



SOUTH AFRICAN INSTITUTE OF  
PROFESSIONAL ACCOUNTANTS™

■ YOUR WEALTH

# **GUIDELINES**

## **Promotion of Access to Information Manual**

*In terms of Section 51, Promotion of Access to Information Act  
Act 2 of 2000*

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# 1 INTRODUCTION

## 1.1 The Promotion of Access to Information Act, Act 2 of 2000

03 February 2000 saw the enactment of the Promotion of Access to Information Act, 2 of 2000 (“the Act”), giving 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.

Where a request is made in terms of this Act, the private or public body to which the request is made is obliged to release the information, except where the Act expressly provides that the information must not be released. The Act sets out the requisite procedural issues attached to such request.

## 1.2. Background

Section 32 of the Constitution of the Republic of South Africa, No. 108 of 1996 (“the Constitution”) provides:

**(1) Everyone has the right of access to –**

**(a) any information held by the state; and**

**(b) any information that is held by another person and that is required for the exercise or protection of any rights.**

**(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.**

The Act gives effect to this constitutional right of access as required in terms of subsection (2).

With the exception of sections 10, 14, 16 and 51, the Act came into operation on 9 March 2001. Government Gazette number 23119 brought the remaining sections into operation on 15 February 2002.

## 1.2 Purpose

This document is intended to:

- serve as a guide to private bodies in the drafting of their information manuals, as prescribed in terms of Section 51 of the Act;
- avoid the duplication of inherently non-competitive work; and
- provide a generic outline for private bodies to follow in drafting their manuals, wherein the level of detail included in the manuals is standardised and applied across the industry with uniformity.

Private bodies are recommended to confirm their status in terms of the definition in the Act, and state their conclusion accordingly in their manual.

A private body means –

**(a) a natural person who carries on any trade, business or profession but only in such capacity;**

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- (b) a partnership which carries or has carried on any trade, business or profession; or***
- (c) any former or existing juristic person, but excludes a public body.***

A public body 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; or***
- (b) any other functionary or institution when –***
  - (i) exercising a power or performing a duty in terms of the Constitution of a provincial constitution; or***
  - (ii) exercising a public power or performing a public function in terms of any legislation.***

### **1.3 Impact on the Private Sector**

Section 50 of the Act provides:

- (1) A requester must be given access to any record of a private body if –***
  - (a) that record is required for the exercise or protection of any rights;***
  - (b) that person complies with the procedural requirements in this Act relating to a request for access to that record; and***
  - (c) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part.***

The Act applies to any recorded information, regardless of form or medium, in the possession or under the control of a private body and whether or not it was created by that private body. This includes records in the possession of or under the control of sub-contractors and officials engaged by the private body in their capacity as such.

It is recommended that private bodies appoint somebody in the position of an 'information officer', to be responsible for:

- drafting the information manual as required in terms of Section 51 the Act;
- formulating procedures and standard forms to ensure that requests are processed speedily, within the prescribed time limits, and that whenever required the relevant third party is informed of the request;
- formulating guidelines clearly stating when a request must be granted or declined;
- co-ordinating implementation of the required procedures between the various business units and divisions of the private body, to ensure compliance with the Act.

Such information officer must possess the necessary skills, experience and qualifications to carry out these functions.

#### **1.4 The Interpretation of a 'Right'**

*Note: the discussion that follows hereunder is for clarification purposes only. It is not recommended that the details of this discussion be included into private bodies' manuals.*

An interpretational issue to be borne in mind is the definition of a 'right', as required in terms of section 50 of the Act: this is not something expressly defined in the Act. When processing a request for access to a record, one is able to objectively assess whether the procedural requirements of the Act have been complied with and whether or not the information requested falls within one of the excluded categories. However, it becomes more problematic when determining whether the record is required for the exercise or protection of any 'right'.

### 1.3.1. Bill of Rights

There are a number of factors in favour of the argument that the `rights' referred to in the Act pertain to the narrow interpretation of rights, viz restricted to those rights as enunciated in the Bill of Rights. These arguments include:

- The Act has its origins in the Bill of Rights, as entrenched in the Constitution. It is therefore argued that, by implication, only those rights identified in the Bill of Rights are applicable when considering a request in terms of section 50;
- Rights in terms of the Bill of Rights are considered of vital importance. It was therefore the intention of Parliament to afford such rights the highest of protection, including by way of the Act;
- The Preamble to the Act recognises the horizontal application of the rights in the Bill of Rights to juristic persons; and
- Rights in terms of the Bill of Rights are easily identifiable. It could not have been the intention of Parliament to extend the reach of the Act to include a more uncertain and unidentifiable category of rights. Such broader interpretation would result in problems being encountered in adequate compliance with the Act.

