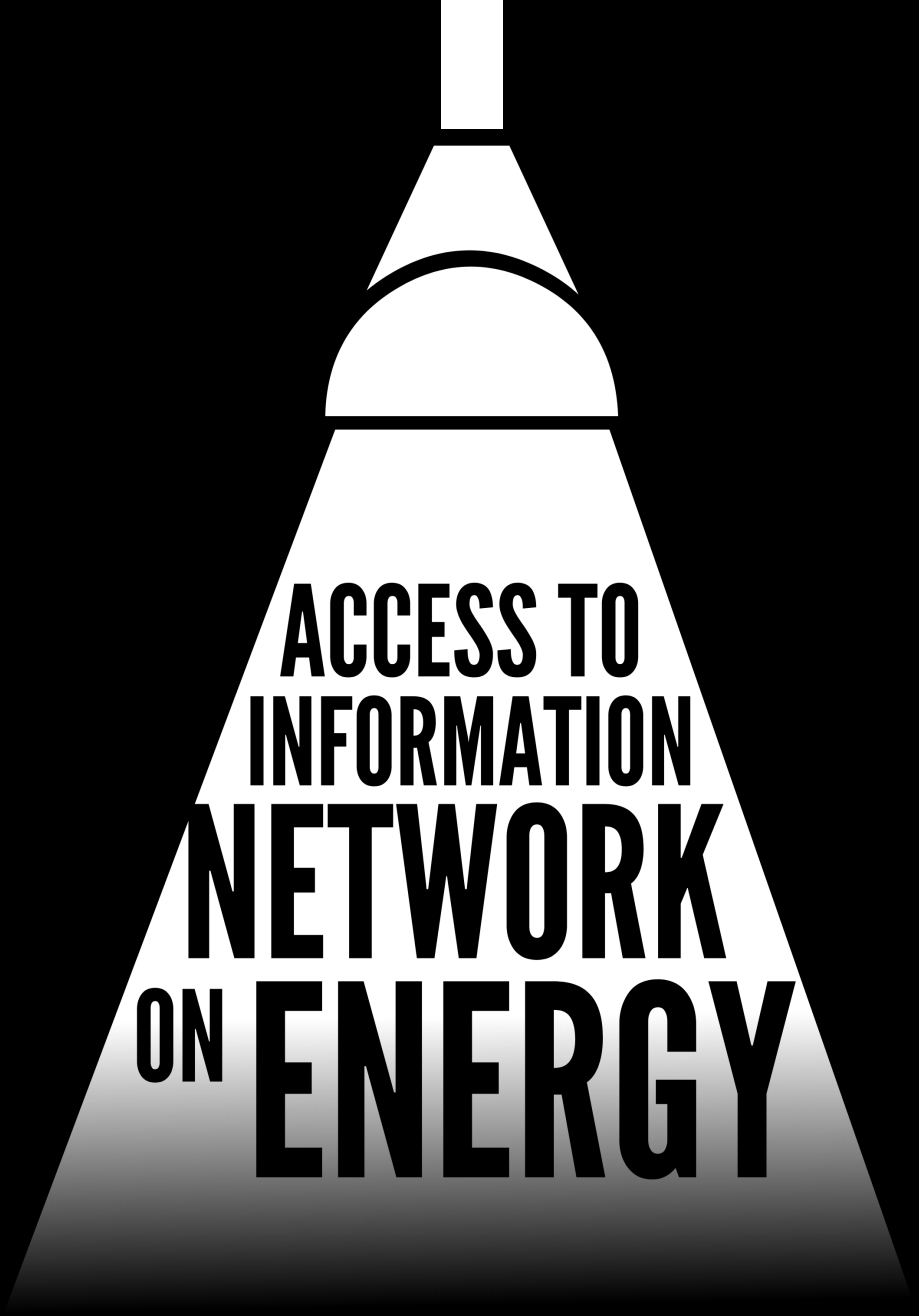

ACCESS TO INFORMATION IN THE CLIMATE, ENERGY AND ENVIRONMENTAL SPACE

SUBMISSION TO THE INFORMATION REGULATOR

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1 INTRODUCTION & PURPOSE OF THIS SUBMISSION

The Access to Information (ATI) Network (the "**ATI Network**") is a coalition of civil society organisations working to advance transparency and accountability in the climate change, energy, and environmental governance spaces in South Africa. Access to information is a fundamental right enshrined in section 32 of the Constitution[1] and given effect to through the Promotion of Access to Information Act 2 of 2000 ("**PAIA**"). Despite these legal protections, organisations within the ATI Network continue to face significant barriers when seeking climate- and energy-related information from both public and private entities. These barriers undermine public participation, informed decision-making, and the ability to hold powerful institutions accountable at a crucial time for South Africa's energy transition.

On 5 December 2024, the ATI Network met with the Information Regulator[2] at its Johannesburg offices to highlight the systemic issues preventing the effective realisation of the right to access information in the broader climate and energy spaces, being experienced across the ATI Network. The discussion focused on the following key concerns:

- Consistent non-compliance with PAIA – Many entities, both public and private,fail to comply with their PAIA obligations, leading to excessive delays, refusals to grant access to information without valid justification, and administrative roadblocks that hinder access to critical and often time-sensitive climate and energy-related information.

- Secrecy in energy and climate governance – Given South Africa's energy crisis and the urgency of action to combat climate change, it is particularly concerning that critical information such as environmental impact assessments, procurement contracts with energy providers, and emissions data is often withheld. Lack of access to this information directly affects the public's ability to engage in policy-making and advocate for a just and sustainable energy transition.

1 Constitution of the Republic of South Africa, 1996.

2 The Information Regulator acted within its mandate under Part 4, Chapter 1A and Part 5 of the PAIA.

- Need for proactive disclosure of information – Many of the records sought by civil society in the climate and energy spaces should be proactively disclosed in the public interest. However, the failure to implement proactive disclosure mechanisms forces organisations into lengthy and financially draining PAIA request processes, which often lead to unjustified refusals.

During this engagement, the Information Regulator's officials advised the ATI Network to make a formal submission detailing the challenges raised during the meeting. This submission serves as a critical step in seeking the Information Regulator's guidance and intervention to ensure meaningful access to information in these key sectors, and is meant to assist in strengthening accountability mechanisms and reinforcing the importance of transparency in climate and energy governance.

The discussion in this submission engages with legal precedent, analysing how courts have interpreted and applied the PAIA in cases concerning access to information, and juxtaposing that with the experience of the ATI Network's members when seeking to access information in the climate and energy spaces. We provide insight into how PAIA-related decisions should be framed, the limits of exempting relevant information from being disclosed, and the procedural requirements that information holders must adhere to. The examples referred to offer critical guidance on the proper treatment of access to information requests in the climate space, reinforcing that:

- The right of access to information must be approached in a manner that upholds the constitutional values of openness and accountability;[3]

- Exemptions from disclosure under the PAIA (also referred to as grounds for refusal of access) must be narrowly interpreted to prevent unjustified secrecy;[4]

- The balancing of privacy and transparency under the Protection of Personal Information Act 4 of 2013 ("POPIA") should be done in a manner that does not erode the public's right to access crucial governance-related information;

- There is a need for the Information Regulator to provide clarity on the intersection of PAIA and POPIA in the climate and energy spaces,

3 *Khanyile v Director-General Province of KwaZulu-Natal and Others* [2024] 1 All SA 204 (KZP) para 2.

4 *Transnet Ltd and Another v SA Metal Machinery Co (Pty) Ltd* 2006 (6) SA 285 (SCA) para 58; *Ibex RSA Holdco Limited and Another v Tiso Blackstar Group (Pty) Ltd and Others* (862/2022) [2024] ZASCA 166 (Steinhoff).

ensuring that personal information protections are not misapplied to suppress legitimate public interest disclosures;[5]

- There is an ongoing need for the Information Regulator to apply stronger oversight and enforcement mechanisms to hold both public and private entities accountable for non-compliance with the PAIA;

- Greater transparency in climate and energy governance is required, particularly around procurement contracts, environmental risk assessment and management, and decision-making processes that impact communities, the climate and the environment; and

- The need for proactive disclosure of key environmental and energy-related information must be reinforced to reduce unnecessary administrative burdens and delays.

The ATI Network stands ready to work alongside the Information Regulator to develop practical solutions that advance transparency, ensure compliance with the law, and uphold the constitutional right to access information. Given the urgency of the climate crisis and the critical role of access to information in ensuring just and accountable governance, we urge the Information Regulator to give due consideration to these concerns and take concrete steps to address them.

5 *Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others* 2023 (5) SA 319 (CC) para 138.

2 THE CONTEMPORARY URGENCY OF **ENSURING ACCESS TO INFORMATION IN THE CLIMATE & ENERGY SPACES**

South Africa is one of the 167 Members States which have ratified the International Covenant on Civil and Political Rights ("**ICCPR**")[6] which was adopted by the United Nation's ("**UN**") General Assembly in 1966, and became effective in 1976. Article 19 of the ICCPR, which is informed by the Universal Declaration of Human Rights,[7] states that:

> "(1) Everyone shall have the right to hold opinions without interference. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> (2) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order, or of public health or morals."

The Report of the Office of the United Nations High Commissioner for Human Rights which was submitted in accordance with Human Rights Council Resolution 44/1 sought to highlight "good practices for establishing national normative frameworks that foster access to information held by public entities".[8] The UN High Commissioner stated that:

6 UN General Assembly, *International Covenant on Civil and Political Rights*, United Nations, Treaty Series, vol. 999, p. 171, 16 December 1966.

7 UN General Assembly, *Universal Declaration of Human Rights,* 217 A (III), 10 December 1948.

8 Report of the Office of the United Nations High Commissioner for Human Rights, *Freedom of Expression,* UN Doc A/HRC/49/38 (2022), p 1.

> "States should promote the principles of openness and transparency in all aspects of decision-making processes, and of accountability of public authorities for the implementation of the right to participate in public affairs."[9]

Furthermore, Principle 1 of the African Commission on Human and People's Rights' Declaration of Principles on Freedom of Expression and Access to Information affirms that:

> "Freedom of expression and access to information are fundamental rights protected under the African Charter and other international human rights laws and standards. The respect, protection and fulfilment of these rights is crucial and indispensable for the free development of the human person, the creation and nurturing of democratic societies and for enabling the exercise of other rights."[10]

Section 24(1)(a) of the Constitution protects the right to an environment that is not harmful to one's health or well-being. Read together with section 32, this means that transparency regarding climate governance is constitutionally mandated. In *Company Secretary of ArcelorMittal South Africa v Vaal Environmental Justice Alliance* 2015 (1) SA 515 (SCA) Navsa JA stated that:

> "It is .... in accordance with international trends, and constitutional values and norms, that our legislature has recognised, in the field of environmental protection ... the importance of consultation and interaction with the public. After all, environmental degradation affects us all. One might rightly speak of collaborative corporate governance in relation to the environment."[11]

The United Nations Framework Convention on Climate Change ("**UNFCCC**")[12] to which South Africa is a party, foregrounds transparency as key to the implementation of climate governance.

