

YOUR RIGHT OF ACCESS TO INFORMATION

A Simplified Guide to Namibia's Access to Information Act 8 of 2022



BOOKLET 3

WHAT TO DO IF YOUR REQUEST FOR INFORMATION IS REFUSED

Booklet 1 in this series outlines the scope and principles of the Access to Information Act and introduces the officials who administer it.
Booklet 2 explains how to request access to information, step by step.
Booklet 3 explains your options if your request for information is denied.

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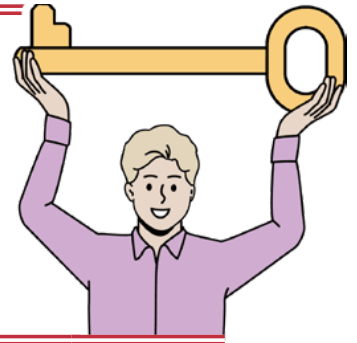
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If your request for access to information held by a public or private entity is denied, you have a right to challenge the information officer's decision. This booklet explains how.



STEP 1 NOTICE OF REFUSAL

If your request for information is denied, the information officer must give you a written notice that includes the reasons for the refusal.

The head of every public or private entity must designate a staff member to be its **information officer**. If an entity fails to designate an information officer, then the head of the entity must serve as the information officer.

Access to Information Act, section 22

STEP 2 INTERNAL REVIEW BY THE HEAD OF THE ENTITY

You have **14 days** to apply to the information officer for an internal review of the decision by the **head of the entity** or a staff member assigned by the head. There are **three possible results**:

- The information officer's original decision is **confirmed**.
- The information officer's original decision is **overruled**.
- The information officer's original decision is **amended**.

The head of an entity is its "**administrative head**". In the case of a government ministry, the administrative head is the Executive Director. In the case of other government bodies or parastatals, the statute that governs them will sometimes identify the administrative head. In private entities, the CEO may be the administrative head, or there may be another official who plays this role. It depends on the type of entity and its structure.

Access to Information Act, section 1
(definition of "head of an information holder")

STEP 3 APPEAL TO INFORMATION COMMISSIONER

If you are not happy with the outcome of the internal review, you have **14 days** to appeal to the **Information Commissioner**. The Information Commissioner will hold a **hearing** and then make a decision on the appeal. The **three possible outcomes** are the **same as for an internal review**.

The Access to Information Act is administered by an independent **Information Commissioner** and one or more **Deputy Information Commissioners** appointed by the President with the approval of the National Assembly.

You can read more about the qualifications and appointment of these officials in **Booklet I** of this series.

Access to Information Act, section 5

STEP 4 REVIEW BY HIGH COURT

If you are not happy with the outcome of the appeal, you may ask the High Court to review the decision if you act within a reasonable time. The High Court will mainly look at whether the decision-making process was fair and reasonable. It can confirm, overrule or amend the decision, although it is rare for the High Court to substitute its own decision for the one that is under review. If the process was flawed, the Court is more likely to point out what was wrong and refer the case back to the Information Commissioner for a fresh decision.

As far as possible, matters arising under the Access to Information Act should be resolved quickly, informally and without unnecessary technicalities.
Access to Information Act, section 9(2)(h)

STEP 1 NOTICE OF REFUSAL

If your request for information is denied, the information officer must give you a written notice that includes the reasons for the refusal. The notice must cite the provisions of the law that justify the refusal and inform you of your right to challenge the decision.

If your request for access to information was granted, you can ask for a review of any fee that is charged. You can also ask for a review of an information officer's decision to exclude portions of the information you requested.

Access to Information Act, section 37(7)

Disclosure of the requested information could compromise national security. I am going to deny it on that basis. I must give the person who requested the information a written notice that includes the reasons why I have concluded that the information is exempt from disclosure.