### 1.3.2. All Rights

There are a number of arguments in favour of a wider interpretation of `rights' towards the inclusion of all rights, without limitation to the Bill of Rights:

- The Preamble to the Act recognises that “at least” all the rights in the Bill of Rights need to be protected, promoted and fulfilled, inferring that an extension to other rights is also envisaged;
- The Preamble to the Act envisages the purpose of the Act being to enable people to more fully exercise and protect “all their rights”, inferring a wider interpretation;

- Section 9 of the Act provides that the objects of the Act are to give effect to the constitutional right of access to any information required for the exercise or protection of “any rights”, and to give effect to that right in a manner which balances “that right with any other rights, including the rights in the Bill of Rights”, once again inferring a wide interpretation is intended.
- Section 32 of the Constitution, dealing with access to Information, refers to “any right” inferring a wider interpretation of the right.

This interpretation is one that was favoured by the court in *Van Niekerk v Pretoria City Council*, 1997 (3) SA 839 (T), which interpretation was approved of in *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC & Others*, 2001 (3) SA 1013 (SCA).

### 1.3.3. Proposed Solution

Section 2(1) of the Act provides that when interpreting a provision of this Act, a court must prefer any reasonable interpretation that is consistent with the objects of this Act over any alternative interpretation that is inconsistent with those objects.

It is recommended that private bodies decide at the outset as a matter of policy whether rights will be treated restrictively (i.e. only rights in terms of the Bill of Rights will be entertained) or inclusively (i.e. all rights will be entertained.) All requests will therefore be guided by the policy decision taken and consistency in the treatment of a right will be established within the organisation.

It is then recommended that a private body confronted with a request should follow the following two-stage enquiry:

1. Ascertain whether the requester is seeking to protect or exercise a right or an interest.

2. After the private body has satisfied itself that the requester is seeking to exercise or protect a right and not an interest, the private body is then required to ascertain whether the information requested will actually assist the requester exercise or protect the right. The requester is therefore required to establish a nexus, or causal link between the right alleged and the information requested. It does not follow from the mere establishment of the right by the requester that he is automatically entitled to the information requested. The requester must establish that the information sought will assist him in the exercise or protection of his right.

#### 1.3.4. Identification of a Right

Private bodies will be required to formulate procedures for staff to follow as a guideline to enable them to identify whether a requester is seeking to exercise or protect a *right* or an *interest*. The staff processing the request should therefore be trained to be able to distinguish between a legitimate right and a 'fishing expedition'. It is impossible to envisage every possible practical scenario in formulating a procedure and it is therefore anticipated that such a procedure will at first be general and become specific over time, with the specifics being determined by the nature and variety of the request received, together with the development of case law.

#### 1.3.5. Establishing a connection between the right alleged and the records requested.

The provision of the records to the requester does not follow automatically from the establishment of a right by the requester. The requester has to show that the records requested will actually assist him or are reasonably required for the exercise or protection of the alleged right.

Guidance can be obtained from constitutional and other case law dealing with access to information in terms of the Interim Constitution and its transitional section 23, as well as more recent case law dealing with section 32 of the Final Constitution. Rights can be acquired contractually, delictually, or by way of legislation, with each request needing to be considered on its individual merits.

In dealing with this section, the Court has provided a judicial interpretation of the word “required” in Section 50 of the Act in so far as it might assist private bodies distinguish between legitimate requests and fishing expeditions. The following is an example of how a general procedure can be formulated with guidance from case law:

In *Le Roux v Direkteur-Generaal van Handel en Nywerheid*, 1997 (4) SA 174 (T) the court held that an applicant, to have access to documents, must lay a foundation in respect of each document claimed, and why that document is reasonably required for the exercise of his or her rights. This could be interpreted to mean that the private body is entitled to seek information from the requester to assist it to properly determine whether the requester is on a fishing expedition or not. It could be further argued that it places a duty on the requester to provide this additional information since he is required to “lay a foundation in respect of each document” in order to have access thereto. The private body should then implement procedures to assist with the identification of the nature of the requisite additional information. It could be that the requester is required to provide details enabling the private body to verify his right to the information requested an affidavit in which the requester deposes to the veracity of his request etcetera.

### 1.3.6. Duty of Care

When dealing with requesters possessing differing levels of understanding of the Act, the question arises as to the extent of the duty of care imposed upon a private

body to assist a requester in the identification or accurate articulation of a right. Neither the Act nor its Regulations impose such a duty on a private body. Similarly, such duty is not expressed in other general legislation governing Financial Services Institutions, case law, the Banking Code of Conduct or the Constitution.

Where a private body is unable to respond to a request due to lack of clarity in the identification or articulation of a right, it is recommended that the private body respond by either returning or enclosing Form B (where the request was contained in a format other than on a Form B) with a covering letter:

- Explaining briefly the requirements of the Act and the enclosed Form B (where the request was not contained in a Form B)
- The reason for the return of Form B (where the request was contained on Form B)
- A suggestion that the requester obtain assistance, preferably legal, with the formulation of the right.

Although the private body is not obliged to make this suggestion, it is recommended as a courtesy to the requester and to facilitate the efficient administration and processing of the request.

Once a right has been identified, however, it is recommended that private bodies offer some general assistance to the customer in terms of the request process, and also in terms of clarifying the records as requested by the requester, on a high-level basis.

#### **1.4. Information Manual**

Guidelines for private bodies towards the drafting of their respective information manuals follow hereunder. The purpose of the information manual is generally to act as a means of alerting potential requesters to their right to information, and the manner in which they may obtain such information. It is noted that the manual is not

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intended to be detailed and in depth: rather, it needs to be simple, user-friendly, easy-to-read and as concise as possible.

