



Open Democracy Advice Centre

Promotion of Access to Information Rules

Applications

3. ...

(5) The information officer or head of a private body, as the case may be, must:

...

(b) within 15 days after receipt of the application—

...

(iii) serve on the applicant a true copy of the reasons, if they have not yet been provided.

COMMENT

Under subsection (3)(a) of section 39 of the Promotion of Access to Information Act, if a request for access to a record of a public body must or may be refused in terms of subsection (1)(a) or (b) (the mandatory protection of police dockets in bail proceedings, and protection of law enforcement and legal proceedings), or could, if it existed, be so refused, and the disclosure of the existence or non-existence of the record would be likely to cause the harm contemplated in subsection (1)(a) or (b), the information officer concerned may refuse to confirm or deny the existence or non-existence of the record.

The information officer of a public body may also refuse to confirm or deny the existence or non-existence of a record under subsection (4)(a) of section 41 if to do so would be likely to cause the harm contemplated in subsection (1) (information concerning the defence, security and international relations of the Republic).

Where the information officer has refused to confirm or deny the existence or non-existence of a record under subsections (3)(a) of section 39 or (4)(a) of section 41, subrule (5)(b)(iii) of the Promotion of Access to Information Rules should require the information officer to serve on the applicant a true copy of the notice referred to in sections 39(3)(b) and 41(4)(b).

4. ...

(2) The Court receiving the representations referred to in subrule (1) shall take the steps that it may deem appropriate to bring the representations to the attention of the parties to the application.

COMMENT

Subsection 80(1) of the Promotion of Access to Information Act states that the court may examine any record of a public or private body to which the Act applies, and no such record may be withheld from the court on any grounds.

The Promotion of Access to Information Rules should clearly state that the court can require the information officer to produce the document that is the subject of the request, and any other evidence the court thinks necessary, so that the court can decide whether the documents contain confidential information.

Under subsection 80(2), the court may not disclose '(a) any record of a public or private body which, on a request for access, may or must be refused in terms of this Act'; or (b) if the information officer of a public body refuses to confirm or deny the existence or non-existence of the record, 'any information as to whether the record exists.'

Subrule 2 of rule 4 states that the court 'shall take the steps that it may deem appropriate to bring the representations to the attention of the parties to the application'. Where the information officer claims that access to certain information contained in the representation (such as documentary and oral evidence and submissions) may or must be refused under the terms of the Act, the court should require the information officer to:

- (a) provide the applicant with an index that:
 - (i) identifies each document withheld;
 - (ii) states the provisions of the Act relied upon;
 - (iii) explains how disclosure would damage the interests protected by those provisions of the Act ('state adequate reasons for the refusal').

- (b) where the information officer claims that the existence or non-existence of certain information contained in the representation may be neither confirmed nor denied under the terms of the Act, the court should require the information officer to make a statement stating that the representation includes such information.

While it may be necessary to withhold certain evidence from the applicant to avoid the disclosure of confidential information, only those measures restricting the applicant's access to such information that are absolutely necessary should be permissible. By requiring the information officer to provide the applicant with an index that identifies any withheld information contained in the representation and any evidence submitted during *in camera* hearings (unless to do so would reveal the information which is either the subject of the request or is otherwise protected by the Act), the Rules would effectively balance the need to maintain appropriate confidentiality and the rights of the applicant to fair hearing.

may or must be withheld.

Parties would therefore need to prepare two versions of their representations—one full version for the court, and one version to be exchanged with the other parties, which does not include information which needs to be kept confidential, but which does include an index identifying the information that has not been included and the reasons why.