STEP 2

INTERNAL REVIEW BY THE HEAD OF THE ENTITY



You have **14 days** to apply to the information officer for an internal review of the decision by the head of the entity. This period is counted starting with the day after you received the notice, and it *does not include Sundays and public holidays*. The information officer can accept a late application if there is a good reason for the delay. For example, if you were hospitalised right after the initial decision, this might be considered a good reason for delay.

Who is the "head" of an entity?
The head of an entity is its "administrative head", such as the ED of a government ministry.

JANUARY						
S	M	T	W	T	F	S
	1	2	3	4	5	6
7	8	9	10	11	12	13
14	15	16	17	18	19	20
21	22	23	24	25	26	27
28	29	30	31			

FEBRUARY						
S	M	T	W	T	F	S
				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29		

DAY 5:
Deadline for information officer to give all review information to head of entity



DAY 14: Deadline for making your review application to the information officer

DAY 14: Deadline for decision on your review application

You can apply for an internal review in writing or orally. The application must set out the reasons why you think the decision should be reviewed. If your application is made orally, the information officer must write it down and give you a copy to confirm what you said.

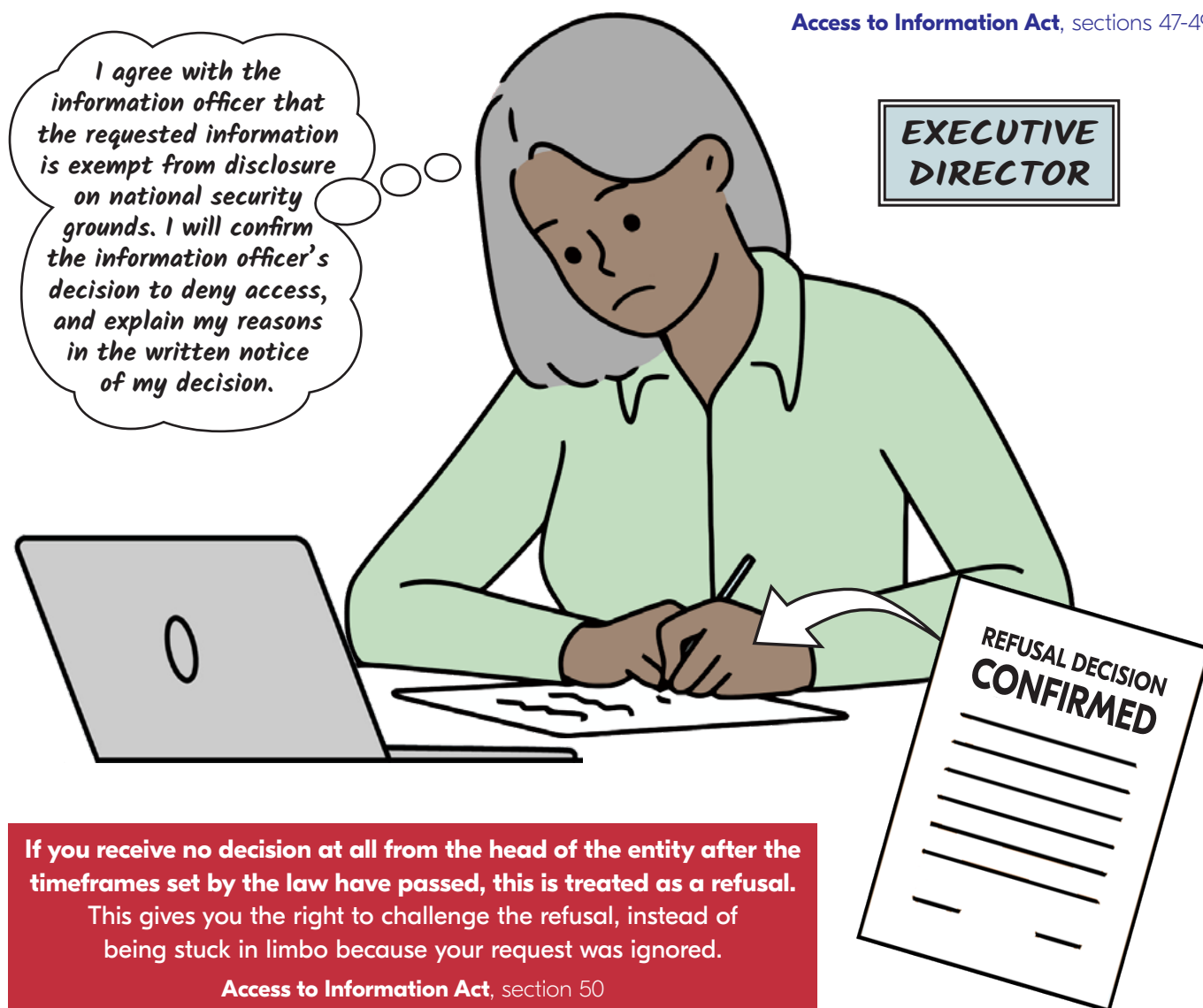
The information officer must forward your application to the head of the entity within **5 days** of receiving it. The information officer must include the reasons for the decision and any evidence that is relevant. The information officer must notify you when the documentation has been forwarded to the head.