## **2. SECTION 51**

### **1.1 The Section**

***(1) Within six months after the commencement of this section or the coming into existence of the private body concerned, the head of a private body must compile a manual containing –***

- (a) the postal and street address, phone and fax number and, if available, electronic mail address of the head of the body;***
- (b) a description of the guide referred to in section 10, if available, and how to obtain access to it;***
- (c) the latest notice in terms of section 52(2), if any, regarding the categories of record of the body which are available without a person having to request access in terms of this Act;***
- (d) a description of the records of the body which are available in accordance with any other legislation;***
- (e) sufficient detail to facilitate a request for access to a record of the body, a description of the subjects on which the body holds records and the categories of records held on each subject; and***
- (f) such other information as may be prescribed.***

***(2) The head of a private body must on a regular basis update the manual referred to in subsection (1).***

***(3) Each manual must be made available as prescribed.***

***(4) For security, administrative or financial reasons, the Minister may, on request or of his or her own accord, by notice in the Gazette, exempt any private body or category of private bodies from any provision of this section for such period as the Minister thinks fit.***

### 2.3. Commencement

Section 51 commenced on 15 February 2002. *Extension was granted to certain private companies to 31 December 2011.*

### 2.4. Impact

Private bodies are required to compile an Information Manual in accordance with the provisions of Section 51 within six months of the commencement of such section. The deadline for the completion of such compilation is 14 August 2002. Once compiled, the manual must be:

- published in the Government Gazette;
- sent to the Human Rights Commission;
- sent to the controlling body of which it is a member, if applicable; and
- published on the private body's internet site, if applicable.

## 3. SECTION 51(1) (a): CONTACT DETAILS

### 3.1. Information Officers

In terms of this section, the manual to be compiled by the head of a private body must contain the **postal and street address, phone and fax number** and, if available, electronic mail address of the head of the body.

To assist in the interpretation and implementation of section 51 of the Act, reference should be had to the portion of the Act which deals with public bodies:

- the Act imposes certain powers and duties upon the information officer of a public body;
  - the information officer of a public body is defined in the Act as the person holding a specified designation in terms of legislation governing the public body;
- and

- each public body must designate such number of persons as deputy information officers as are necessary to render the public body as accessible as reasonably possible to requesters of its records. The information officer of a public body will have direction and control over every deputy information officer of that body and may delegate a power or duty conferred or imposed by the Act to a deputy information officer.

In relation to a private body, the Act imposes certain powers and duties upon the head of a private body. The head of a private body is defined as "***the chief executive officer or equivalent officer or any other person duly authorised by that officer***". Although the Act does not specifically address the appointment of an "information officer" in the context of a private body, the chief executive officer of the private body is effectively required to carry out the functions of an information officer. The chief executive officer may authorise another person to perform such functions. It is recommended that the chief executive officer of private bodies makes use of such right to delegate; such delegatee is, for the purposes of these guidelines, referred to as the information officer.

Depending on the size and internal structures of a private body, it may be appropriate for the information officer to designate deputy information officers, for example in respect of each division / business unit, to ensure that the private body is as accessible as is reasonably possible to requesters of its records and that the requirements of the Act are appropriately managed. The manual should therefore also include the specified details in respect of each deputy information officer appointed, in addition to the information officer's details.

### 3.2. Practical considerations

- It is recommended that the information officer / deputy information officers are referred to in the manual by designation rather than by name.

- Depending on the volume of correspondence / communications, it may become advisable to designate a separate postal, fax and/or electronic mail address in respect of access to information issues.
- A private body needs to decide whether to institute a centralised or decentralised structure (or a hybrid) in the handling of requests. Such decision could be based on the size and/or nature of the private body concerned. The chosen structure should be borne in mind when establishing procedures.

#### **4. SECTION 51(1) (B): HUMAN RIGHTS COMMISSION**

Section 10 of the Act provides that:

- (1) *The Human Rights Commission must, within 18 months of this section, compile in each official language a guide containing such information, in an easily comprehensible form and manner, as may reasonably be required by a person who wishes to exercise any right contemplated in this Act.***
- (2) *The guide must, without limiting the generality of subsection (1), include a description of –***
- (a) *the objects of this Act;***
  - (b) *the postal and street address, phone and fax number and, if available, electronic mail address of –***
    - (i) *the information officer of every public body; and***
    - (ii) *every deputy information officer of every public body appointed in terms of section 17(1);***
  - (c) *such particulars of every private body as are practicable;***
  - (d) *the manner and form of a request for –***
    - (i) *access to a record of a public body contemplated in section 11;***  
***and***
    - (ii) *access to a record of a private body contemplated in section 50;***
  - (e) *the assistance available from the information officer of a public body in terms of this Act;***