9 Report of the Office of the United Nations High Commissioner for Human Rights, *Freedom of Expression*, UN Doc A/HRC/49/38 (2022) para 10.

10 African Commission on Human and Peoples' Rights, *Declaration of Principles on Freedom of Expression and Access to Information in Africa,* adopted at the 65th Ordinary Session, Banjul, The Gambia, 21 October - 10 November 2019.

11 *Company Secretary of Arcelormittal South Africa and Another v Vaal Environmental Justice Alliance* 2015 (1) SA 515 (SCA) para 71.

12 *United Nations Framework Convention on Climate Change*, 1992, Article 11: "the financial mechanism shall have an equitable and balanced representation of all Parties within a transparent system of governance".

From the 2022 KwaZulu Natal floods (one of the deadliest natural disasters of the 21st century in South Africa) to the Just Energy Transition ("**JET**") policy framework, South Africa has entered a new stage of its national and economic development which sees climate change increasingly imposing new conditions of life on the majority of its people.

There are a number of good faith actors from government to private industry and civil society, who wish to pool their resources towards mitigating against the risk posed by climate change. Equally, there are always bad actors who seek economic opportunity in times of crisis.

The findings of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State (the Zondo Commission) shocked millions of South Africans. The findings revealed multiple layers of corruption that implicated both the State and private industry and which caused irreparable damage to the public's trust towards both sectors. In many ways the source of that erosion was the lack of transparency that is endemic in South Africa's institutional and political life.

The need to address climate change has introduced a host of new private actors (including corporations, investors and individuals) with the potential to capture the state under the guise of the climate crisis. The Information Regulator, now more than ever, has an opportunity to centre access to information as a right that is central to climate governance and the promotion of accountability across measures to address the crisis.

THE INFORMATION REGULATOR, NOW MORE THAN EVER, HAS AN OPPORTUNITY TO CENTRE ACCESS TO INFORMATION AS A RIGHT THAT IS CENTRAL TO CLIMATE GOVERNANCE AND THE PROMOTION OF ACCOUNTABILITY.

According to a recent report on the JET in South Africa, only 4% of people living and working in mining communities in Mpumalanga, Limpopo, the Free State and KwaZulu Natal had heard about the JET from government officials and councillors; only 1% had heard about the JET from the Presidential Climate Commission; and more than half of the affected communities had never heard about the JET.[13] The JET purportedly aims to reduce harm to these affected communities and yet the information which is vital to their future is veiled by a systemic lack of transparency.

The ATI Network aims to highlight the importance of the Information Regulator's role in supporting access to information in the context of climate governance and the JET. Accordingly, this submission examines the ATI Network's members' lived experience of the access to information system and its related impact on climate governance and public accountability.

13 Seriti and UN Development Programme 'Survey & analysis – Community response: Just Energy Transition (JET)' (July 2024), available at: https://seriti.org.za/wp-content/uploads/2024/09/JET-survey-report-20240822.pdf.

3 A BRIEF OVERVIEW OF **THE PAIA**

Access to information is a fundamental right that promotes transparency and accountability. The PAIA is cognisant of the role secrecy played in South Africa's apartheid past, which is why its Preamble states that it recognises that "the system of government in South Africa before 27 April 1994, amongst others, resulted in a secretive and unresponsive culture in public and private bodies which often led to an abuse of power and human rights violations".[14] In order to advance transparency and accountability in our public and private bodies, the PAIA actively promotes "a society in which the people of South Africa have effective access to information to enable them to more fully exercise and protect all their rights".[15]

Accordingly, the PAIA establishes clear guidelines to ensure that information holders disclose information unless a valid ground for refusal of access applies. Section 11 of the PAIA enforces a pro-disclosure principle in relation to records held by public bodies, meaning that access to those records should be granted by default, and refusals should be the exception rather than the rule. As regards records held by private bodies, under section 50 a requester must establish that the record is required for the exercise or protection of any right. This places a higher burden on the requester, and the default assumption of disclosure does not apply unless that threshold is met. This distinction is particularly relevant in the climate and energy spaces, where key records may be held by both public and private actors.

As a starting point, the law states that individuals requesting access to information are entitled to those records, regardless of their stated reasons or the assumptions of the information officer regarding their motives, so long as they meet the procedural requirements set by the PAIA. If these requirements are satisfied, access can only be denied based on the specific grounds outlined in either of the PAIA's Chapter 4.[16] Therefore, if the

14 Preamble to the PAIA.
15 Preamble to the PAIA.
16 The PAIA has two chapter 4's, one under Part 2 which relates to access to records of *public* bodies, and another under Part 3 which relates to access to records of *private* bodies.

requested information does not fall within a ground for refusal of access, neither the information holder nor the court has the discretion to refuse access.[17]

When access to information is denied, both public and private entities have a duty to provide clear reasons for their decision. Sections 25(3) and 56(3) of the PAIA mandate that refusals must be communicated in writing, with specific reasons referencing the applicable legal provisions. This requirement serves as a safeguard against arbitrary refusals, ensuring that institutions justify their decisions and do not withhold information without legitimate grounds. By compelling public and private bodies to provide detailed explanations, these sections promote accountability and enable requesters to challenge unjust denials through internal appeals (in the case of refusals by a public body), complaints to the Information Regulator or through instituting court proceedings.

Despite these legal protections, compliance with sections 25(3) and 56(3) remain problematic in practice. Many public and private bodies fail to provide specific reasons for refusal, often citing vague terms such as "confidential" or "privileged" without referencing the relevant PAIA sections and providing the prescribed "adequate reasons" for the refusal. Others resort to delay tactics and/or stalling responses well beyond the legally mandated 30-day response period. Additionally, some institutions misuse grounds for refusal of access, such as 'commercial confidentiality' or 'national security', as a blanket justification for a refusal to grant access, even when these grounds do not genuinely apply or where the necessary facts and/or arguments to back up that ground have not been provided.

The PAIA also outlines specific grounds for refusal of access that require justification rather than automatic refusal. Section 34, for example, protects third party personal information, but disclosure may still be justified if, for example, the third party has consented or the information is already publicly available. Similarly, section 36 allows refusal based on commercial confidentiality, but only if the record contains trade secrets or, for example, disclosure will result in prejudice to the third party. Even then, information that reveals a serious public safety or environmental risk may not be refused. Section 37 mandates the protection of certain confidential information, yet it does not apply if confidentiality was not explicitly agreed upon. When refusals are based on defence, security, or international relations (section 41), institutions must provide a clear justification (providing "adequate reasons, including the provisions relied upon"[18]), rather than making broad claims that

17 Section 11 of the PAIA; *Transnet Ltd and Another v SA Metal Machinery Co (Pty) Ltd* 2006 (6) SA 285 (SCA); *Khanyile v Director-General Province of Kwazulu-Natal and Others* (16707/22P) [2023] ZAKZPHC 119 para 3.

18 This threshold is mandatory for all refusals.

the disclosure could reasonably be expected to prejudice these matters.

To prevent misuse of these grounds for refusal of access, the PAIA includes a 'public interest' override under sections 46 and 70. This provision ensures that, even when a ground for refusal of access applies, disclosure is required if it serves the public interest, particularly in cases of legal violations, public safety or environmental risks, and in addition we suggest, corruption.[19] This mechanism is crucial in preventing public and private entities from using grounds for refusal of access as a shield to hide wrongdoing.

Finally, the PAIA sets strict procedural requirements to ensure timely responses to information requests. Section 25 mandates that public bodies respond to requests within 30 days (unless the provisions regarding third party notification and intervention apply or an extension in terms of section 26 applies). Unjustified delays violate procedural fairness, and a failure to respond within the timeframe is regarded as a refusal of the request. If a requester is dissatisfied with a refusal by a public body, section 74 allows for internal appeals, and section 77A provides for complaints to the Information Regulator. A requester who has exhausted the appeal or complaint procedure may apply to court for appropriate relief. This ensures oversight and accountability in cases of unlawful non-disclosure.

While the PAIA provides strong legal protections to promote transparency, its effectiveness is often undermined by vague refusals, procedural delays, and weak enforcement.

19 We submit that the need to combat corruption is an urgent and recognised state priority. South Africa is a signatory to several international anti-corruption treaties such as the United Nations Convention against Corruption (2004); OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997); African Union Convention on Preventing and Combating Corruption (2003); and the Southern African Development Community Protocol Against Corruption (2001). South Africa has also passed specific anti-corruption legislation such as the Prevention and Combating of Corrupt Activities Act 12 of 2004.

WHILE THE PAIA PROVIDES STRONG LEGAL PROTECTIONS TO PROMOTE TRANSPARENCY, ITS EFFECTIVENESS IS OFTEN UNDERMINED BY VAGUE REFUSALS, PROCEDURAL DELAYS, AND WEAK ENFORCEMENT.

4 ISSUES BEING EXPERIENCED ACROSS THE ATI NETWORK WHEN SEEKING **ACCESS TO CLIMATE- AND ENERGY-RELATED INFORMATION**

When we detail the issues being experienced across the ATI Network when seeking access to climate- and energy-related information, we reference the provisions applicable to both public and private bodies under the PAIA. This is because the nature of the information sought, such as procurement contracts, environmental assessments, or supply agreements, often resides with either public institutions (such as government departments, municipalities and state-owned enterprises) or private entities (such as contractors, suppliers and consultants). Depending on the entity holding the information, the applicable sections of PAIA differ.[20] Where applicable, all relevant provisions are cited to highlight a systemic pattern of non-compliance and/or blanket refusals regardless of the body which holds the information sought.

Non-compliance with PAIA sections 25(3) and 56(3): Lack of adequate reasons for refusals / Blanket refusals

PAIA section 25(3)(a) provides that, if an Information Officer of a public body refuses a request for access, the decision notice must "state adequate reasons for the refusal, including the provisions of this Act relied upon". Section 56(3)(a) is a similar provision in relation to a request to a private body.

The PAIA does not permit blanket refusals where access to the information sought is refused; thus, public and private bodies cannot simply refuse access to information requests without providing a proper justification based on the refusal grounds outlined in the Act. In this regard the Constitution and the PAIA are informed by the international human rights standards cited above which have created binding obligations on States to ensure that the 'freedom to seek information' is guaranteed, and is only limited where necessary through law.