The internal review must be decided by the head of the entity or a staff member assigned by the head within **14 days** of receiving it. There are three possibilities:

- ▶ The information officer's original decision is **confirmed**.
- ▶ The information officer's original decision is **overruled**, meaning that you can have access to the requested information in the same way as if the original request had been granted.
- ▶ The information officer's original decision is **amended**, such as deciding that you can have access to part of the requested information or receive the requested information in a different form.

You will receive a written notice of the review decision. If the review was not decided in your favour, the notice must explain the reasons for the decision, the relevant provisions of the law and your right to make a further appeal to the Information Commissioner.

Access to Information Act, sections 47-49



STEP 3

APPEAL TO THE INFORMATION COMMISSIONER

If you are not happy with the outcome of the internal review, you can appeal to the Information Commissioner.

An appeal to the Information Commissioner can also be decided by a Deputy Information Commissioner or anyone else who is serving as the Acting Information Commissioner.

Access to Information Act, sections 15, 53(1)(d)

DAY 1:
Date of receiving the notice of refusal of the information requested

JANUARY						
S	M	T	W	T	F	S
	X	2	3	4	5	6
X	7	8	9	10	11	12
X	14	15	16	17	18	19
X	21	22	23	24	25	26
X	28	29	30	31		

FEBRUARY						
S	M	T	W	T	F	S
				1	2	3
X	4	5	6	7	8	9
X	11	12	13	14	15	16
X	18	19	20	21	22	23
X	25	26	27	28	29	DAY 14

DAY 5:
Deadline for making a decision on your appeal

DAY 14: Deadline for appealing to the Information Commissioner

DAY 14: Deadline for notifying you of the decision on your appeal



I am going to exercise my right to appeal against the Ministry's refusal to disclose the information I requested.



INFORMATION COMMISSIONER

Part of my job as Information Commissioner is to consider and decide on appeals where an entity refuses to disclose requested information.



Bypassing the internal review

There are a few circumstances where you can bypass the internal review procedure and go straight to the Information Commissioner with an appeal:

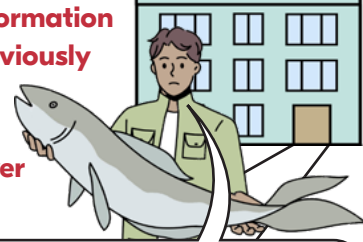
- 1) **The information officer refused to give you access to your own personal information.**



I have worked for this ministry for many years. I want to see my own personnel file before I start applying for other jobs so I will have a better idea of what the ministry will say if I ask them for a reference.

