in section 44(1)(a)(ii) of PAIA.
- 2.24. It must be remembered that PAIA is not merely a piece of legislation which gives effect to the constitutional right of access to information. PAIA is also a law of general application that limits the right of access to information under specific grounds for refusal of access to records held by public bodies.
- 2.25. As indicated herein above, a public body may only refuse access to a record on grounds of refusal covered by Chapter 4 of Part 2 of PAIA. These grounds of refusal are a law of general application as contemplated in section 36(1) of the Constitution. These grounds of refusal are, subject to section 36, reasonable and justifiable grounds for limiting the constitutional right of access to any information.

2.26. In *President of the Republic of South Africa and Others v M&G Nedia LTD*<sup>25</sup> the Constitutional Court held as follows: par.

"[23] *In order to discharge its burden under PAIA, the State must provide evidence that the record in question falls within the description of the statutory exemption it seeks to claim. The proper approach to the question whether the State has discharged its burden under s 81(3) of PAIA is therefore to ask whether the State has put forward sufficient evidence for a court to conclude that, on the probabilities, the information withheld falls within the exemption claimed.*

[24] *The recitation of the statutory language of the exemptions claimed is not sufficient for the State to show that the record in question falls within the exemptions claimed. Nor are mere ipse dixit affidavits proffered by the State. The affidavits for the State must provide sufficient information to bring the record within the exemption claimed. This recognises that access to information held by the State is important to promoting transparent and accountable government, and people's enjoyment of their rights under the Bill of Rights depends on such transparent and accountable government.*

[25] *Ultimately, the question whether the information put forward is sufficient to place the record within the ambit of the exemption claimed will be determined by the nature of the exemption. The question is not whether the best evidence to justify refusal has been provided, but whether the information provided is sufficient for a court to conclude, on the probabilities, that the record falls within the exemption claimed. If it does, then the State has discharged its burden under s 81(3). If it does not, and the State has not given any indication that it is unable to discharge its burden because to do so would require it to reveal the very*



*information for which protection from disclosure is sought, then the State has only itself to blame.”*

2.27. For the requested record to fall within the grounds of refusal covered by section 44(1)(a)(ii), the public body has to satisfy the following:

2.27.1 It must provide sufficient evidence and information to demonstrate that the requested record falls within the description of the statutory exemption.

2.27.2 The requested record, which is the subject of disclosure, must provide an account of something that has already happened. This means that the requested record must have formed part of a process previously undertaken and must relate specifically to an account of something that has happened, namely, “a consultation, discussion or deliberation” or at any meeting between the public body and stakeholders.

2.27.3 The requested record must have been obtained for the purpose of assisting in formulating a policy or to take a decision in the exercise of a power or performance of a duty conferred or imposed by law. So, the purpose must have existed at the time when the record was prepared.

2.28. The Regulator confirms the view of the Enforcement Committee that an interpretation of section 44(1)(a)(ii) demonstrates that the Information Officer of the public body has a discretion to refuse access to the requested records. The refusal is not peremptory. Further, a proposal or submission prepared by the public body to the relevant Minister, is not a record as intended in section 44(1)(a)(ii).

2.29. Having considered the explanations advanced by the public body for its reliance on section 44(1)(a)(ii) as a ground for refusal, the Regulator is of the considered view that the public body has not demonstrated that access to the requested record can be refused on the basis of section 44(1)(a)(ii).

- 2.30. As a result of the foregoing, the public body has failed, on a balance of probabilities, to discharge its burden of justifying a limitation of the complainant's constitutional right of access to information, as contained in section 32(1)(a) of the Constitution.
- 2.31. The mandatory disclosure in the public interest in terms of section 46 of PAIA is not relevant and/or applicable in the circumstances of this matter.
- 2.32. The Regulator is of the considered view that the ground of refusal relied upon by the public body must be rejected.
- 2.33. Consequently, the complainant has the right to be granted access to the requested records held by the public body.

### **3. COMPLIANCE PERIOD**

The Information Officer of a public body is hereby directed to comply with this Enforcement Notice within thirty (30) days from the date of receipt of this Notice.

### **4. REVIEW OF THE DECISION OF THE INFORMATION REGULATOR**

Please be advised that the Information Officer of the public body has the right to apply to a Court with jurisdiction for appropriate relief, in terms of section 82 of PAIA, should he or she be aggrieved by a decision of the Regulator in this Notice.

The Information Officer of the public body is required to notify the Regulator, within ten (10) working days of receipt of this notice, about his or her intention to apply to a Court for appropriate relief in terms of section 82 of PAIA.

The application, in terms of section 82 of PAIA, must be brought to a Court having jurisdiction for appropriate relief within a period of one hundred and eighty (180) days from date of receipt of this Notice.


**5. CONSEQUENCES FOR NON-COMPLIANCE WITH AN ENFORCEMENT NOTICE**

Please note that the Information Officer of the public body who fails to comply with this Enforcement Notice is guilty of an offence and liable upon conviction to a fine or to imprisonment for a period not exceeding three (3) years or to both such a fine and such imprisonment.

**DATED at JOHANNESBURG on 06 FEBRUARY 2025.**




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**ADV. PANSY TLAKULA**  
**CHAIRPERSON: INFORMATION REGULATOR**



Enforcement Notice #:  
**0009**

**CERTIFICATION OF ENFORCEMENT NOTICE**  
**(In terms of section 77J(4) of the Promotion of Access to Information Act 2 of 2000)**  
**This is to certify that this document is a true copy of the original Enforcement Notice issued by the Information Regulator.**



**CHAIRPERSON**  
**INFORMATION REGULATOR**  
**Date: 06 February 2025**