20 PAIA section 25(3) applies to refusals by public bodies, while section 56(3) applies to refusals by private bodies.

The PAIA places a number of prohibitive limits on blanket refusals, such as:

- the obligation to consider requests individually: public bodies must assess each information request separately, and determine whether it falls within the ambit of the PAIA and whether any limitations or grounds for refusal of access apply; and

- the duty to provide written reasons for a refusal: if a public body refuses to grant access to information, the PAIA requires them to provide adequate written reasons for the refusal, referencing the specific ground for refusal of access relied upon.

The Supreme Court of Appeal ("**SCA**") has been particularly instructive in this regard. In *South African History Archive Trust v South African Reserve Bank and Another* 2020 (6) SA 127 (SCA) the court emphasised that public bodies have an onus to prove that a refused PAIA request falls within one of the recognised grounds for such refusal. The SCA criticised the South African Reserve Bank's ("**SARB**") refusal in the most categorical terms:

> "The blanket refusal by the SARB on entirely spurious grounds which do not even assert the elements entitling them to withhold access supports a costs order being made against it. That response has bordered on the obstructive and is certainly not in keeping with the purpose of PAIA in its outworking of the provisions of the Constitution to promote openness and transparency. As was submitted by the appellant, the approach was redolent of the dark days of apartheid, where secrecy was routinely weaponised against a defenceless population."[21]

What this means in practice is that the information holder cannot reject a request for all records, relating for example to a particular tender, simply by claiming broadly that the information sought is confidential. Instead, the information holder must (i) assess whether any parts of the information can be disclosed and disclose those parts accordingly, (ii) justify withholding certain sections using PAIA's grounds for refusal of access, and (iii) provide reasons for the parts withheld and inform the requester of their right to challenge the decision. Thus, the PAIA ensures that refusals to disclose information are not arbitrary but legally justified and subject to oversight.

21 *South African History Archive Trust v South African Reserve Bank and Another* 2020 (6) SA 127 (SCA) para 48.

Practical experience of the issue

The failure to provide adequate reasons for refusal, as required by the PAIA, is unfortunately all too common in practice. Public and private bodies often respond to requests by merely citing the relevant PAIA provision, without providing the necessary justification to support the refusal. Examples of this can be seen in Annexure A hereto, which provides data on the PAIA requests made by the ATI Network's members, where refusals frequently lack the specificity and reasoning required by law.

Non-compliance with PAIA sections 28 and 59: Severing sensitive information

Under the PAIA, the reliance on broadly-worded exemptions or overused justifications for refusing access to information is problematic because it does not align with the Act's standards, particularly the principle of severability in sections 28 and 59. Severability requires that when a record contains both exempt and non-exempt information, the information holder must grant access to the non-exempt portions rather than refusing access to the entire record. This ensures that only the parts of a document that lawfully qualify for exemption from disclosure are withheld, while the rest is disclosed, thereby prohibiting blanket refusals.

The excessive redaction of documents under the PAIA can amount to a de facto refusal of access, particularly when the redactions render the disclosed information incomprehensible or meaningless. Redacting entire sections or key details without justification contradicts the requirement to disclose information that can be severed, and undermines the right of access to information. Our courts have consistently held that public bodies cannot rely on confidentiality clauses or broadly framed grounds for refusal of access to

THE FAILURE TO PROVIDE ADEQUATE REASONS FOR REFUSAL, AS REQUIRED BY THE PAIA, IS UNFORTUNATELY ALL TOO COMMON IN PRACTICE. PUBLIC AND PRIVATE BODIES OFTEN RESPOND TO REQUESTS BY MERELY CITING THE RELEVANT PAIA PROVISION, WITHOUT PROVIDING THE NECESSARY JUSTIFICATION TO SUPPORT THE REFUSAL.

withhold essential information, especially in matters involving public funds;[23] once a public procurement contract is awarded, details such as tender prices and financial terms must be disclosed to ensure accountability.

Public bodies invoking grounds for refusal of access under section 42(3) are thus obligated to ensure that redactions are limited to what is strictly necessary. Overbroad redactions, where the disclosed material lacks substantive meaning, fail to meet the PAIA's legal standards and effectively amount to a non-disclosure, requiring justification as if access had been outright denied.

Failure to comply with sections 28 and 59 occurs when institutions refuse access to the entire document instead of redacting only the sensitive portions. They thereby fail to properly assess what can be disclosed and what cannot, ultimately using blanket refusals as a way to prevent access to what should be publicly available information.

This underscores that the PAIA does not allow for the unnecessary withholding of information; it requires a narrow and justified application of grounds for refusal of access. Institutions that fail to sever sensitive information and instead opt for blanket refusals are thus acting unlawfully under the PAIA.

Practical experience of the issue

An example of the failure to apply severability properly is Open Secrets' 2024 PAIA request to Eskom Holdings SOC Ltd (Distribution Division) for its negotiated pricing agreement (NPA) with South32 Hillside Smelter (Pty) Ltd ("**Open Secrets' South32 PAIA request**"). The request covered contracts, pricing structures, signatories, final invoices, duration, and annual price adjustments. Initially, Eskom disclosed only the NPA in a heavily redacted form, rendering it virtually meaningless; the excessive redactions made it impossible to assess the pricing structure, financial implications, and overall fairness of the agreement, despite its direct impact on public resources and electricity costs. This accordingly constituted a *de facto* refusal of the request.

- It was only after a complaint was filed with the Information Regulator that Eskom complied with the PAIA and granted access to

23 *Afriforum NPC v Eskom Holdings SOC Ltd and Another* (2023/002513) [2024] ZAGPPHC 270 para 40.

the requested information in a meaningful, unredacted form. This was the outcome of a mediation process undertaken by the Information Regulator.

- This case demonstrates how broad and unjustified redactions are used to obstruct transparency, even where disclosure is in the public interest. Institutions must be held accountable for improperly withholding records by failing to apply severability.

- We accordingly recommend that the Information Regulator actively enforce this obligation by scrutinising any excessive redactions, to prevent the misuse of redactions that undermine access to information in the public interest.

How the Information Regulator can seek to address this issue

The Information Regulator plays a crucial role in ensuring that the right of access to information is upheld in a manner that balances transparency with legitimate confidentiality concerns. To address this issue while still accommodating a legitimate need to protect sensitive information, the Information Regulator should consider implementing clear and enforceable guidelines on redaction and severability.

- One way to achieve this is by developing standardised redaction protocols that ensure that severability apply to any provision falling under chapter 4, to ensure that only truly sensitive information is redacted rather than entire sections of documents being blacked out indiscriminately.[24]

- Public bodies should be required to provide a redaction log, specifying exactly which sections have been redacted and citing the precise ground for refusal of access under the PAIA that justifies each removal. This would prevent the widespread use of vague, blanket justifications that frustrate access to meaningful information.

The establishment of an expedited complaint review process for excessive redaction disputes would ensure that unjustified refusals are swiftly addressed. At present, lengthy delays in resolving issues often render information obsolete by the time it is finally disclosed. By introducing a fast-track mechanism for specific issues that can be more swiftly addressed – such as excessive redaction and the failure to properly sever sensitive

24 PAIA section 15 is one mechanism for the establishment of best practices/industry norms and standards.

information – the Information Regulator could prevent unnecessary litigation and uphold the spirit of the PAIA.

Furthermore, the Information Regulator should encourage public bodies to engage in proactive disclosure of the information they hold, making key financial and contractual records publicly available[25] while redacting confidential information before disputes arise.

Lastly, the public interest override which necessitates disclosure (PAIA sections 46 and 70) should be given greater consideration, particularly where excessive redaction obstructs access to information which holds significant public value. The Regulator could issue clear guidance on when the public interest in disclosure outweighs claims of confidentiality, ensuring that the PAIA remains a tool for accountability rather than a shield for secrecy.

PAIA sections 36, 37(1) and 64: Over-reliance on 'commercial sensitivity and confidentiality' as a refusal ground

The improper reliance on 'commercial sensitivity' as a ground on which both public and private bodies rely to refuse access to information has been an overburdening challenge across the ATI Network. Both public and private bodies often invoke this justification to avoid disclosing records that may be important for accountability and transparency.

'Commercial sensitivity and commercial confidentiality' refers to grounds of refusals that are linked to sections 36(1) and 64(1) of the PAIA. The first two sub-sections of each provision (sections 36(1)(a) and (b) and 64(1)(a) and (b)) provide for the mandatory protection of the commercial information of a third party. The third sub-section allows a refusal on the basis of the mandatory protection of certain confidential information belonging to a third party where disclosure could reasonably be expected to "put that third party at a disadvantage in contractual or other negotiations; or to prejudice that third party in commercial competition".

Section 37(1), protects the confidential information of third parties held by public bodies in two distinct instances: refusal is mandatory if such disclosure would breach a duty of confidence owed to a third party under an agreement, and refusal is discretionary and subject to the public interest balancing test if disclosure could reasonably be expected to prejudice the future supply of similar information from the same source and it is in the

25 In this regard we note that even accessing information which should be automatically available is often complicated or even not possible.

public interest that such information continues to be supplied. Such refusals have also been improperly invoked by public bodies to block access to procurement or financial records, citing the "operations of public bodies" exemption.

This issue is particularly relevant in the climate and energy sectors, where access to procurement-related information is essential for transparency and accountability. Many climate and energy projects involve significant public funds, long-term contracts, and partnerships between the government and the private sector. When public and private bodies invoke 'commercial sensitivity and commercial confidentiality' to withhold information about procurement processes, pricing structures, and contractual obligations, it creates a lack of transparency that hinders public oversight and enforces anti-competitive behaviour, which has the effect of inflating prices.

In cases where renewable energy projects, power purchase agreements, or fossil fuel-related contracts are shielded from scrutiny under the guise of 'commercial sensitivity and confidentiality', there is a heightened risk of impropriety. Lack of disclosure prevents civil society organisations and the broader public from identifying potential collusion, inflated pricing, or unfair tender processes. This ultimately affects public expenditure, as undisclosed government commercial arrangements can lead to excessive costs being passed on to the public, reduced accountability for environmental impacts, and limited opportunities for emerging players in the sector. This in turn operates against the broader public interest.

Given the global urgency of the energy transition, access to procurement-related information is crucial in ensuring that climate-related projects are conducted in a manner that is cost-effective, sustainable, and aligned with the public interest. The misuse of 'commercial sensitivity and confidentiality' as a ground of refusal undermines these objectives and reinforces market concentration amongst the dominant players.

GIVEN THE GLOBAL URGENCY OF THE ENERGY TRANSITION, ACCESS TO PROCUREMENT-RELATED INFORMATON IS CRUCIAL IN ENSURING THAT CLIMATE-RELATED PROJECTS ARE CONDUCTED IN A MANNER THAT IS COST-EFFECTIVE, SUSTAINABLE, AND ALIGNED WITH THE PUBLIC INTEREST.

