

THE RIGHT OF ACCESS TO INFORMATION:

SOME RAMIFICATIONS FOR THE HEALTH SECTOR

1. Introduction

The Promotion of Access to Information Act 2 of 2000 (“the Act”) came into operation on 9 March 2001. The Act purports to give effect to the human right of access to information and provides the basis on which it 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 of their rights.

This Act aims to provide information pertaining to the correct procedure to follow to gain access to required information, forms to be used and what different types of access exist.

There are several explanations and guidelines on what timeframes are present and how long a period must be allowed whereby a person/institution, from which information was requested, has to respond.

It is important to note that concerns were raised with regard to the effect this Act will have on the health sector and the explicit requirements from medical practitioners and other health professions regarding privacy of patient’s information and restriction of Access thereto.

ACCESS TO HEALTH OR OTHER RECORDS

Section 30 –

- (1) If the information officer who grant, in terms of section 11, a request for access to a record provided by a health practitioner in his or her capacity as such about the physical or mental health, or well-being –
 - (a) Of the requester; or
 - (b) If the request has been made on behalf of the person to whom the records relates, of that person, (in this section, the requester and person referred to paragraphs (a) and (b), respectively, are referred to as the “relevant person”), is of the opinion that the disclosure of the record to the relevant person might cause serious harm to his or her physical or mental health, or well-being, the

information officer may, before giving access in terms of section 29, consult with a health practitioner who, subject to subsection (2), has been nominated by the relevant person.

(2) If the relevant person is –

- (a) Under the age of 16 years, a person having parental responsibilities for the relevant person must make the nomination contemplated in subsection (1); or
 - (b) Incapable of managing his or her affairs a person appointed by the court to manage those affairs must make that nomination.
- (a) If, after being given access to the record concerned, the health practitioner consulted in terms of subsection (1) is of the opinion that the disclosure of the record to the relevant person would be likely to cause serious harm to to his or her physical or mental health, or well-being, the information officer may only give access to the record if the requester proves to the satisfaction of the information officer that adequate provision is made for such counseling or arrangements as are reasonably practicable before, during or after the disclosure of the record to limit, alleviate or avoid such harm to the relevant person.
- (b) Before access to the record is so given to the requester, the person responsible for such counseling or arrangements must be given access to the record.

2. Decision of to automatically available information

As a first step, all health care facilities (including private practices), irrespective of whether they are private or public, has to decide which information is to be made available “voluntarily and automatically” to the public at large for free and for sale.

All other information has to be made available as set out below and at the fees described below. This list has to be included in the manual that every facility has to have that describes access to records held by that facility (Sections 15 and 52 of the Act).

A body can also request the Minister of Justice to exempt certain types of information from the application of the Act. All facilities should have a policy on the retention of records, as well as when records may be disposed of, etc.

3. Requests made in terms of the Act

A person requesting access to records or information held by a private body has to show that s/he is requesting the information in order to protect or exercise his/her rights. A person requesting information from a public body does not have to show that s/he is requesting it in pursuance of their rights. This creates a rather strange anomaly in that persons will have easier access to health care information (or even their own records) held by state health care facilities, than those held by a private sector facility. Apart from this, there are two more differences between access to information held by public and private bodies: public bodies has to appoint so-called “information officers” and also has to have a process of internal appeal if the requester is not satisfied.

A person requesting information has to do so on the prescribed form (found in the regulations to the Act), and there are two types of fees payable. The Act distinguishes between “personal requesters” and “requesters”. A “personal requester” is a person requesting information about him/herself. Such a person does not have to pay the standard fee of R35 (in the case of information requested from a public body) or R50 (in the case of information requested from a private body). All other requesters have to pay that fee. When access is to be given, there are three more types of fees that all requesters have to pay, i.e. reproduction fees (for photocopying, computer disks, etc.); search and preparation fees (R15 per hour or part thereof in the case of public bodies and R30 per hour or part thereof in the case of private bodies); and actual postage. The Act does not provide for faxing costs, i.e. a requester would either have to receive the information by mail, collect it personally, or the private or public body could fax it, if it so wishes, on its own account.

4. Refusal of access

Refusal of access to information may only take place on the grounds prescribed by the Act (sections 34-45 in the case of public- and sections 63-69 in the case of private bodies). If part of a record may be refused, and part of it not, the principle of severability states that such parts should be deleted, photocopied out of severed from the parts to which access should be granted. Therefore the mere fact that a part of a record contains information that may be refused may not serve as a reason to refuse access to the rest of the record.