- (f) the assistance available from the Human Rights Commission in terms of this Act;***
  - (g) all remedies in law available regarding an act or failure to act in respect of a right or duty conferred or imposed by this Act, including the manner of lodging –***
  - (h) an internal appeal; and***
  - (i) an application with a court against a decision by the information officer of a public body, a decision on internal appeal or a decision of the head of a private body;***
  - (j) the provisions of sections 14 and 51 requiring a public body and private body, respectively, to compile a manual, and how to obtain access to a manual;***
  - (k) the provisions of sections 51 and 52 providing for the voluntary disclosure of categories of records by a public body and private body, respectively;***
  - (l) the notices issued in terms of sections 22 and 54 regarding fees to be paid in relation to requests for access; and***
  - (m) the regulations made in terms of section 92.***
- (3) The Human Rights Commission must, if necessary, update and publish the guide at intervals of not more than two years.***
- (4) The guide must be made available as prescribed.***

In terms of section 10 of the Act, the South African Human Rights Commission (“SAHRC”) is required to compile a guide containing information which someone intending to use the Act would require. Such guide must be made available in all official languages and if necessary must be updated and published every 2 years. The first guide is to be made available 18 months after this section came into operation.

Private bodies should make reference in their respective manuals to the obligation resting on the Human Rights Commission in terms of section 10, give an indication

of what their manual is envisaged to include, and hence their inability to furnish more complete information. In addition, the SAHRC's contact details should be included, viz:

Private Bag 2700  
Houghton  
2041  
Tel: 011- 484 8300  
Fax: 011 - 4841360

## **5. SECTIONS 51(1) (C) AND (D): RECORDS**

### **5.1. Section 51(1) (c)**

In terms of Section 52, a private body may, on a voluntary and periodic basis, submit to the Minister a description of categories of records which are automatically available without a person having to request access in terms of this Act. This includes records which are available:

- for inspection
- for purchase or copying from the private body; and
- from the private body free of charge.

In addition, the private body should indicate how a requester may go about accessing such records.

It is recommended that the relevant private body liaise with their Secretarial Services when considering this section. As compliance is voluntary, and the nature and details of such records are individual to each private body, this provision will not be further dealt with in these guidelines.

## 5.2. Section 51(1) (d)

The manual must describe those records which a private body must make available in terms of any other legislation. It is recommended that on completing this portion of the manual, information officers should consult with their Secretarial and Legal Services for input and guidance. In the process, it is recommended that the following legislation be considered. This list is by no means exhaustive, and is intended to serve as a guide only.

Private bodies should note that this provision requires a *description* of the records: it is therefore not necessary to list *all* records that are available in terms of the legislation. It is recommended that the manner in which these records are *described* in the pertinent sections of the legislation be used as a guide to compiling this portion of the manual.

In considering this legislation, private bodies are cautioned to have due regard for section 6 as read with section 86, which effectively provide that access may be granted in terms of such other legislation if the manner of request is not more onerous than a request under this Act. If the manner of request under other legislation is more onerous, the request should be made in terms of this Act, unless that legislation is listed in the Schedule. The only piece of legislation currently listed in the schedule is the National Environmental Management Act, no 107 of 1998.

### 5.2.1. Unlimited Requesters

We keep a record of the following legislation relevant to our organisation

- **Auditing Profession Act 26 of 2005**
- **Companies Act 71 of 2008**
- **Close Corporations Act 69 of 1984**

- **Close Corporations amendment Act 25 of 2005**
- **Value-Added Tax Act 89 of 1991**
- **Income Tax Act 58 of 1962**
- **Consumer Protection Act 68 of 2008**
- **Sectional Titles Act 95 of 1986**
- **SA Schools Act 84 of 1996**
- **Short-term Insurance Act no. 53 of 1998**
- **Financial Advisory and Intermediary Services Act no 37 of 2002**
- **Non-profit Organisations Act 71 of 1997.**
- **The National Credit Act 34 of 2005**
- **The Co-operatives Act 14 of 2005**
- **The Fund-Raising Act 107 of 1978**

### ***5.2.2. Limited Requester s***

Certain legislation mandates private bodies to allow certain persons access to specified information, upon request, which persons and/or forms of request must be as prescribed in the relevant legislation. It is once again stressed that only a description of the records is required. In this regard, it is also notable that the requester in terms of this type of legislation generally comprises of persons who are

knowledgeable and experienced in such requests: a detailed description should therefore not be required.

## **6. SECTION 51(1) (E): PROCEDURE**

### **6.1. Prescribed Access Form**

In terms of section 53, a request for access to a record of a private body must be made in the prescribed form to the private body concerned at its address, fax number or electronic mail address. The form must require the requester to provide the following information:

- sufficient information to enable to information officer to identify the requester ;
- sufficient information to enable to information officer to identify the record(s) requested;
- the form of access required;
- the requester 's postal address or fax number;
- identification of the right sought to be exercised or protected;
- an explanation on why the record is required to exercise or protect that right;
- the manner in which the requester wishes to be informed of the decision on the request, if in a manner in addition to written notification; and
- if the request is made on behalf of a person, the submission of proof of the capacity in which the requester makes the request, to the satisfaction of the information officer.

A specimen of the request form should be included in the manual (see Appendix 1). Requester s should also be cautioned that all of the information as listed above should be provided, failing which the process will be delayed while the private body requests such additional information. The prescribed time periods will not commence until all pertinent information has been furnished on the private body by the requester.