The ATI Network has experienced the over-reliance on "commercial sensitivity" in two distinct manners: as being relied on without reference to particular commercial interests that give rise to a right to refuse disclosure, and as being unsubstantiated and without reference to the potential harm which would arise from disclosure.

Unsubstantiated reliance on "commercial sensitivity" – proof of the 'harm' is required

According to the PAIA, to justify any refusal under sections 36(1)(b) & (c), and, in part, section 42(3)(b), public bodies are required to demonstrate the claimed potential harm and/or prejudice which would be suffered by allowing access to the information sought. This would necessitate a thorough assessment of the probable 'harm' resulting from disclosure. Thus, each refusal must be tangible and significant, rather than merely speculative; the public body bears the burden of proving that its refusal is not merely hypothetical but grounded in reality.[26]

This was confirmed by the SCA in *BHP Billiton PLC Inc v De Lange* 2013 (3) SA 571 (SCA), where it cautioned against bare refusals and an over-reliance on sections 36(1)(b) and (c) without justification, by stating that:

> "A party who relies on these provisions to refuse access to information has a burden of establishing that he or she or it will suffer harm as contemplated in ss 36(1)(b) and (c). The party upon whom the burden lies. . . must adduce evidence that harm 'will and might' happen if the holder of the information parts with or provides access to information in its possession relating to the contracts. The burden lies with the holder of the information and not with the requester."[27]

In *AfriForum NPC v Eskom Holdings SOC Ltd and Another* (2023/002513) [2024], the High Court stated that the threshold of probability required to justify such a refusal is that when the language used suggests a likelihood of harm, as opposed to a mere *expectation* of harm, a higher degree of probability is necessary.[28] Thus, in order to justify refusing disclosure based on the grounds of "likely to", the entity invoking this provision must demonstrate, on substantial grounds, a strong probability of harmful consequences.

26 *Afriforum NPC v Eskom Holdings SOC Ltd and Another* (2023/002513) [2024] ZAGPPHC 270 para 21. See also I Currie and J de Waal The Bill of Rights Handbook (6th Ed, Juta) p 692.

27 *BHP Billiton PLC Inc v De Lange* 2013 (3) SA 571 (SCA) para 25.

28 See also *M&G Media v 2010 FIFA World Cup Organising Committee* 2011 (5) SA 163 (GSJ) para 403.

In *Health Justice Initiative v Minister of Health and Another* (10009/22) [2023] ZAGPPHC 689 the North Gauteng High Court provided some guidance, citing *CCII Systems (Pty) Ltd v Fakie and Others NNO*, where it was held that:

> " [B]ecause of the onus created in s81, it will be necessary for the information officer to identify documents which he wants to withhold. A description of his entitlement to protection is to be given, one would imagine, as in the case of a discovery affidavit in which privilege is claimed in respect of some documents. The question of severability may come into play. Paragraphs may be blocked out or annexures or portions may be detached."[29]

Furthermore, in *President of the Republic of South Africa and Others v M & G Media Ltd* 2015 (1) SA 92 (SCA), the court stated:

> "The Act [PAIA] requires a court to be satisfied that secrecy is justified and that calls for a proper evidential basis to justify the secrecy."[30]

In *South African History Archive Trust v South African Reserve Bank and Another* 2020 (6) SA 127 (SCA), the court observed:

> "Some comment must be made on the overall approach taken by the SARB. I think it is fair to say that the answering affirmation is long on stock phrases which merely repeat parts of this chapter of PAIA. The affirmation falls woefully short on fact, detail, or proper application of the provisions of PAIA."[31]

Adequate justification for refusing access to a record for "commercial sensitivity" under the PAIA requires more than merely asserting confidentiality or relying on 'stock phrases'. It demands specific and detailed reasoning that is evidentially supported, demonstrating why secrecy is justified in the particular access to information request. This includes identifying the specific documents to be withheld, explaining the entitlement to protection, and applying the relevant provisions of the PAIA appropriately. A mere general claim of "commercial sensitivity" without the necessary factual backing is insufficient. The justification

29 *CCII Systems (Pty) Ltd v Fakie and Others NNO* 2003 (2) 325 (T) para 16.

30 P*resident of the Republic of South Africa and Others v M & G Media L*td 2015 (1) SA 92 (SCA) paras 11-16.

31 *South African History Archive Trust v South African Reserve Bank and Another* 2020 (6) SA 127 (SCA) para 21.

must meet the standards set out by the courts, ensuring that access is refused only when there is a proper legal basis, and thus that the refusal is not based on mere assumptions or generic assertions.

Practical experience of the issue

This issue has been experienced firsthand within the ATI Network, particularly in cases wherein members have sought transparency in state procurement matters.

- In Open Secrets' South32 PAIA request, Open Secrets sought access to an NPA between Eskom and a private company.

- Eskom refused access, improperly citing section 42(3) of the PAIA without providing adequate justification. The refusal also failed to demonstrate any potential harm or prejudice, as required under sections 36(1) and 37(1) of the PAIA. The refusal was thus based on vague assertions of commercial sensitivity rather than a detailed, evidence-based justification.

- Ultimately, after Open Secrets filed a complaint with the Information Regulator, the Regulator mediated the matter and Eskom disclosed the unredacted NPA, demonstrating that the unsubstantiated reference to commercial sensitivity had been without merit.

This example highlights the pressing need for the stringent application of the PAIA's provisions to prevent unwarranted secrecy; just because commercial interests are implicated, does not immediately necessitate protection from disclosure. If the information holder fails to justify such a refusal without reference to specific harm which would be caused by disclosure, then the refusal is unwarranted.

How the Information Regulator can seek to address this issue

The Information Regulator should promote and reinforce the narrow interpretation of the PAIA exemptions to disclosure to prevent the overuse of confidentiality claims, particularly in cases involving public funds, procurement, and government contracts.

PAIA sections 64 ('commercial interests of third parties') and 65 (mandatory protection of certain confidential information of third party): Increasing use to delay and/or deny access to information

Sections 64 and 65 of the PAIA allow private bodies to refuse access to records if disclosing them would harm the commercial interests of third parties. While this provision is meant to protect sensitive business information, it is increasingly being misused to obstruct access to information more generally, particularly in cases implicating public procurement processes, government contracts, and corporate accountability for wrongdoing.[32]

Section 64 only applies when the disclosure would cause unreasonable harm to a third party's commercial, financial, or trade secrets. It is acknowledged that records requested from public or private bodies might contain information such as trade secrets of third parties who may be unaware of the request, which could impact their rights. To address this, the PAIA was carefully designed to ensure that third parties have an opportunity to be heard before a decision is made. In line with common law principles, affected parties must be notified if granting access to such information may impact them because decisions made without their input deviate from the fundamental principle of *audi alteram partem* (hear the other side). This principle is reflected in sections 71 to 73 of the PAIA.[33]

The PAIA acknowledges that, despite reasonable efforts, it may not always be possible to notify all third parties before making a decision. In such cases, a decision must still be reached on the information request. To address this, section 49(2) states that if all reasonable steps have been taken as required by section 47(1), but the third party has not been informed and has not submitted representations, the decision must be made with consideration of the fact that the third party had no opportunity to object. However, this exception must be interpreted narrowly. The standard rule, under both the common law and the PAIA, is that individuals whose rights may be impacted by a decision must be given the opportunity to present their case.

32 Section 81 of the PAIA addresses, among others, the burden of proof in proceedings contemplated in section 78, and subsection (3)(a) provides that the burden of establishing that the refusal of a request for access complies with the PAIA rests on the party claiming that it so complies (i.e. the holder of the information).

33 *Recycling and Economic Development Initiative of South Africa NPC v Minister of Environmental Affairs* 2019 (3) SA 251 (SCA) para 46; PAIA sections 47-49 set out the circumstances in which an information officer must take all reasonable steps to notify a third party of a request for information and invite representations.

State contracts in the climate and energy space involve third-party businesses. Information officers increasingly cite section 64 to block access to such agreements, even when public funds are involved, to shield public-private contracts from scrutiny. This has been a major barrier for civil society organisations and journalists working to expose corruption, irregularities, and inflated contracts, and has a chilling effect on public accountability.

This issue is particularly relevant in the climate and energy sectors, where large-scale procurement deals, public-private partnerships, and infrastructure projects involve substantial public funding. The reliance on section 64 to withhold access to these agreements creates significant barriers to transparency, especially in an era where corruption, mismanagement, and inflated contracts in energy procurement have been well-documented.

Given the urgency of climate action and the need for equitable and accountable energy transitions, civil society organisations and journalists play a crucial role in scrutinising these deals to ensure that public funds are not misused and that contracts serve the public interest. However, excessive reliance on section 64 can operate to shield critical details, such as pricing structures, financial commitments, and contractual obligations, from scrutiny, making it difficult to assess whether these projects are cost-effective, sustainable, and free from corruption. This lack of transparency ultimately undermines public trust and weakens oversight over energy and climate financing, where accountability is paramount.

If section 64 is too broadly interpreted it discourages legitimate requests for corporate accountability, particularly in cases involving public procurement, government contracts, or corporate wrongdoing. Many private entities overuse section 64 as a blanket reason to deny access, often without demonstrating real harm to a specific third party's commercial interests. Rather, the PAIA requires a case-by-case analysis, meaning that an entity must demonstrate that disclosing the information would likely cause harm to a third party's commercial interests; it cannot just make that claim broadly.[34]

In this regard, in *Transnet Ltd*[35] the court held:

> "To my mind the overriding consideration here is that the appellant, being an organ of State, is bound by a constitutional obligation to conduct its operations transparently and accountably. Once it enters into a

34 See *Transnet Ltd and Another v SA Metal Machinery Co (Pty) Ltd* 2006 (6) SA 285 (SCA).

35 *Transnet Ltd and Another v SA Metal Machinery Co (Pty) Ltd* 2006 (6) SA 285 (SCA) at paras 55-6.

> commercial agreement of a public character like the one in issue (disclosure of the details of which does not involve any risk, for example, to State security or the safety of the public) the imperative of transparency and accountability entitles members of the public, in whose interest an organ of State operates, to know what expenditure such an agreement entails."

This ruling directly challenges the broad and unjustified reliance; it made it clear that transparency and accountability take precedence, particularly when public funds or state contracts are involved. Information officers must therefore ensure that sections 37 and 64 are not misused to shield commercial agreements from scrutiny. Where disclosure would reveal non-compliance with the law or serve the public interest, refusal would not only be unlawful but also contrary to the constitutional principle of open governance.