- 2) **The information officer refused access to information that was previously available to the public and was never withdrawn.**

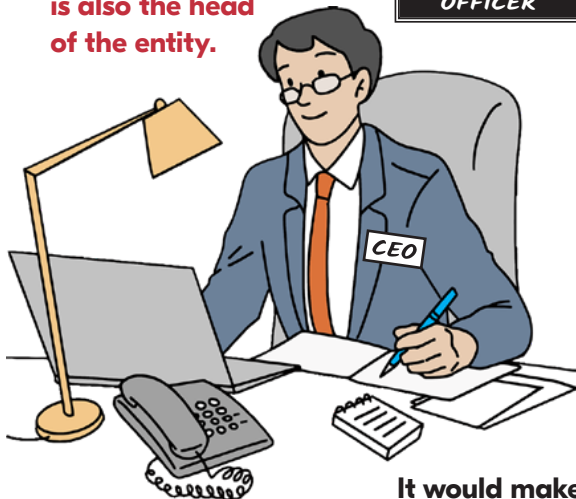
MINISTRY OF FISHERIES



I saw the new Fishing Rights Policy on the Ministry's website last week, but the website is now down. I submitted a request for access to the policy, but the information officer never replied.

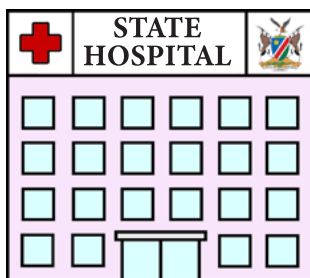
- 3) **The information officer is also the head of the entity.**

INFORMATION OFFICER



It would make no sense to ask someone to review his or her own decision.

- 4) **Someone's life, liberty or rights are at stake.** You have a reasonable basis to believe that access to the requested information is necessary to safeguard the life, liberty or rights of some person, but the information officer refused access or gave no reply at all within 48 hours after the request.



My mother's life is at risk because she needs kidney treatment that requires a special machine. I was told at the State Hospital that all the kidney machines are broken, but I heard a rumour that they are actually being reserved for use by important State officials. I asked the information officer for access to information about the location and state of repair of each machine it possesses, but I received no answer. This information is very urgent.

You can make the appeal in writing or orally. The application must set out the reasons why you think the previous decision was incorrect. If your application is made orally, the Information Commissioner must arrange for it to be written down and provide you with a copy to confirm what you said.

Access to Information Act, section 53

In most cases this **previous decision** will be the one made in the internal review, but it could be the original decision of the information officer in situations where the internal review can be bypassed.

The next step will be a **hearing**.

THE HEARING

Notice to all relevant persons

The Information Commissioner must give the **head of the entity** involved at least **7 days'** notice of the hearing.

Within **2 days** of receiving this notice, the head of the entity must provide the Information Commissioner with the details of any **third parties** involved in the matter, if this information has not already been provided. The Information Commissioner must give all third parties notice of the hearing as soon as their details are provided.