## 6.2. Prescribed Fees

Payment of fees is regulated in terms of section 54 of the Act. The Regulations, as further discussed under 8 below, provide for two types of fees:

- Request fee: This is a form of administration fee paid by all requester s, except personal requester s, before the request is considered. It is not refundable.
- Access fee: which is paid by all requester s in the event of a request for access is granted. This fee is intended to reimburse the private body for the costs involved in searching for a record and preparing it for delivery to the requester.

Requester s should be advised that the private body may withhold a record until the request fee and the deposit (if applicable) have been paid. The points that follow on fees should also be included in the manual.

### 6.2.1. Requester other than Personal Requester

The information officer must give written notice to a requester other than a personal requester of the request fee and amount to be paid before the request may be further processed.

If in the information officer's opinion the search for a record, or preparation of the record for disclosure will require more than the prescribed hours, the information officer may require the requester to pay a deposit, not being more than one third of the access fee that would be payable if the request is granted. If the request is declined, the deposit must be repaid to the requester.

The notice given by the information officer must advise the requester that s/he has a right to apply to court against the payment of the request fee or deposit, and also advise of the procedure of the application.

### 6.2.2. Personal Requester

A personal requester is described in terms of the Act as a requester seeking access to a record containing information about the requester.

A personal requester is not liable to pay a request fee, is liable for payment of access fees in the event of a request being granted, but may not be required to pay a deposit before the granting of the record.

### **6.3. Decision-making Process**

Section 55 provides that if all reasonable steps have been taken to find a record that has been requested, and there are reasonable grounds for believing that the record cannot be found or does not exist, the information officer must notify the requester by way of affidavit or affirmation that it is not possible to give access to the record. This is deemed to be a refusal of the request. If, however, the record is later found, the requester must be given access if the request would otherwise have been granted.

Section 56 provides that the information officer must within 30 days of receipt of a correctly completed request notify the requester of the decision as to whether or not to grant the request. If the request is:

- **Granted:** the notification must state the applicable access fee required to be paid, together with the procedure to be followed should the requester wish to apply to court against such fee, and the form in which access will be given.
- **Declined:** the notification must include adequate reasons for the decision, together with the relevant provisions of the Act relied upon, and provide the procedure to be followed should the requester wish to apply to court against the decision.

The information officer may extend the period of 30 days by a further period not exceeding 30 days if:

- the request is for a large number of records or requires a search through a large number of records;
- the request requires a search for records located in a different office of the private body not situated in the same city;
- consultation between divisions of the private body, or with another private body is required; or
- the requester consents to the extension.

The requester must be notified within the initial 30 day period in writing of the extension, together with reasons therefore, and the procedure involved should the requester wish to apply to court against the extension.

The information officer's failure to respond to the requester within the 30 day period constitutes a deemed refusal of the request.

Section 59 provides that the information officer may sever a record and grant access only to that portion which the law does not prohibit access to. In this regard, it is recommended that the requester's attention be drawn to the grounds for refusal of a request.

If access is granted, access must be given in the form that is reasonably required by the requester, or if the requester has not identified a preference, in a form reasonably determined by the information officer. It is recommended that the manual incorporate reference to the manner in which the information officer would prefer to make the information available, with reference to cost and expediency.

Insurance companies in particular should also warn potential requesters requesting access to medical records that in the event that the information officer, in consultation with the relevant health practitioner who compiled the record, is of the opinion that disclosure could result in serious harm to the requester's health or well-being, the requester may be required to prove that he/she has made provision

for counselling or other practical arrangements towards limiting, alleviating or avoiding such harm, before access will be granted, as per section 61.

#### **6.4. Third Parties**

If the request is for a record pertaining to a third party, the information officer must take all reasonable steps to inform that third party of the request. This must be done within 21 days of receipt of the request. The manner in which this is done must be in the fastest means reasonably possible, but if orally, the information officer must thereafter give the third party a written confirmation of the notification. The third party must be advised that he/she/it may within 21 days thereafter either make representation to the private body as to why the request should be refused, alternatively grant written consent to disclosure of the record. The third party must be advised of the decision taken by the information officer on whether to grant or decline the request, and must also be advised of his/her/its right to appeal against the decision by way of application to court within 30 days after the notice.

#### **6.5. Grounds for Refusal of a Request**

A potential requester should be cautioned that notwithstanding compliance with section 50, the request may be declined in accordance with one of the prescribed grounds in terms of the Act, namely:

Section 63 prohibits the unreasonable disclosure of the personal information of natural person third parties to requester s. This includes the personal information of deceased persons. Section 63(2) does provide exceptions to this; details of these exceptions need not be included in the manual, but must be borne in mind by an information officer considering such a request.

Section 64 mandates that a request must be refused if it relates to records containing third party information pertaining to:

- trade secrets;

- financial, commercial, scientific or technical information where disclosure would be likely to cause harm to the commercial or financial interests of that third party; or
- information supplied in confidence by the third party, the disclosure of which could reasonably be expected to put the third party at a disadvantage in contractual or other negotiations, or prejudice the third party in commercial competition.

