

# SAHA DIALOGUE:

## Challenges in using the right to information of private bodies



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# Outline

- What is a private body?
- Need to justify request: “Required for the exercise or protection of any rights”
- Grounds of refusal
- Lack of internal appeal
- Suggestions

# What is a private body?

'private body' means-

- (a) a natural person who carries or has carried on any trade, business or profession, but only in such capacity;
- (b) a partnership which carries or has carried on any trade, business or profession; or
- (c) any former or existing juristic person, but excludes a public body;

'public body' means-

- (a) any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or
- (b) any other functionary or institution when-
  - (i) exercising a power or performing a duty in terms of the Constitution or a provincial constitution; or
  - (ii) exercising a public power or performing a public function in terms of any legislation;

# Public v private bodies

- Possible ambiguities and PAIA response in s8
- Rationale for the distinction: transparency not always the default?

# Need to justify a request

- Anyone has the right of access to any info that is held by another person and that is “required for the exercise or protection of any rights”.
- ‘any rights’ so need not be the rights of the requestor
- Continuum: necessary – useful
- too high - purpose of PAIA frustrated; too low - regime applicable to private and public bodies is collapsed.

# Grounds of refusal

- protection of privacy of third party
- protection of safety of individuals and protection of property
- protection of records privileged from production in legal proceedings
- protection of research information
- commercial information of the private body and a 3<sup>rd</sup> party

# Grounds of refusal

Commercial information is understood as:

- trade secrets;
- financial, commercial, scientific or technical information, other than trade secrets, the disclosure of which would be likely to cause harm to the commercial or financial interests of the body;
- information whose disclosure could reasonably be expected to
  - put the body at a disadvantage in contractual or other negotiations or
  - prejudice the body in commercial competition

# Grounds of refusal

- Possibility of redaction
- Onus of proof - not enough to just state the ground
  - S81(3)
  - Davis v Clutchco
- Tag team with public bodies



# Requests ignored and absence of appeal

## PAIA CSN Shadow Report

- 15 requests
  - one was pending at the time of the Report
  - six resulted in a full or partial release of records
  - eight were refused
  - half of the refusals reflect a failure to respond at all (deemed refusals), rest were refusals on other basis.

# Requests ignored and absence of appeal

- Litigation not possible for many
- Difficult to assess prospects of success
- Few cases in this area

# Suggestions

1. Speaking the right language
2. Voluntary disclosure
3. Carrots as well as sticks
4. Open access as a condition of regulatory authorisations