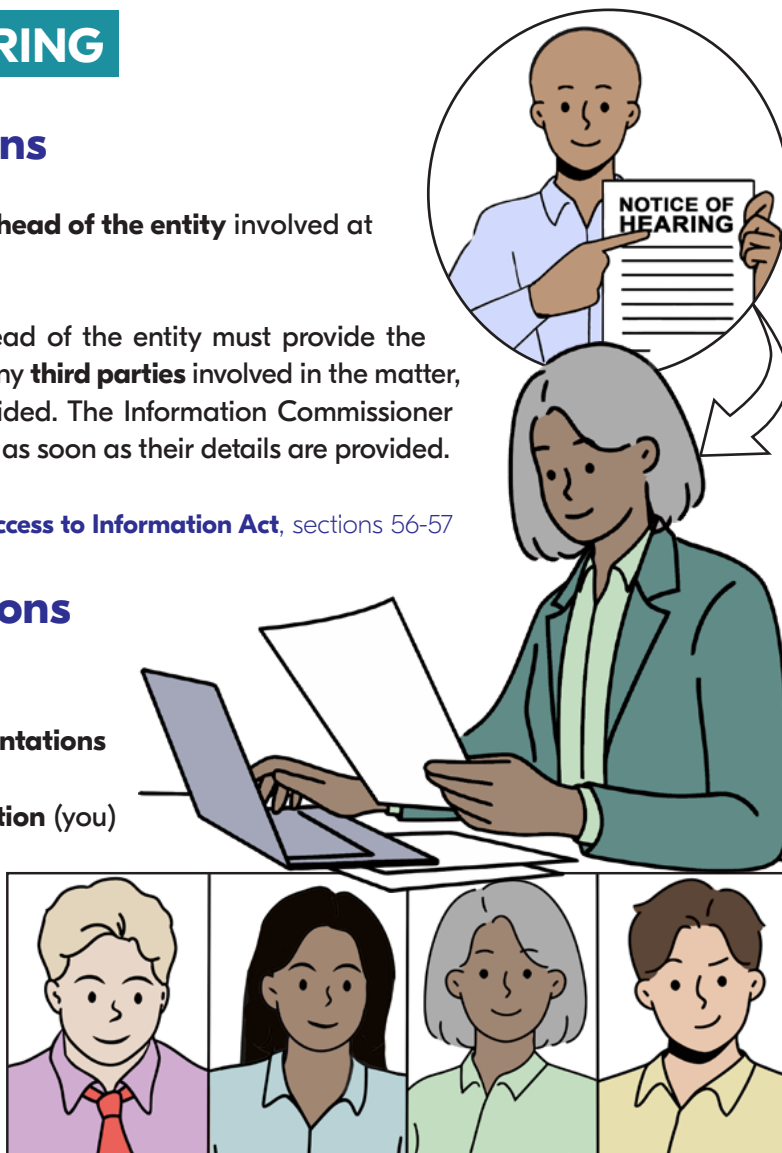
Access to Information Act, sections 56-57

Right to make representations at the hearing

These persons have a right to **make representations at the hearing**:

- the **person seeking access to the information** (you)
- the **person who submitted the request for information** (if someone else was acting on your behalf)
- the **head of the entity** that holds the information
- any **third party** involved in the information.

Access to Information Act, section 58



Public hearings

Hearings before the Information Commissioner are normally open to the public. The Information Commissioner has the power to hold a hearing behind closed doors if he or she thinks this is warranted. Any of the parties to the appeal can also ask for the hearing to be heard in private. The Information Commissioner has the power to approve a request for a private hearing if the request is motivated by good reasons.

Access to Information Act, section 59

Conduct of the hearing

The Information Commissioner has the power to summon witnesses to the hearing and to order them to produce relevant evidence. For example, relevant witnesses might include Ministers, members of the board of directors of a parastatal or a private company or experts who have specialised knowledge of the relevant issues.