The information must, however, be released if it pertains to the results of product or environmental testing, the disclosure of which would reveal a serious public safety or environmental risk.

Section 65 prohibits disclosure of information if such disclosure would constitute a breach of any duty of confidentiality owed to a third party in terms of an agreement.

In terms of section 66, a private body must refuse a request if disclosure could reasonably be expected to:

- endanger the life or physical safety of an individual;
- prejudice or impair the security of a building, structure or system, means of transport, or other property; or
- methods, systems, plans or procedures for the protection of an individual in accordance with a witness protection scheme or safety of the public.

Section 67 mandates the refusal of a request if the record is privileged from production in legal proceedings, unless the person entitled to the privilege has waived it.

Section 68 pertains to records containing information about the private body itself and unlike the other provisions pertaining to decline of a request, is not mandatory, but rather discretionary. The private body may refuse access to a record if the record:

- contains trade secrets of the private body;

- contains financial, commercial, scientific or technical information, the disclosure of which would be likely to cause harm to the commercial or financial interests of the private body;
- contains information which, if disclosed, could reasonably be expected to put the private body at a disadvantage in contractual or other negotiations, or prejudice the private body in commercial competition; or
- consists of a computer program owned by the private body.

Notwithstanding the above, the information must be released if it pertains to the results of product or environmental testing, the disclosure of which would reveal a serious public safety or environmental risk.

Section 69 prohibits the disclosure of information about research where disclosure is likely to expose the third party, the person conducting the research on behalf of the third party, or the subject matter of the research to serious disadvantage. Disclosure is discretionary if such research pertains to the private body itself.

Notwithstanding any of the above-mentioned provisions, section 70 provides that a record must be disclosed if its disclosure would:

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

## 6.6. Application to Court

A requester that is dissatisfied with an information officer's advice that the request is declined may, within 30 days of notification of the decision, apply to court for relief. Likewise, a third party dissatisfied with an information officer's decision to grant a request may, within 30 days of notification of the decision, apply to court for relief.

It should be noted that notwithstanding any provision in this Act, the court may examine the record(s) in question: no record may be withheld from the court on any grounds. The court may not, however, disclose the contents of the record(s).

The court is empowered to grant any order that is just and equitable, including:

- confirming, amending or setting aside the information officer's decision
- requiring the information officer to take any action, or refrain from taking any action as identified by the court within a specified period;
- granting an interdict, interim or special relief, declaratory order or compensation; or
- costs.

## 7. SECTION 51(1) (E): TYPES OF RECORDS

### 7.1. Introduction

Section 51(1)(e) provides that a private body must provide in their manual a description of the *subjects* on which the private body holds records, and the *categories* of records held on each subject. It is not necessary to provide a detailed analysis of every record the private body holds for the following reasons:

- the Act only requires **subject** descriptions, and **categories** of records within each subject;
- a requester ought generally to know the types of records required by him/her for the exercise or protection of the relevant right;
- it should in any event not be necessary for the requester to know in depth details about the private bodies records: the private body should, once satisfied that a right has been established and that a causal connection does exist, provide general assistance to the requester in identifying the records that are specifically relevant to the right;
- it is not practical for large corporations which have varied interests to identify every record within their possession; and

- a detailed description will invariably result in information being erroneously left out.

It is noted that the provision does not provide much assistance in identifying the required content of the manual in this regard. The following method is suggested.

## **7.2. Subjects and Categories of Records**

A private body should identify the subjects and categories of records, encapsulating all their business units. As indicated above, the manual is intended to be concise and simple, thus a detailed list of all the private body's records themselves is not a requirement. A simple, high-level description of the subjects and categories will suffice.

Four broad subjects have been identified, viz:

- Personnel records;
- Customer-related records;
- Private body records; and
- Records in the possession of or pertaining to other parties.

The following represents guidance to private bodies in the completion of their manuals, and is not intended to constitute an exhaustive list. It is, however, recommended that private bodies retain a high level identification of their records in terms of this section. It is recommended that the information officer liaise inter alia with their Line Management, Secretarial Services, and Human Resource Departments when completing this portion of their manual.

### **7.2.1. Personnel records**

Personnel refers to any person who works for or provides services to or on behalf of the private body and receives or is entitled to receive any remuneration and any other person who assists in carrying out or conducting the business of the private

body. This includes, without limitation, directors, executives, non-executives, all permanent, temporary and part-time staff as well as contract workers.

Personnel records include the following:

- Any personal records provided to the private body by their personnel;
- Any records a third party has provided to the private body about any of their personnel;
- Conditions of employment and other personnel-related contractual and quasi-legal records;
- Internal evaluation records; and
- Other internal records and correspondence.

### 7.2.2. Customer-related records

A customer includes any natural or juristic entity who receives services from the private body. Customer-related information includes the following:

- Any records a customer has provided to a third party acting for or on behalf of the private body;
- Any records a third party has provided to the private body; and
- Records generated by or within the private body pertaining to the customer, including transactional records.