The increasing use of these sections of the PAIA is problematic when relied on too broadly and without proper justification. The PAIA was designed to promote transparency and ensure that public and private bodies provide access to information unless there is a valid and justifiable reason for refusal. Information officers cannot use these sections as a blanket shield to deny access to information that is in the public interest. Where records reveal legal non-compliance, sections 70 and 46 mandate disclosure, overriding commercial confidentiality. Failure to apply these principles correctly undermines accountability, enables both state and corporate misconduct, and may constitute an unlawful refusal of access to information.

Practical experience of the issue

In October 2023, Open Secrets submitted a PAIA request to Eskom seeking access to records on Eskom's coal, diesel, petroleum, and gas supply contracts, including contract values, signed agreements, tender evaluations, and related documents ("**Open Secrets' Eskom procurement PAIA request**").

- Eskom refused the request on the basis that disclosing the information sought could harm its commercial or financial interests, that revealing such information could disadvantage it in negotiations or commercial competition, and that disclosing the information sought would breach its duty of confidence to third parties. Despite this, Eskom failed to furnish any detailed explanation in support of its grounds for refusal.

- The matter is the subject of an ongoing complaint before the Information Regulator.

How the Information Regulator can seek to address this issue

The Information Regulator should develop stricter guidelines on when commercial interests genuinely justify non-disclosure of information sought – clearer legal thresholds can work to prevent overbroad and vague refusals that undermine transparency and constitute an abuse of the grounds for refusal of access provided for in the PAIA.

Environmentally sensitive information held by corporations

In *Vaal Environmental Justice Alliance*, the SCA addressed the obligations of private entities that perform public functions, particularly concerning access to environmental information.[36]

The dispute arose when the Vaal Environmental Justice Alliance ("**VEJA**"), an environmental advocacy group, sought information pertaining to ArcelorMittal's (AMSA) 'Environmental Master Plan' which contained information about the levels of pollution in its Vanderbijlpark steel plant. AMSA refused the request, contending that VEJA had not identified a specific

36 *Company Secretary of ArcelorMittal South Africa and Another v Vaal Environmental Justice Alliance* 2015 (1) SA 515 (SCA) (VEJA).

THE INFORMATION REGULATOR SHOULD DEVELOP STRICTER GUIDELINES ON WHEN COMMERCIAL INTERESTS GENUINELY JUSTIFY NON-DISCLOSURE OF INFORMATION SOUGHT – CLEARER LEGAL THRESHOLDS CAN WORK TO PREVENT OVERBROAD AND VAGUE REFUSALS THAT UNDERMINE TRANSPARENCY AND CONSTITUTE AN ABUSE OF THE GROUNDS FOR REFUSAL OF ACCESS PROVIDED FOR IN THE PAIA.

right they sought to protect or exercise, as required under section 50(1)(a) of the PAIA, and further argued that the documents were outdated, irrelevant, and scientifically flawed. VEJA challenged this refusal under the PAIA, arguing that the public had a right to access environmental information, especially because, as the SCA noted, "[AMSA] is a major, if not *the* major, polluter in the areas in which it conducts operations".[37]

The SCA ruled in VEJA's favour, finding that VEJA had substantiated its request using three laws in addition to the constitutional environmental right – namely, the National Environmental Act 107 of 1998, the National Water Act 36 of 1998 and the National Environmental Management: Waste Act 59 of 2008 – as relevant legislation in its PAIA request to AMSA. The Court held that VEJA had complied with the threshold contained in section 50(1) and confirmed that PAIA imposes duties on private actors whose operations impact constitutional rights, particularly where environmental harm is concerned. AMSA was ordered to disclose the records requested.

- The VEJA case has since become an important case in grounding the right of access to information to the right to have the environment protected. The Court held that:

> "It is clear, therefore, in accordance with international trends, and constitutional values and norms, that our legislature has recognised, in the field of environmental protection, inter alia, the importance of consultation and interaction with the public. After all, environmental degradation affects us all. One might rightly speak of collaborative corporate governance in relation to the environment."[38]

PAIA section 41(1): Vague grounds for refusal based on 'state security' concerns

The misuse of "state security" concerns as a ground for refusal under the PAIA has increasingly become a major barrier in accessing information in the climate and energy spaces. Public bodies often invoke section 41(1), which permits refusal on the basis of national security, defence, or international relations, to withhold critical records about large-scale energy procurement projects, just transition-related infrastructure development, and climate

37 *Company Secretary of ArcelorMittal South Africa and Another v Vaal Environmental Justice Alliance* 2015 (1) SA 515 (SCA) para 52.

38 *VEJA* para 71.

financing agreements. This practice is particularly concerning given the high levels of public funding and international investment (whether development or private finance) involved in energy projects and the JET more broadly, with transparency being essential to prevent corruption, mismanagement, and unfair contract awards.

The onus to demonstrate why access to a record should be refused is borne by the party refusing access. Section 46 of the PAIA "ought not to be read or applied to create an insuperable barrier to the exercise of [the] right of access and certainly not to place an onus on [the requester]".[39]

In the climate and energy sectors, government contracts frequently involve long-term power purchase agreements, renewable energy procurement programmes, and fossil fuel-related investments, all of which have significant social, economic, and environmental impacts. Overusing "state security" justifications to found refusals of access, public bodies effectively shield procurement details, project feasibility studies, and financial commitments from public scrutiny, obstructing efforts by civil society organisations, journalists, and researchers to hold the state and private actors accountable for large-scale spending.

This pattern mirrors broader trends in strategic state secrecy, where information is concealed not because of legitimate security concerns, but rather to avoid public accountability in politically sensitive or controversial projects. If left unchecked, this practice could erode transparency in climate governance, making it difficult to track whether public funds are being used efficiently, whether procurement processes are fair, and whether contractual obligations align with South Africa's climate commitments.

39 *Health Justice Initiative* at paras 33 & 46.

IN THE CLIMATE AND ENERGY SECTORS, GOVERNMENT CONTRACTS FREQUENTLY INVOLVE LONG-TERM POWER PURCHASE AGREEMENTS, RENEWABLE ENERGY PROCUREMENT PROGRAMMES, AND FOSSIL FUEL-RELATED INVESTMENTS, ALL OF WHICH HAVE SIGNIFICANT SOCIAL, ECONOMIC, AND ENVIRONMENTAL IMPACTS.

Simply restating the statutory wording of the ground for refusal of access is not enough to justify withholding a record. Likewise, mere assertions in affidavits without supporting details are insufficient. The State must provide enough information to show that the record sought genuinely qualifies for this ground for refusal of access. This requirement highlights the importance of access to information in ensuring transparency and accountability in government, which in turn supports the public's ability to exercise their constitutional rights.

In *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services (Freedom of Expression Institute as Amicus Curiae): In re Masetlha v President of the Republic of South Africa* 2008 (5) SA 31 (CC) it was held that:

> 'Secrecy is in a sense a matter of degree. Nothing is ever completely secret. Information is always known to somebody. Information impinging on national security is no exception.'[40]

The court ruled that claims of "state security" must be carefully weighed against the public interest, and blanket refusals based on security concerns must be justified. This prevents vague "state security" refusals and supports sections 46 and section 70 (the public interest override).

One of the key issues with the reliance on broadly-worded grounds for refusal of access under the PAIA is the failure to meet justification standards – broad and vague refusals on the basis of "state security concerns" do not align with the PAIA's standards because they lack specificity, fail to provide adequate reasons, and risk undermining transparency. The PAIA does not allow blanket refusals – each refusal must be justified on a case-by-case

40 *President of the Republic of South Africa and Others v M&G Media Ltd* 2012 (2) SA 50 (CC) paras 44–47.

LEGAL PRECEDENTS AND THE PAIA'S STANDARDS GENERALLY FAVOUR DISCLOSURE, PARTICULARLY IN CASES WHERE THE REQUESTED INFORMATION RELATES TO PUBLIC SPENDING, SUCH AS TENDERS AND GOVERNMENT CONTRACTS.

basis, showing actual harm or prejudice rather than speculative risks. As such, the courts have repeatedly ruled that a mere claim of "state security" is insufficient;[41] the information holder must demonstrate how disclosure would cause harm at a level rising to that which implicates the state's security.

Ultimately, whether the state's evidence is sufficient depends on the nature of the exemption from disclosure being claimed. The key issue is not whether the State has provided the strongest possible justification for refusal, but whether the evidence presented allows a court to reasonably conclude that the record falls within the exemption. If the State meets this threshold in court proceedings, it has fulfilled its duty under section 81(3). However, if it fails to do so and does not indicate that disclosing more information would undermine the very exemption it relies on, then it has only itself to blame for not meeting the burden of proof.

Legal precedents and the PAIA's standards generally favour disclosure, particularly in cases where the requested information relates to public spending, such as tenders and government contracts. The courts have also rejected refusals that lack specific evidence of harm or where there is a clear public interest in disclosure. This reinforces the principle that transparency should be the default, and grounds for refusal of access must be narrowly construed to prevent unjustified secrecy.

41 *President of the Republic of South Africa and Others v M&G Media Ltd* 2012 (2) SA 50 (CC) paras 44–47.

[I]N THE CONTEXT OF PUBLIC PROCUREMENT, THE MERE EXISTENCE OF A CONFIDENTIALITY CLAUSE DOES NOT AUTOMATICALLY JUSTIFY WITHHOLDING INFORMATION OR DOCUMENTATION.

PUBLIC INSTITUTIONS MUST STILL DEMOSTRATE A VALID AND LAWFUL REASON FOR RESTRICTING ACCESS, RATHER THAN RELYING SOLELY ON CONTRACTUAL CONFIDENTIALITY TO AVOID SCRUTINY.

PAIA sections 34, 36, 37, 63 and 64: Improper classification of information sought as 'confidential'

These sections are often invoked by information officers as refusal grounds to shield personal, commercial, and privileged information, often beyond the scope of what the PAIA permits. The court in *Health Justice Initiative* emphasised that public bodies cannot enter into agreements containing confidentiality clauses and then use those clauses as a shield to evade their legal duties of accountability and transparency.[43] The court made it clear that contractual confidentiality cannot override the principles of openness and access to information, particularly when the agreements involve matters of public interest.

