

THE ORGANISATION UNDOING TAX ABUSE'S PROPOSAL ON
AMENDMENTS TO THE PROMOTION OF ACCESS TO INFORMATION
ACT, 2000

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ORGANISATION UNDOING TAX ABUSE NPC

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1. INTRODUCTION

- 1.1 The Organisation Undoing Tax Abuse (“OUTA”) is proud to be part of an initiative headed by civil society in reforming legislation so crucial to society in ensuring transparency.
- 1.2 By way of introduction, OUTA is a proudly South African non-profit civil action organisation, comprising of and supported by people who are passionate about improving the prosperity of our nation. We envision a prosperous country, with an organised, engaged and empowered civil society that ensures responsible use of tax revenues.
- 1.3 Part and parcel to OUTA's mission is the challenging of legislation and regulatory environment, this includes participating and engaging with government on legislation such as the abovementioned Bill.
- 1.4 As the tool which gives effect to section 32 of the Constitution of the Republic of South Africa, 1996 (“the Constitution”), the Promotion of Access to Information Act, 2000 (“PAIA”) can only be effective if it does not hinder access to information through unnecessary processes and technical convolution.

2. TIME PERIODS

AD SECTION 1

Rationale:

- 2.1. OUTA has observed a sense of ambiguity from both public and private bodies when it comes to the interpretation of “days” according to PAIA. Generally, reference to “days” throughout PAIA is inconsistent. OUTA submits that a

definition of what constitutes “*days*”, as rudimentary as it may seem, ought to be clearly set out in PAIA.

- 2.2. With reference to the aforementioned, it is clear that PAIA makes provision for two meanings to the word “*days*” – unfortunately, true meaning requires contextual reading of the provision(s). The first reference to “*days*”, are reflected in sections 11, 18 and 25.
- 2.3. The reference to days in the aforementioned sections, refers to “*days*” in the normal course (calendar days), with the exception that, in the event that the last day of such number so calculated falls on a day which is not a business day, the last day shall be deemed to be the next succeeding day which is a business day.
- 2.4. Furthermore, “*days*”, are referred to in section 78 of the PAIA Act. Within this context “*days*” refer to business days (“*working days*” as per the definition), seeing that section 78 proceedings are civil proceedings subject to “court days” and relevant court rules.
- 2.5. OUTA submits that it is superfluous for PAIA to differentiate between “*days*” and “*working days*”. It would be more practical for PAIA to differentiate between “*days*” when applicable from the submission of a request for access to information, followed by “*court days*” which triggers once all relevant periods have lapsed prior to litigation. OUTA further submits that the public should not be burdened with interpretational principle in exercising the right of access to information.
- 2.6. In order to avoid situations whereby a requester does not comply with the relevant time periods and need to file a condonation application with the court for such

noncompliance, it is reasonable to describe such period as per section 78 of PAIA as court days.

Proposed amendment:

Section 1 of the principal Act is hereby amended:

by the insertion after the definition of “court” of the following definition:

“Days” means any days, including Saturdays and Sundays, but excluding public holidays as per Schedule 1 of the Public Holidays Act, 1994. Where a timeframe is affected by the 15 December to 2 January period, the timeframe must be extended by the number of days falling within the 15 December to 2 January period. Where a timeframe is affected by one or more public holidays, the timeframe must be extended by the number of public holiday days falling within that timeframe.”

by the insertion after the definition of “court” of the following definition:

“Court days” means any day other than a Saturday, Sunday, or public holiday as per Schedule 1 of the Public Holidays Act, 1994. Where a timeframe is affected by the 15 December to 8 January period, the timeframe must be extended by the number of days falling within the 15 December to 8 January period. Where a timeframe is affected by one or more public holidays, the timeframe must be extended by the number of public holiday days falling within that timeframe.”

3. MANDATORY DISCLOSURE IN THE PUBLIC INTEREST

AD SECTION 46¹

Rationale:

¹ Proposed changes to section 46 would apply *mero motu* to section 70.