### 7.2.3. Private body records

The following are considered to include but not be limited to records which pertain to the private body's own affairs:

- Client registration records
- Client statutory returns
- Commercial contracts
- Client database (describe the contents)
- Financial records;
- Operational records;
- Databases;
- Marketing records;

- Internal correspondence;
- Product records;
- Statutory records;
- Internal policies and procedures;
- Records held by officials of the private body.

#### 7.2.4. Other Parties

The private body may possess records pertaining to other parties, including without limitation contractors, suppliers, subsidiary/holding/sister companies, joint venture companies, service providers. Alternatively, such other parties may possess records which can be said to belong to the private body.

The following records fall under this category:

- Personnel, customer or private body records which are held by another party as opposed to being held by the private body; and
- Records held by the private body pertaining to other parties, including without limitation financial records, correspondence, contractual records, records provided by the other party, and records third parties have provided about the contractors / suppliers.

### 7.3. General

Private bodies may also wish to include in their manual a brief description of the procedure and manner in which their documents are stored (originals, imaged, on-site, off-site, general archive procedures etcetera), which will serve to:

- caution the requester against misperceptions of how long it will take for a record to be retrieved and access granted; and
- assist the information officer in identifying where the record might be found.

Whichever method is adopted by the private body in complying with the Act, the information officer should be tasked with establishing clear internal policies on the nature of records which are automatically available to requester s without the need

for a formal request, those that are available on request in terms of this Act, and those that will be refused upon request.

## **8. SECTION 51(1) (F): OTHER INFORMATION**

In what seems to be a deliberate attempt to leave this section open-ended, subsection (f) was introduced providing for a private body's manual to contain "such other information as may be prescribed". Regulations have not been prescribed in this regard.

## **9. REGULATIONS**

### **9.1. Introduction**

Simultaneously with promulgating the Act into law, Regulations 1-9 were published in Government Gazette No. 22125 on 9 March 2001. On the 10<sup>th</sup> of August 2001 further (draft) Regulations 10-15 were published in respect of the outstanding Sections 10, 14, 16, and 51.

### **9.2. Regulations 1-3**

These regulations are only applicable to requests for access to records held by a public body and therefore are not of importance for purposes of obtaining access to information held by private bodies.

### **9.3. Regulation 4:**

This regulation provides for a standard form to be used where a request for access to a record held by a private body is made, as can be seen in Annexure 1.

#### 9.4. Regulation 5:

This regulation provides for various fees payable in respect of the following:

- For **reproduction** of records described in a list to be published by the Minister as information that will automatically be made available by the private body to any person as provided for in Section 52(3);
- A **request fee** applicable to third parties submitting requests for access to records held by the private body on other persons in terms of Section 54(1);
- **Access fees** payable by requesters in terms of Section 54(7); and
- Instances where **deposits** are payable.

##### 9.4.1. Reproduction fees:

Where a private body has voluntarily provided the Minister with a list of categories of records that will automatically be made available to any person requesting access thereto, the only charge that may be levied for obtaining such records, will be a fee for reproduction of the record in question.

The applicable fees for reproduction as referred to above are:

*For every photocopy of an A4-size page or part thereof	R0.60
*For every printed copy of an A4-size page or part thereof held on a computer or in electronic or machine readable form:	R0, 40
*For a copy in a computer-readable form on:	
- stiffer disc	R5.00
- Compact disc	R40, 00
* A transcription of visual images, for an A4-size page or part thereof	R22, 00
- For a copy of visual images	R60, 00
* A transcription of an audio record, for an A4-size page or part thereof	R12, 00
- For a copy of an audio record	R12, 00

#### 9.4.2. Request fees:

Where a requester submits a request for access to information held by a private body on a person other than the requester himself/herself, a request fee in the amount of R50,00 is payable up-front before the private body will further process the request received.

#### 9.4.3. Access fees:

An access fee is payable in all instances where a request for access to information is granted, except in those instances where payment of an access fee is specifically excluded in terms of the Act or an exclusion is determined by the Minister in terms of Section 54(8).

The applicable access fees which will be payable are:

	R
*For every photocopy of an A4-size page or part thereof	R0.60
*For every printed copy of an A4-size page or part thereof held on a computer or in electronic or machine readable form	R0, 40
*For a copy in a computer-readable form on:	
- stifty disc	R5.00
- Compact disc	R40, 00
* A transcription of visual images, for an A4-size page or part thereof	R22, 00
- For a copy of visual images	R60, 00
* A transcription of an audio record, for an A4-size page or part thereof	R12, 00
- For a copy of an audio record	R17, 00
*To search for a record that must be disclosed, R35, 00 per hour or part of an hour reasonably required for such search.	
*Where a copy of a record needs to be posted the actual postal fee is payable.	

#### 9.4.4. Deposits

Where a private body receives a request for access to information held on a person other than the requester himself/herself and the information officer upon receipt of the request is of the opinion that the preparation of the required record for disclosure will take more than 6 (six) hours, a deposit is payable by the requester.

The amount of the deposit is equal to 1/3 (one third) of the amount of the applicable access fee.

#### 9.5. **Regulations 6 & 7:**

These Regulations relate to internal appeals within public bodies, as contemplated in Section 75(1) of the Act, and are therefore not applicable to private bodies.