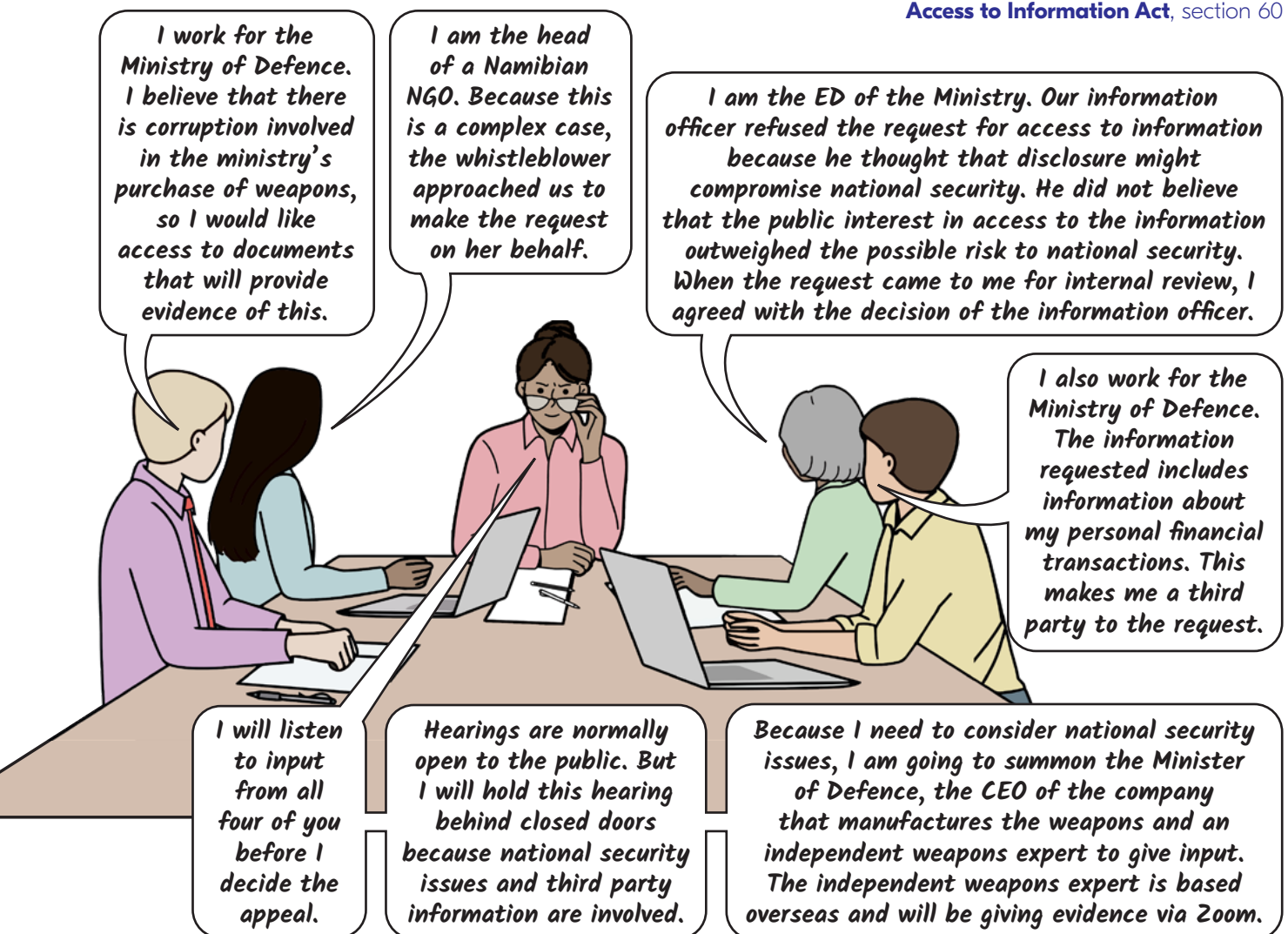
The Information Commissioner has the power to allow other persons with an interest in the outcome of the appeal to take part in the hearing, if they apply to participate.

The Information Commissioner can provide assistance to the person seeking access to the information where this is appropriate. For example, the Information Commissioner can make sure that you understand how the hearing will work, But the Information Commissioner must remain impartial. He or she must make sure that everyone involved has a fair chance to give their input.

The Information Commissioner can allow parties and witnesses to participate in hearings through the medium of their choice. For example, a witness who is not present in Namibia might prefer to give information via some digital format, such as a Zoom video call.

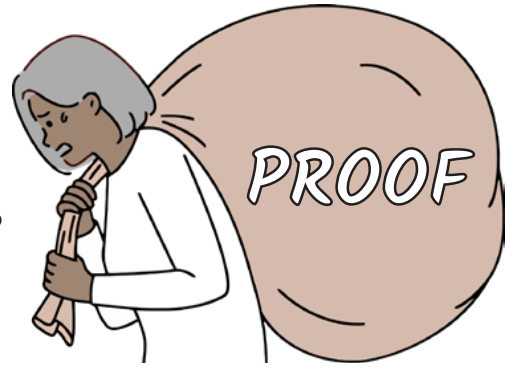
The Information Commissioner can consider information given in person, as well as information presented in a sworn written statement instead of in person.