- 3.1. As it currently stands, OUTA submits that the onus on the requester seeking to rely on mandatory disclosure of records within the public interest as contemplated in sections 46 and 70 respectively is unreasonable. As one of PAIA's primary objectives to "*actively promote a society in which the people of South Africa have effective access to information to enable them to more fully exercise and protect all of their rights*", the aforementioned sections prejudice a requester's exercise of its right.
- 3.2. At no point in time before a request for access to information is submitted, can a requester reasonably foresee what the records so requested *will* in actual fact reveal. The eventuality of what records *may* reveal could perhaps be supported by independent research or an anticipation. The requester may also have had sight of the records in question through a whistle blower. Upon submission of a request for access to information, a requester does so primarily based on a *spes* (or hope) that should the record be disclosed, his or her suspicions or anticipations would be confirmed.
- 3.3. In the context of the modern social contract (public bodies), a requester can only reasonably determine if the public body in question has adhered to a particular obligation when such records are disclosed. Considering the lack of accountability and tainted credibility of the majority of public bodies, a requester cannot take for granted that a public body adhered to an obligation (and followed due process) simply because such public body communicated that it had done so publicly.
- 3.4. Public scrutiny is crucial in "*foster[ing] a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information.*" Merely exercising the right of access to information by the utilisation of PAIA and

submitting a request for access to information becomes moot if the outcome of such request does not advance a culture of transparency and accountability.

3.5. Moreover, the public will always be affected by acts or omissions made by the state in the exercise of public functions and duties, irrespective of whether such acts or omissions were done in contravention of the law or would result in imminent environmental risk. In this regard, OUTA submits that section 46(a)(i) and (ii) ought not be mutually exclusive. Mandatory disclosure should be triggered if *either* of the subsections apply.

3.6. OUTA is in agreement with the amendments proposed in the amendment bill, however, OUTA submits that the amendments proposed below will give effect to the importance of records that fall within the public interest.

Proposed amendment:

“46 Mandatory disclosure in public interest

*Despite any other provision of this Chapter, the information officer of a public body must grant a request for access to a record of the body contemplated in section 34 (1), **35**, 36 (1), 37 (1) (a) or (b), 38 (a) or (b), 39 (1) (a) or (b), 40, 41 (1) (a) or (b), 42 (1) or (3), 43 (1) or (2), 44 (1) or (2) or 45, if-*

*(a) the disclosure of the record **[would] may potentially** reveal evidence of-*

*(i) a **[substantial]** contravention of, or failure to comply with, the law; or*

*(ii) an imminent and serious public safety or environmental **or any other material** risk **that may reasonably affect the public; [and] or***

b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question.”

4. AFFIRMATION OF PUBLIC INTEREST BY THE INFORMATION REGULATOR

AD SECTION 77C

Rationale:

- 4.1. In order to alleviate the onus for a requester to establish whether a particular set of records falls within the public interest (and outweighs the potential harm of disclosure) once proceedings as per section 78 are underway, OUTA submits that the Information Regulator is in a prime position (should Chapter 1A proceedings be triggered) to assert the applicability of sections 46 and 70 respectively.
- 4.2. Should a requester elect to proceed with complaint proceedings as contemplated in Chapter 1A, the Information Regulator's finding in relation to public interest may also assist the court during adjudication. Similarly, any assertion made by the Information Regulator should also be included in the notice as per section 77I.

Proposed amendment:

“(1) The Information Regulator, after receipt of a complaint made in terms of section 77A, must-

- (a) investigate the complaint in the prescribed manner;*
- (b) refer the complaint to the Enforcement Committee established in terms of section 50 of the Protection of Personal Information Act, 2013; [or]*
- (c) decide, in accordance with section 77D, to take no action on the complaint or, as the case may be, require no further action in respect of the complaint. or*
- (d) affirm whether the records sought by the requester in question –**
 - (i) falls within the public interest; and**
 - (ii) whether the public interest outweighs the potential harm contemplated in the provision in question relied upon by the public or private body whichever the case may be.”**