Furthermore, the judgment clearly outlined that in the context of public procurement, the mere existence of a confidentiality clause does not automatically justify withholding information or documentation. Public institutions must still demonstrate a valid and lawful reason for restricting access, rather than relying solely on contractual confidentiality to avoid scrutiny.[44]

In *De Lange* it was held that reliance on a confidentiality clause to withhold disclosure was insufficient, and more was required:

> "[D]etails as to the nature of this confidence, whether it arises from the agreements themselves or some other basis, what aspects of the agreements the duty of confidence covers, and whether the duty of confidence contains any exceptions, for example, in relation to disclosures required by law or pursuant to a court order."[45]

In the recent SCA judgment in *Ibex RSA Holdco Limited and Another v Tiso Blackstar Group (Pty) Ltd and Others* (862/2022) [2024] ZASCA 166 (*Steinhoff*), the court extended the approach applied in *Health Justice Initiative* to documents that could be argued to be legally privileged. The judgment reaffirmed that legal professional privilege does not automatically apply to documents merely because litigation was one of the purposes for their creation. Instead, the "dominant purpose" test must be applied.[46]

43 *Health Justice Initiative* para 34.
44 Health Justice Initiative para 36.
45 *De Lange* para 128.
46 *Steinhoff* paras 65-75.

- The SCA relied on the principles set out in English law in *Waugh*.[47] The court in *Waugh* held that privilege could not apply unless obtaining legal advice or preparing for litigation was the *dominant* purpose of the document's creation. The SCA thus held that withholding documents that serve broader purposes, such as ensuring safety or corporate accountability, undermines justice, as it prevents access to the best available evidence:

> "The dominant purpose test advances the adversarial system of justice by broadening the discovery process, thus ensuring that the courts decide issues between parties on an evaluation of the full facts. The former approach clothes documents that would in any event have been produced and otherwise not privileged, with legal professional privilege; and is at odds with the object of discovery."[48]

- This judgment reinforces the principle that public interest and transparency should prevail over broad claims of confidentiality or privilege, particularly in cases involving corporate misconduct or public accountability.

Confidentiality is, however, not a ground without exception. In *Arena Holdings (Pty) Ltd t/a Financial Mail v South African Revenue Service* [2023] ZACC 19, the Constitutional Court held that the information holder must balance confidentiality against the public's interest, considering the interconnectedness of the rights to privacy, access to information and freedom of expression. The Court emphasised that PAIA sections 46 and 70 (which provide for mandatory disclosures in the public interest) obliges disclosures that would have otherwise been protected.

47 *Waugh v British Railways Board* [1980] AC 520.
48 *Steinhoff* para 71.

TRANSPARENCY AROUND PUBLIC PROCUREMENT PROCESSES AND AGREEMENTS WILL INEVITABLY PLAY A CRUCIAL ROLE IN DETERMINING THE SUCCESS OF CLIMATE GOVERNANCE IN SOUTH AFRICA.

THE LEGITIMACY OF THE JET REQUIRES THAT OUR PUBLIC INSTITUTIONS PRIORITISE TRANSPARENCY.

Similarly in *Health Justice Initiative* the Court stated that:

> "It seems somewhat obvious, in the context of public procurement but in particular in the present instance, that just because there is a confidentiality clause, does not mean that the information and documentation can be withheld on that basis alone. In *De Lange and Another v Eskom Holdings Ltd and Other* it was held that ...'[D]etails as to the nature of this confidence, whether it arises from the agreements themselves or some other basis, what aspects of the agreements the duty of confidence covers, and whether the duty of confidence contains any exceptions, for example, in relation to disclosures required by law or pursuant to a court order'."[49]

Transparency around public procurement processes and agreements will inevitably play a crucial role in determining the success of climate governance in South Africa. The legitimacy of the JET requires that our public institutions prioritise transparency particularly where this will not be the source of any harm or prejudice, and that transparency must be attended to in fulfilment of the culture of justification that permeates the Constitution and the PAIA.

Recurring refusals for similar information already in the public domain

Once access to particular information has been granted by a court, there should be no need to institute further PAIA requests to access later iterations of that information which is materially the same in form and content as that requested and granted in prior litigation. Where such a PAIA request is instituted to access those later iterations, it should certainly not be denied.

The burden should not rest on the public to issue PAIA requests for subsequent iterations of information which have already been granted and thereby made publicly available. Refusals of such PAIA requests violate the PAIA, the right to access to information and the system of judicial precedent.

Members of the ATI Network face the burden of having to indulge these kinds of refusals, where there should not have been any need for a PAIA request to seek the information in the first place, precisely because the matter would have already been decided by the courts.

49 *Health Justice Initiative v Minister of Health and Another* (10009/22) [2023] ZAGPPHC para 36.

Practical experience of the issue

The information sought by Open Secrets from Eskom involved the negotiated pricing agreement with the South 32 Hillside Smelter in Richard's Bay, KwaZulu Natal. The information request was materially the same in form and content as that requested by Media24 in the litigation which culminated in the SCA's judgment in BHP Billiton PLC Inc and Another v De Lange and Others 2013 (3) SA 571 (SCA), in which access to the information sought was ultimately granted. In refusing Open Secrets' request, Eskom ignored the doctrine of precedent. Such a refusal can only be interpreted as a deliberate misapplication of the PAIA and a wilful refusal to follow judicial precedent.

Use of the POPIA to refuse access sought through the PAIA

Some entities use the POPIA as a blanket justification to deny access to records that should be publicly available under the PAIA. This misinterpretation of the law creates unnecessary obstructions and limits transparency.

The Constitutional Court in *Arena Holdings* reinforced that privacy protections under the POPIA cannot be applied in a manner that undermines the right of access to information under the PAIA. The Court affirmed that the PAIA's public interest override allows for the disclosure of otherwise confidential information where the public interest clearly outweighs the harm of disclosure. The Court emphasised that this is a high threshold, maintaining substantial protection for confidential and personal information, and that disclosure will only be permitted in carefully circumscribed circumstances, particularly where the information pertains to public governance, accountability, or potential wrongdoing.[51] This principle is particularly relevant in the energy and environmental governance sectors, where access to information is critical for transparency, oversight, and accountability.

Practical experiences of the issue - Just Share NPC and amaBhungane Centre for Investigative Journalism / DFF

Just Share NPC and the amaBhungane Centre for Investigative Journalism submitted a PAIA request to the Department of Forestry, Fisheries, and the Environment ("**DFFE**") for records related to bilateral engagements between the DFFE and four private entities. The subject matter within the scope of this request – carrying an inherent public interest – included meetings on

51 *Arena Holdings* paras 143-6.

forthcoming regulatory instruments under the newly promulgated Climate Change Act 22 of 2024, the Carbon Tax Discussion Paper for Phase Two of the Carbon Tax (which was published for comment in December 2024), and South Africa's recommended positions at the twenty-ninth session of the Conference of the Parties ("**COP**") to the UNFCCC.

The DFFE's initial response on 3 January 2025 advised that the records requested "may" be records contemplated in sections 34(1), 36(1), 37(1) or 43(1) of the PAIA. As such, the DFFE was required to follow the third-party notification procedure in terms of sections 47 to 49 of the PAIA, inviting either written consent for the disclosure of the records or written and / or oral submissions as to why the request should be refused. Following this procedure, the DFFE issued an outcome letter on 31 January 2025 granting access to the bulk of the records, where they existed, with redactions on the basis of section 36(1) of the PAIA – commercially sensitive information – and the POPIA.

The DFFE went further, however, refusing access to records from two bilateral engagements with one of the identified third-parties, only, relying on section 11 of the POPIA. Notwithstanding the third-party notification procedure, which extends to the protection of personal information under section 34(1) of the PAIA, the DFFE was of the position that the requesting organisations were also required to request consent from the third-party data subject in terms of sections 11(1)(a) and 11(2)(a) of the POPIA. Thereafter, DFFE asked for proof that this burden had been discharged.

On 14 February 2025, the requesting organisations communicated in a letter that in the event that the POPIA does apply to the records in question, it was acknowledged that the Department, as the holder of the records and responsible party, was required to act in accordance with relevant provisions in the POPIA. However, the requesting organisations disagreed with the interpretation that they also fall under the definition of a responsible party, considering that the requested information fell within the ambit of the PAIA, which provides for a third-party notification procedure. To the extent that section 11 of the POPIA was applicable, the requesting organisations would constitute third-parties with "legitimate interests" to which the information would be supplied in terms of section 11(1)(f) of the POPIA. In response to this counter-interpretation, the DFFE subsequently granted access to redacted versions of the records of the two bilateral engagements in question, and seemingly abandoned its request for proof of a request for consent in terms of section 11(1)(a) and 11(2)(a) of the POPIA.

Practical experiences of the issue - The Green Connection / Azinam (Block 2B)

The Green Connection encountered significant resistance when requesting, via email and thus outside of the PAIA process, access to environmental records relating to Azinam/Eco Atlantic's ("**Azinam**") oil exploration activities off the South African West Coast, which documents should be publicly available. Initially directed to the consultants conducting the stakeholder engagement process on Azinam's behalf and later to Azinam's legal representatives (Cliffe Dekker Hofmeyr), the Green Connection was refused access to the Oil Spill Contingency Plan ("**OSCP**") on the basis that the information was confidential and contained personal information protected by the POPIA.

Despite proposing redactions of any sensitive personal details, the Green Connection was told that the OSCP could only be shared subject to a non-disclosure undertaking, failing which they were advised to submit a formal PAIA request to the South African Maritime Safety Authority ("**SAMSA**"). The Green Connection refused to sign the requested non-disclosure undertaking.

Ultimately, the Green Connection elected to submit a PAIA request to the Petroleum Agency South Africa, and Azinam's OSCP was made available, albeit with some redactions.

This practical example displays a growing trend in which private actors rely on broad claims of confidentiality and the POPIA to obstruct access to environmental records that ought to be public, particularly those relevant to coastal communities and emergency response preparedness.

PAIA sections 46 and 70: Strengthening the 'public interest' override

The public interest override in sections 46 and 70 of the PAIA is a crucial provision that allows access to information that would otherwise be refused, where the public interest in disclosure outweighs the harm of non-disclosure. Our courts have dealt with this override in several key cases, emphasising transparency, accountability, and the constitutional right to access information.

At the outset, information officers must, in the course of adjudicating a PAIA request, be compelled to weigh the public interest in disclosure before invoking any provision for the purposes of a refusal.

Despite the PAIA's provision for a public interest override, it is common for information officers to repeatedly deny access to information without reassessing whether their justification for the refusal remains valid over time. Often, once an exemption is cited, information officers continue to rely on it without conducting a fresh, case-specific assessment of whether the public interest in disclosure now outweighs the harm of releasing the information. This practice violates the spirit and purpose of PAIA.

If public interest considerations were consistently applied and information officers were required to reassess their justifications in every instance of refusal, it would significantly reduce the recurrence of unlawful denials. Strengthening the mandated reassessment process would ensure that secrecy is not maintained by default, particularly in cases where transparency is crucial for public accountability, environmental justice, and the responsible governance of climate finance.