Access to Information Act, section 60



Burden of proof

The burden of proof means who must prove the case. For example, in a criminal trial, the accused person is innocent until proved guilty by the State prosecutor. The accused does not have to prove that he or she is innocent. The State bears the burden of proof. **In access to information issues, the entity that holds the information generally bears the burden of proving that the information should not be disclosed.** Instead of “innocent until proven guilty”, it is “disclosure unless proved otherwise”. This means, for example, that it is up to the information holder to prove that the requested information falls into one of the categories of exempt information and that the harm that would result from disclosure outweighs the public interest in disclosure.



There are two exceptions to this general approach.

1) **When a request for access to information is denied by a private entity**

Remember that a private entity has no duty to disclose information unless the information might assist in the exercise or protection of a fundamental right or freedom. If your request is denied, you have the burden to show on appeal that the information is relevant to a fundamental right or freedom.

2) **When you are challenging a reproduction fee on the grounds that the information requested is in the public interest or that you cannot afford to pay the fee.**

You have the burden to prove public interest or lack of means in an appeal about the fee.

Access to Information Act, section 61

THE DECISION

The appeal must be decided by the Information Commissioner within **14 days** of receiving it. There are three possibilities, as in the case of an internal review:

- ▶ The previous decision is **confirmed**.
- ▶ The previous decision is **overruled**, meaning that you can have access to the requested information in the same way as if the original request had been granted.
- ▶ The previous decision is **amended**, such as deciding that you can have access to part of the requested information or receive the requested information in a different form.

Access to Information Act, section 54(1)

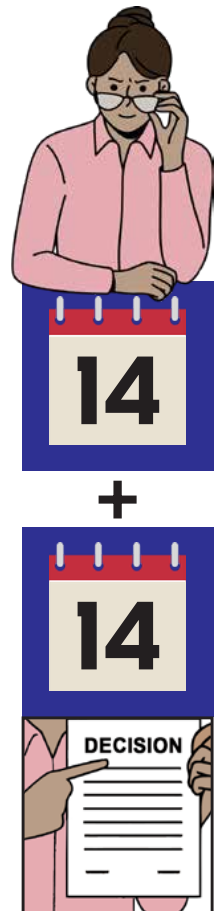
NOTICE OF THE DECISION

The Information Commissioner has **14 days** after making a decision at the end of a hearing to give notice of the decision to all the parties involved.

If the Information Commissioner decides to grant access to the requested information, this will work in the same way as if your original request for access had been granted.

If the Information Commissioner decides against granting access, the notice must explain the information considered in reaching the decision, the reasons for the decision, the relevant provisions of the law and your right to ask the High Court to review the decision.

Access to Information Act, sections 54(2) and 62(1)





I disagree with the Ministry's finding that the requested information could compromise national security. The information concerns payment for weapons and does not include any details that could affect national security. The previous decision-makers forgot that the starting point is to assume that information must be disclosed. The Ministry that holds the information did not prove that the information falls within the national security exception to disclosure, so access must be granted. I will provide my detailed reasons for this finding in the written notice of my decision.

Exceptions to the requirements to give notice of the appeal decision

The Information Commissioner can **omit information from the notice** of his or her findings if the decision involved exempt information that is sensitive.

The Information Commissioner also has the power to **dispense with the notice requirement** in these circumstances:

- ▶ It would prejudice a criminal investigation.
- ▶ It would prejudice the enforcement or administration of the law.
- ▶ It would endanger the life or physical safety of a person.
- ▶ It would prejudice the commercial interests of a private business or private individual
- ▶ It would impair relations between States.

Access to Information Act, section 62(2)-(3)



Although the Act allows the Information Commissioner to dispense with the notification that communicates the decision in these circumstances, lack of a notice with reasons for the decision could undermine the right to review by the High Court. If you asked the High Court to review a decision in these circumstances, it is likely that the reasons for the decision would have to be shared with the High Court in private so that the Court will have the information necessary for the review.

STEP 4 REVIEW BY HIGH COURT

If you are not happy with the outcome of the **appeal** to the Information Commissioner, you have a right to ask the High Court to **review** the decision. You must make this application for review **within a reasonable time** after the appeal decision by the Information Commissioner.