Some of the most pertinent grounds for refusal concern the protection of privacy of a third party and the protection of confidentiality agreements. This means that private information may not be unreasonably disclosed to a third party. Personal information includes medical information, financial information, etc. As it is uncertain as to what “unreasonable” disclosure entail, it is advisable that medical practitioners do not provide any information relating to a patient to any third party without the patient’s informed consent. Alternatively, medical practitioners may conclude confidentiality agreements with their patients, if, for example, they want to protect the medical information of a minor from being accessed by a parent.¹

Medical aid funds, pharmaceutical companies, researchers, etc. all request patient information from health care practitioners from time to time. Even though such information may be de-identified, it may still constitute a violation of privacy. In order to protect themselves from possible legal action, medical practitioners should in all cases obtain the informed consent of patients as to the specific requesters to who specified information will be divulged. If a medical aid fund requests information from a medical practitioner, only information as delineated in the Medical Schemes Act of 1998 may be given to medical aid funds, and then only under the prescribed circumstances. These circumstances include that the information has to serve the purpose of managed care and that access has to take place in terms of an agreement between the medical aid fund and the service provider.

Other grounds for refusal include commercial information of a third party where the disclosure of such information would cause disadvantage in contractual or other negotiations, privileged legal information and the commercial information of a private body. It should be noted that the list for grounds of refusal in relation to public bodies differs from those listed for refusal by private bodies. Information relating to police dockets in bail proceedings, for example, may be refused under certain circumstances listed in the Act. SARS records, for example, are also protected by this list.

Medical records that do not fall within one of the grounds for refusal, but which contain information that is likely to cause serious physical or mental harm to the patient requesting it, has to be dealt with in terms of a specific procedure set out in the Act. In short, the

¹ This may be the case where child abuse is suspected, or where the minor has legally obtained a termination of her pregnancy, has legally consented to medical tests or treatment, etc.

patient must be asked to nominate a health practitioner with whom the person from whom the information is requested can consult on the possible serious harm and ensure that adequate arrangements are made as to the counseling of the patient.

5. Mandatory disclosure

Despite falling within the grounds for refusal, the Act states that certain information has to be disclosed. Such disclosure must take place if it reveals a substantial contravention – or failure to comply with the law or an imminent and serious public safety risk and the *public* interest in the disclosure clearly outweighs the harm contemplated by the ground on which disclosure could be refused. This may be very risky terrain, as some people may feel disclosing the Hiv status of a person falls within the ambit of this section. However, it should be borne in mind that the Act only applies to where information is requested. It does not apply where information is volunteered. In such cases the laws in relation to the protection of privacy, as well as the relevant ethical considerations still apply. If information is requested and it is possible that it falls within this ambit, it is advisable to first obtain legal advice on this matter.

6. Operation of the Act in practice

In practice, the Act will operate as follows:

1. A person will request access on the prescribed form. In the case of public bodies the information officer will take responsibility for the request, the head of a private body has to duly delegate a person to fulfill this function. The information officer must open a file for every requester, so as to keep track of the flow of correspondence on the matter.
2. The information officer writes the requester a letter stating that the request has been received and a decision will be made within 30 days. This period may be extended if the search or request concerns a large number of documents, etc. In this case, however, the requester must consent to such an extension. If the record concerns a health record that may pose serious harm to the requester, the requester must be asked in this letter to nominate a health care practitioner.
3. If the request is granted, written notice must be given to the requester of the access fee (R35 or R50) and the fees in relation to searches, reproduction and postage. It is advisable that a table sets out exactly how this is calculated. The letter should include reference to the fact that the request may approach a relevant court of law if not

satisfied with the outcome. In the case of a public body, the requester must be made aware of the internal appeal procedure.

4. If the request is denied, written notice must be given with full particulars as to the grounds, as specified in the Act, on which access is refused. Again information has to be given as to the rights of appeal or review.
5. If a record was lost, destroyed, could not be found or does not exist, the requester must be informed of that. An affidavit or affirmation to that effect has to be made and attached to the letter. The affidavit must state all the steps taken in order to find the document and it is advisable that the policy of the facility in relation to the retention, destruction, etc. of records be attached to such affidavit and letter. Destroying or losing a document so as to evade the provisions of the Act constitutes an offence for which a fine or up to 2 years imprisonment given.
6. If records are requested for which the consent of a third party first has to be obtained (sections 47ff and sections 71ff), those procedures and timeframes have to be adhered to.