In *Steinhoff*,[52] the court ruled that a report on Steinhoff's financial irregularities must be disclosed as it provides clear evidence of large-scale fraud, which operates to serve the public interest and override any competing considerations for refusing disclosure. Thus, where the disclosure of a record would reveal evidence of legal non-compliance, fraud, or an imminent public safety or environmental risk, the public interest in disclosure outweighs any potential harm caused by such disclosure. This provision ensures that information of significant public concern cannot be withheld based on general grounds of refusal, such as legal privilege.[53]

- The SCA made it clear that the public interest override aligns with the common law principle that legal privilege cannot be used to conceal fraud or a crime. Essentially, the PAIA overrides certain refusal grounds by preventing them from being invoked to withhold information in cases where disclosure serves the greater public interest.[54]

- The threshold for the public interest override is a balance of probabilities test. This means that if the material before the decision-maker indicates that disclosure is more likely than not to reveal evidence of legal non-compliance, the record must be disclosed, regardless of any applicable refusal grounds. This applies to both private and public bodies under the PAIA, as well as to courts considering such applications.[55]

52 *Ibex RSA Holdco Limited and Another v Tiso Blackstar Group (Pty) Ltd and Others* (862/2022) [2024] ZASCA 166.

53 *Steinhoff* para 93.

54 *Steinhoff* at para 93 citing *Qoboshiyane NO and Others v Avusa Publishing Eastern Cape (Pty) Ltd and Others* 2013 (3) SA 315 (SCA) para 12.

55 *Steinhoff* para 95.

Information officers must apply this test when assessing information requests from civil society. They cannot refuse disclosure solely because a refusal ground exists - if the public interest override nevertheless applies.

The public interest override is particularly relevant in the climate and energy sectors, where transparency is critical to ensuring that public funds are used effectively and equitably. South Africa, as the first country to conclude a Just Energy Transition Partnership ("**JETP**"), is receiving significant climate finance from international partners to support the country's transition away from fossil fuels. However, the lack of transparency in how these funds are allocated, the terms of agreements, and the involvement of private entities raises serious concerns about accountability, corruption risks, and the potential for mismanagement.

Civil society organisations working on energy governance often request access to procurement agreements, bidding processes, and financial arrangements to scrutinise whether due process was followed and whether contracts serve the public interest rather than private gain. The *Steinhoff* judgment's emphasis on the broader right of the public to know, particularly where public funds and national interests are at stake, reinforces the argument that energy-related procurement contracts should not be shielded from scrutiny.

This case strengthens the position of civil society in demanding access to procurement documents under the PAIA, particularly where there are allegations or indications of corruption, undue influence, or irregularities. Just as the court ruled that Steinhoff's report must be disclosed despite claims of potential harm to its commercial interests, government and third-party entities engaged in energy procurement should not be allowed to withhold crucial information when the public interest in transparency and accountability outweighs any alleged confidentiality concerns.

Practical experience of the issue

There have been several instances where the public interest override in the PAIA should have been applied to grant access to information by default, but instead, requests were denied under vague claims of confidentiality or commercial sensitivity.

- One such example is the Independent Power Producer ("**IPP**") procurement processes in South Africa's Renewable Energy Independent Power Producer Procurement Programme ("**REIPPPP**"). Many of these agreements involve significant public funds and long-term obligations, yet details about pricing structures, contract terms,

and financial risks have been withheld under section 36 of PAIA. Given the substantial impact on electricity tariffs and public expenditure, the public interest in transparency far outweighs any potential commercial harm, particularly when non-disclosure allows for inflated costs and anti-competitive practices.

- Another critical example are the contracts and agreements between the State and fossil fuel companies, including offshore oil and gas exploration deals. In multiple cases, information on environmental risk assessments, financial liabilities, and government guarantees has been refused based on claims of confidentiality. However, the public interest in understanding the environmental and economic risks of such projects should override private commercial concerns, especially when these projects have long-term consequences for climate justice, energy security, and public health.

- Similarly, state procurement of coal-powered energy and related Eskom contracts have been shielded from public scrutiny under the guise of commercial sensitivity, despite these contracts contributing to South Africa's ongoing energy crisis. Given Eskom's reliance on public bailouts and its direct impact on electricity pricing and supply stability, the application of the public interest override should ensure full transparency in these agreements to prevent corruption, mismanagement, and excessive costs to the public.

How the Information Regulator can seek to address this issue

It is recommended that the Information Regulator enforce clear, binding guidance requiring information officers to demonstrate that they have actively considered and documented the public interest assessment in every refusal decision. This would prevent the overuse of exemptions from disclosure and ensure that critical energy and climate-related information is not unjustly withheld from the public.

Moreover, the Information Regulator can strengthen the 'public interest' override provision by enforcing default disclosure where information affects public funds, competition, or environmental impact, particularly in energy and climate-related contracts.

IT IS RECOMMENDED THAT THE INFORMATION REGULATOR ENFORCE CLEAR, BINDING GUIDANCE REQUIRING INFORMATION OFFICERS TO DEMONSTRATE THAT THEY HAVE ACTIVELY CONSIDERED AND DOCUMENTED THE PUBLIC INTEREST ASSESSMENT IN EVERY REFUSAL DECISION.

5 ADDITIONAL & GENERAL RECOMMENDATIONS TO THE **INFORMATION REGULATOR**

Given the above, the ATI Network also makes the following recommendations which operate to address many of the issues detailed herein:

- The Information Regulator should implement mandatory compliance audits to ensure that public and private bodies maintain accurate and up-to-date PAIA manuals, with clear procedures for handling requests. Additionally, the Regulator should establish standardised response timelines and enforcement mechanisms for section 77H assessments, ensuring that public bodies and its own office provide substantive and timely responses.

- The Information Regulator should strengthen training and oversight for public information officers, which would operate to ensure that the obligation set out in the PAIA are consistently met.

- The Information Regulator should maintain a centralised digital tracking system for PAIA complaints, which could serve to enhance transparency and accountability, allowing requesters to monitor the progress of their complaints and any other related information requests. In the climate and energy spaces, this would operate to streamline access to information on government climate strategies, budgets, and related decisions that impact public accountability, and preclude unnecessary PAIA requests where an issue has already been brought before or adjudicated by the Information Regulator.

- The introduction of mechanisms for default disclosure of certain information in high-impact sectors (such as across the climate and energy spaces) would ensure that access to crucial information is not unnecessarily delayed or denied.

- The Information Regulator should provide guidance on when the exemption from disclosure for 'commercial sensitivity' applies, to ensure that it is not used to shield anti-competitive practices or corruption.

- The Information Regulator can undertake a proactive audit of refusals based on confidentiality claims, focusing on high-risk sectors like state procurement and large-scale infrastructure.

6 TRENDS IN PAIA COMPLIANCE **FROM THE ATI NETWORK'S PRACTICAL EXPERIENCE**

The ATI Network's table of PAIA requests shows a concerning trend of non-compliance with the right of access to information. The requests span a broad range of institutions and issues, from mining and energy procurement to climate policy and environmental protection, but across all sectors, the same patterns to justify refusals by information officers recur.

Deemed refusals make up a significant portion of the outcomes. Public and private bodies frequently fail to meet the procedural requirements of the PAIA, particularly in commercially significant matters. Even when responses are provided, grounds for refusal of access are often invoked without sufficient justification, relying heavily on commercial sensitivity, third-party confidentiality, or ongoing investigations. There is also evidence of institutional disfunction within the State, with departments blaming regional offices or failing to appoint PAIA information officers, as seen in the Foskor Mine request.

In some cases, such as the DFFE's climate-related disclosures, grounds for refusal of access under the PAIA were coupled with the POPIA to block access. Access was only granted after formal objections, showing the importance of continued pressure and escalation. A few requests were successful, such as those made to Johannesburg Water and the Department of Social Development. However, these are exceptions in a broader landscape of resistance to disclosure.

The Information Regulator intervened in some cases, notably in the South32 Hillside Aluminium smelter matter, to ensure that information disclosure was granted, but such interventions remain rare and lack visibility. A bolder and more systematic enforcement approach is needed.

7 CONCLUDING **REMARKS**

Access to information is critical in ensuring transparent, accountable, and inclusive climate governance. Public procurement in the energy sector, environmental impact assessments, and fossil fuel contracts must be open to scrutiny to prevent corruption, inflated costs, and environmentally harmful practices. The Information Regulator has a key role in enforcing access to climate-related information, ensuring that secrecy does not undermine South Africa's energy transition and broader environmental commitments.

Civil society plays a vital role in holding public and private entities accountable for their climate and energy-related decisions. To enhance transparency, the Information Regulator should continue to actively engage with advocacy groups, legal practitioners, and public interest organisations to develop best practices, issue advisory opinions, and challenge systemic patterns of information refusal. Collaborative platforms, stakeholder engagements, and public education initiatives can strengthen the enforcement of access to information rights in climate and energy governance.

We trust that this submission is received with the above in mind, and look forward to further engagement with the Information Regulator on these critical issues.

ANNEXURES

ANNEXURE A
ACCESS TO INFORMATION NETWORK: LIST OF RELEVANT PAIA REQUESTS
JANUARY 2024 TO JUNE 2025

1

Date of request	15 December 2022
Requesting organisation	Centre for Environmental Rights
Institution to which request was made	Department of Mineral Resources and Energy
Information requested	Records in respect of specified properties within the Mabola Protected Environment: • All applications for rights in terms of the MPRDA accepted by the DMRE, including notices of public participation and comments and response reports; • All applications for rights in terms of the MPRDA applied for by Mkhondo Fuels and Projects (Pty) Ltd and/or its associates and/or its holding company and/or its subsidiary; including notices of public participation and comments and response reports; • All rights, licences or permits issued in terms of the MPRDA together with proof of consultation with Interested and Affected Parties (IAPs); • All rights, licences and/or permits issued in terms of the MPRDA to Mkhondo Fuels and Projects (Pty) Ltd and/or its associates and/or its holding company and/or its subsidiary, together with proof of consultation with IAPs;

Information requested	• Environmental authorisations issued by the DMRE in terms of the National Environmental Management Act, 1998 (NEMA); • Environmental authorisations issued by the DMRE in terms of NEMA to Mkhondo Fuels and Projects (Pty) Ltd.
Outcome	Letter from Chief Directorate: Legal Services of the DMRE on 27 February 2023: Acknowledged receipt of request, and that the 30-day period by which to respond had lapsed. Advised that Deputy Information Officer was still liasing with the Mpumalanga Regional office regarding the requested records and that an outcome will be communicated. No response received to date.
Reason for refusal	Deemed refusal.
Further action taken	Internal appeal filed on 14 October 2024, but access to the requested records was still not granted. Complaint to Information Regulator filed.