#### 9.6. **Regulation 8:**

Value Added Tax (VAT) must be added to all fees prescribed in terms of the Regulations.

#### 9.7. **Regulation 9:**

Regulations 1-9 came into operation on 9 March 2001.

#### 9.8. **Regulation 14**

***(1) The head of a private body must immediately after the manual has been compiled in terms of section 51(1) or updated in terms of section 51(2) of the Act –***

***(a) make available a copy to***

***(i) the Human Rights Commission; and***

- (ii) to the controlling body of which it is a member, if applicable;**
- (b) publish the manual in the Government Gazette; and**
- (c) if possible, make it available on the Website.**
- (2) The head of the private body –**
- (a) must during office hours and upon request make available for inspection a copy of the manual;**
- (b) may not charge a fee for inspection referred to in (a); and**
- (c) may in respect of any copy of the manual or part thereof otherwise made available, charge a fee of R1,10 for every photocopy of an A4-size page or part thereof.**
- (3) The head of the private body must, within sixty days after the manual is updated in terms of section 51(2) of the Act, update the manual made available on its Website in terms of sub regulation 14(1)(c)**

## 10. FORM B

### 10.1. REQUEST FOR ACCESS TO RECORD OF PRIVATE BODY

(Section 53(1) of the Promotion of Access to Information Act, 2000 (Act No 2 of 2000)

**(Regulation 4)**

A. Particulars of private body

The Head:

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B. Particulars of person requesting access to the record

- |   |
|---|
| <p>(a) <i>The particulars of the person who requests access to the records must be recorded below.</i></p> <p>(b) <i>Furnish an address and/or fax number in the Republic to which information must be sent.</i></p> <p>(c) <i>Proof of the capacity in which the request is made, if applicable, must be attached.</i></p> |
|---|

Full name and surname:

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Identity number:

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Postal Address:

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Telephone number: \_\_\_\_\_ Fax number: \_\_\_\_\_

E-mail address:

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Capacity in which request is made, when made on behalf of another person:

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**C. Particulars of person on whose behalf request is made:**

*This section must be completed only if a request for information is made on behalf of another person.*

Full names and surname:

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Identity number:

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**D. Particulars of record:**

*(a) Provide full particulars of the record to which access is requested, including the reference number if that is known to you, to enable the record to be located.*

(b) *If the provided space is inadequate please continue on a separate folio and attach it to this form. **The requester must sign all the additional folios.***

1. Description of record or relevant part of the record:

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2. Reference number, if available:

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3. Any further particulars of record:

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**E. Fees**

(a) *A request for access to a record, other than record containing personal information about yourself, will be processed only after a **request fee** has been paid.*

(b) *You will be notified of the amount required to be paid as the request fee.*

(c) *The **fee payable for access** to a record depends on the form in which access is required and the reasonable time required to search for and prepare a record.*

(d) *If you qualify for exemption of the payment of any fee, please state the reason therefore.*

Reason for exemption from payment of fees:

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**F. Form of access to record**

If you are prevented by a disability to read, view or listen to the record in the form of access provided for in 1 to 4 hereunder, state your disability and indicate in which form the record is required.

Disability: _____ _____ _____	Form in which record is required: _____ _____ _____
--	--

**Mark the appropriate box with an “X”**

NOTES:

(a) *Your indication as to the required form of access depends on the form in which the record is available.*

(b) *Access in the form requested may be refused in certain circumstances. In such a case you will be informed if access will be granted in another form.*

(c) *The fee payable for access to the record, if any, will be determined partly by the form in which access is requested.*

<b>1. If the record is in written or printed form:</b>			
	Copy of record*		Inspection of record

<b>2. If record consists of visual images:</b> (this includes photographs, slides, video recordings, computer-generated images, sketches, etc)					
	View the images		Copy of the images*		Transcription of the images*

<b>3. If record consists of recorded words or information which can be reproduced in sound:</b>					
	Listen to the soundtrack (audio cassette)		Transcription of soundtrack* (written or printed document)		

<b>4. If record is held on computer or in an electronic or machine-readable form:</b>					
	Printed copy of record		Printed copy of information derived from the record*		Copy in computer readable form* (stiffy or compact disc)

*If you requested a copy or transcription of a record (above), do you wish the copy or transcription to be posted to you?	YES	NO
<b>A postal fee is payable.</b>		

**G. Particulars of right to be exercised or protected:**

If the provided space is inadequate please continue on a separate folio and attach it to this form.

***The requester must sign all the additional folios.***

Indicate which right is to be exercised or protected:

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1. Explain why the requested record is required for the exercising or protection of the aforementioned right:

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**H. Notice of decision regarding request for access:**

You will be notified in writing whether your request has been approved/denied. If you wish to be informed thereof in another manner, please specify the manner and provide the necessary particulars to enable compliance with your request.

How would you prefer to be informed of the decision regarding your request for access to the record?

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Signed at \_\_\_\_\_ this \_\_\_\_\_ day of  
\_\_\_\_\_ 20\_\_\_\_

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SIGNATURE OF REQUESTER/PERSON ON  
WHOSE BEHALF REQUEST IS MADE