2

Date of request	18 August 2023
Requesting organisation	Legal Resources Centre
Institution to which request was made	Petroleum Agency of South Africa (PetroSA)
Information requested	Environmental documents (EMPr, EMP, EA) for Blocks 2A and 2B
Outcome	Granted in November 2023
Reason for refusal	N/A
Further action taken	None

3

Date of request	October 2023
Requesting organisation	Open Secrets
Institution to which request was made	Eskom SOC Limited (Eskom)
Information requested	Eskom supply contracts (coal, diesel, petroleum, gas)
Outcome	Refused
Reason for refusal	Reliance on PAIA sections 36(1), 37(1), 44(1)
Further action taken	Complaint to Information Regulator: pre-investigation report rejected complaint as court action involving the documents sought is ongoing (January 2025)

4

Date of request	January 2024
Requesting organisation	Open Secrets
Institution to which request was made	Department of Mineral Resources and Energy (DMRE)
Information requested	Diesel/oil/gas contracts with Central Energy Fund
Outcome	Deemed refused
Reason for refusal	No PAIA manual/ information officer – no response
Further action taken	Internal appeal + complaint to Information Regulator

5

Date of request	January 2024
Requesting organisation	Open Secrets / amaBhungane
Institution to which request was made	PetroSA
Information requested	REIPPPP Bid Window 5 & 6 tender documents
Outcome	Deemed refused
Reason for refusal	No third party notice, reliance on PAIA sections 36, 37, 44
Further action taken	Internal appeal + complaint to Information Regulator

6

Date of request	15 January 2024
Requesting organisation	amaBhungane
Institution to which request was made	PetroSA
Information requested	Gazprombank documents submitted to Department of International Relations and Cooperation
Outcome	No response
Reason for refusal	N/A
Further action taken	None

7

Date of request	25 January – 4 March 2024
Requesting organisation	Centre for Applied Legal Studies
Institution to which request was made	Department of Mineral Resources and Energy
Information requested	Documents for Foskor Phalaborwa Mine: • All current and previous social and labour plans (SLPs) • All annual compliance reports in terms of section 25(2)(h) of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) • All amendments in terms of section 102 of the MPRDA with respect to previous and current SLPs during these follow ups that the region (where the information is held) was still compiling the information.
Outcome	Deemed refused due to the failure to provide documents and/or a formal decision notice within requisite 30 day period without requesting an extension. The DMRE's information officer communicated as if the request was approved but stated that the new process was to only issue formal approvals once the regional office of the DMRE has found the documents requested (the regions are where SLPs and other documents are housed).

Outcome	This resulted in several follow ups via telephone and emails including a formal letter to the DMRE on 7 May 2024. The Directorate: Legal Services in the National Department advised during these follow ups that the region (where the information is held) was still compiling the information. This was an instance of the department not refusing access in principle but simply not holding their regional office to their duty to provide access to information approved by the National Office.
Reason for refusal	N/A
Further action taken	Given that CALS' objective in the matter was not specifically about PAIA advocacy but to assist our clients (MACUA) getting the mine to implement its SLP commitments, CALS decided to focus on other interventions including a complaint to the DMRE regarding SLP compliance.

8

Date of request	12 February 2024
Requesting organisation	amaBhungane
Institution to which request was made	EOH Holdings Limited
Information requested	ENS report on EOH Holdings Limited corruption
Outcome	Rejected
Reason for refusal	N/A
Further action taken	Complaint to Information Regulator

9

Date of request	March 2024
Requesting organisation	Open Secrets
Institution to which request was made	Eskom Holdings SOC Ltd
Information requested	Negotiated Pricing Agreement between Eskom and South32 Hillside aluminium smelter
Outcome	Partially granted (heavily redacted)
Reason for refusal	Reliance on PAIA sections 42(3), 36(1), 37(1)
Further action taken	Complaint to Information Regulator: Regulator compelled full access and unredacted document received in early 2025

10

Date of request	20 June 2025
Requesting organisation	amaBhungane
Institution to which request was made	PetroSA
Information requested	Diesel suppliers & tenders
Outcome	No response
Reason for refusal	N/A
Further action taken	Complaint to Information Regulator

11

Date of request	21 June 2025
Requesting organisation	amaBhungane
Institution to which request was made	Civil Aviation Authority of South Africa
Information requested	Aircraft ownership information
Outcome	Rejected
Reason for refusal	Documents not found
Further action taken	None

12

Date of request	25 June 2025
Requesting organisation	amaBhungane
Institution to which request was made	Ithala Development Finance Corporation
Information requested	Tender documents
Outcome	No response
Reason for refusal	N/A
Further action taken	None

13

Date of request	23 July 2024
Requesting organisation	amaBhungane
Institution to which request was made	Sunnyside Police Station
Information requested	File on criminal case relating to environment authorisation granted to Karpowership
Outcome	No response
Reason for refusal	N/A
Further action taken	None

14

Date of request	8 September 2024
Requesting organisation	amaBhungane
Institution to which request was made	Johannesburg Water
Information requested	Tender documents
Outcome	Granted
Reason for refusal	N/A
Further action taken	None

15

Date of request	13 December 2024
Requesting organisation	Just Share
Institution to which request was made	Department of Forestry, Fisheries and the Environment (DFFE)
Information requested	Climate Change Act regulations, Carbon Tax Phase Two, COP29 positions
Outcome	Partially granted
Reason for refusal	PAIA section 36(1); POPIA
Further action taken	Objection in Feb 2025; redacted records granted

16

Date of request	13 December 2024
Requesting organisation	Just Share
Institution to which request was made	National Treasury
Information requested	Following documents/ information in the context of South Africa's policy and regulatory approach to climate change: including meetings on forthcoming instruments such as public comment on the 2024 Draft Taxation Laws Amendment Bill, and the Draft Regulations on amendments to the Carbon Offset Regulations under the Carbon Tax Act, 2019, which concluded on 31 August 2024.
Outcome	Letter of outcome provided: • a list of the meetings and stakeholders within the scope of the request • a summary note on each meeting Access to records from these meetings were refused.
Reason for refusal	Refusal on the grounds that the meetings were not recorded to protect confidential taxpayer information, and in terms section 36(1) of PAIA.
Further action taken	None

17

Date of request	8 January 2025
Requesting organisation	Legal Resources Centre
Institution to which request was made	Chief Albert Luthuli Local Municipality Gert Sibande District Municipality, Mpumalanga
Information requested	Financial records and reports related to the water infrastructure and maintenance within the Municipality
Outcome	Deemed refused
Reason for refusal	No decision in time (PAIA section 27)
Further action taken	Internal appeal filed in April 2025

18

Date of request	8 January 2025
Requesting organisation	amaBhungane
Institution to which request was made	Department of Agriculture, Land Reform and Rural Development
Information requested	Applications made by companies in the toxic chemicals reclassification process
Outcome	Refused after deemed refusal
Reason for refusal	Commercial harm; lack of third-party consent
Further action taken	Internal appeal lodged & amended; no response

19

Date of request	20 February 2025
Requesting organisation	amaBhungane
Institution to which request was made	Department of Social Development
Information requested	Deregistered non-profit organisations
Outcome	Granted
Reason for refusal	N/A
Further action taken	None

20

Date of request	14 March 2025
Requesting organisation	amaBhungane
Institution to which request was made	The Independent Regulatory Board for Auditors
Information requested	Third-party submissions on commercial or financial harm to third parties, and lack of capacity to seek consent from third parties
Outcome	Extension requested
Reason for refusal	N/A
Further action taken	None

21

Date of request	16 April 2025
Requesting organisation	amaBhungane
Institution to which request was made	The Council for Mineral Technology (MINTEK)
Information requested	Documents on tenders and awards for rehabilitation of asbestos mines
Outcome	No response
Reason for refusal	N/A
Further action taken	None

22

Date of request	30 April 2025
Requesting organisation	amaBhungane
Institution to which request was made	National Treasury
Information requested	Draft lease investigation report on the Independent Development Trust
Outcome	Refused
Reason for refusal	Request is premature as the investigation is ongoing
Further action taken	Clarification questions sent

ANNEXURE B
LEGAL TOOLS AVAILABLE TO THE INFORMATION REGULATOR

The Information Regulator is empowered by law to play a much stronger role in enforcing the right to access information. The table below summarises its tools under the PAIA.

Tool	PAIA provision	Binding?	Purpose
Receive and investigate complaints	77A	Yes	• Resolve disputes • Initiate investigations
Conduct investigations	77D	Yes	• Access documents • Summon witnesses • Inspect premises
Issue enforcement notices	83	Yes	• Compel disclosure or corrective action • Failure is a criminal offence
Public findings	83(b)	No (but high impact)	• Name non-compliant bodies to drive accountability
Refer cases or litigate	14, 15, 51	Yes	• Initiate court action

Tool	PAIA provision	Binding?	Purpose
Issue guidance notes	PAIA & POPIA	Yes	• Clarify obligations and prevent misuse of exemptions
Proactive disclosure mandates	14, 15, 51	Yes	Ensure routine publication of key documents

ANNEXURE C
RECOMMENDATIONS TO THE INFORMATION REGULATOR

No.	Recommendation	Key Actions	PAIA provision	Goal
1	**Strengthen monitoring and public reporting**	• Publish quarterly compliance reports • Track response rates, exemption use, appeal outcomes • Share reports publicly and with oversight bodies	83; POPIA section 39	Increase transparency and public pressure on non-compliant bodies.
2	**Enforce consequences for deemed refusals**	• Issue binding enforcement notices requiring response within 7 days • Pursue penalties/disciplinary action for bad faith conduct or repeated refusal • Monitor offenders	83, 90	Prevent abuse of silence and ensure timely legal compliance.
3	**Issue thematic guidance notes**	• Provide sector-specific guidance on PAIA exemptions • Clarify PAIA and POPIA interface • Focus on high-risk sectors (energy, mining, environmental protection, etc)	83; POPIA section 40	Standardize application of exemptions and reduce arbitrary refusals.

No.	Recommendation	Key Actions	PAIA provision	Goal
4	**Introduce public access to information scorecard**	• Score entities annually on response time, refusal quality, compliance, public feedback • Publish scorecard to promote accountability	83(b)	Promote reputational accountability and incentivize compliance.
5	**Expand scope of proactive disclosure**	• Use PAIA section 15 to mandate publication of tenders, contracts, minutes, reports • Prioritize transparency in procurement, energy, mining sectors	15	Reduce formal requests by increasing routine public disclosure.
6	**Simplify appeals and complaints processes**	• Develop an accessible digital platform to submit, track, and appeal PAIA requests • Provide templates and guidance • Ensure usability for non-experts	83; mandate of the Information Regulator	Enhance access for individuals and organisations without legal or technical expertise.