There is no specific timeframe for what is “reasonable”, but your case might not be considered by the Court if you wait too long. It is best to act as quickly as possible.

An application for review must follow the procedure in the Rules of the High Court. The High Court hears cases in Windhoek and in Oshakati.

Any other person involved in the case can oppose the review application.

What is the difference between an appeal and a review?

An **appeal** considers the merits of a decision by another body. An appeal court may replace an incorrect order, ruling or judgment with its own decision, or return the case to the original decision-maker for a new decision.

A **review** involves more limited intervention by a court. The court checks to see that the correct law and procedure were followed and that the decision was reasonable. In a review, a court will not overturn a decision just because it disagrees with the outcome if the process was correct and reasonable.

Do I need a lawyer for a review by the High Court?

You can approach the High Court for a review without the help of a lawyer, but this would be very challenging. If your request for information involved the public interest, you might find a lawyer to assist you without charge. If you want to try to apply for a review on your own, you should approach the Registrar of the High Court to request assistance with the technical requirements of the review application.

Are there costs involved in a review?

The High Court will need a transcript (a written record) of the appeal proceedings before the Information Commissioner in order to review them. The person who is applying for the review must pay the costs of the transcript, which can be expensive. You may also need to pay a lawyer to help you with the application.

If your review is successful, the other parties might have to pay for these costs at the end of the day. But if you are *not* successful, you might have to pay the legal fees of the other parties.

Access to Information Act, section 55
Rules of the High Court, 2014, rules 76-77

What if the entity that holds the information is unhappy with the outcome of the appeal?

The general principles of administrative law allow for any party affected by an administrative decision to ask the High Court to review that decision. So the information holder could also ask the High Court to review a decision to disclose the information even though the Access to Information Act does not mention this option.

THIRD PARTY RIGHTS TO CHALLENGE DECISIONS

If the information you requested includes third party information, the third party has a right to oppose disclosure of the information.

Third party information refers to personal information about an individual, or commercial or confidential information about an entity or an individual.

If the information officer decides to disclose the information over the third party's objections, the third party has the right to challenge that decision through the process described above (internal review, appeal to the Information Commissioner, review by the High Court).

If the third party exercises these rights, you cannot get access to the third party information until after the third party has had a chance to use these steps to challenge the decision.

Access to Information Act, sections 37(4)(c), 38, 47(2), 52(2), 55

MISCONDUCT BY INFORMATION OFFICERS

The Information Commissioner or a court can impose an administrative fine on an information officer for any of these actions:

- ▶ The information officer refuses to accept a request for information without a valid reason,
- ▶ The information officer fails to respond to a request for information within the timeframes set by the law.
- ▶ The information officer does not follow an order from the Information Commissioner.
- ▶ The information officer refuses to grant a request for information in a frivolous or vexatious way.
- ▶ The information officer provides incorrect, incomplete or misleading information.
- ▶ The information officer obstructs the disclosure of information after access has been granted.

“Frivolous” means having no serious purpose or value.

“Vexatious” means something done maliciously to cause a nuisance.

An administrative fine can range from N\$2 000 to N\$30 000 *for each day* that the misconduct prevents proper access to the information.

Access to Information Act, section 82

CRIMINAL OFFENCES

There are some actions that are criminal offences under the law, no matter who commits the wrong:

- ▶ It is a crime to destroy, damage or alter information covered by the Access to Information Act.
- ▶ It is a crime to hide information that has been requested.
- ▶ It is a crime to provide false information.
- ▶ It is a crime to interfere with the power and functions of the officials who implement the law:
 - an information officer
 - any other staff member of a public or private entity
 - the Information Commissioner, a Deputy Information Commissioner or their staff.
- ▶ It is a crime to access information that is exempt from disclosure under the law without proper authorisation.
- ▶ It is a crime to help or encourage anyone to do any of these things.

The possible penalties are fines of up to N\$100 000, imprisonment for up to 5 years or both.

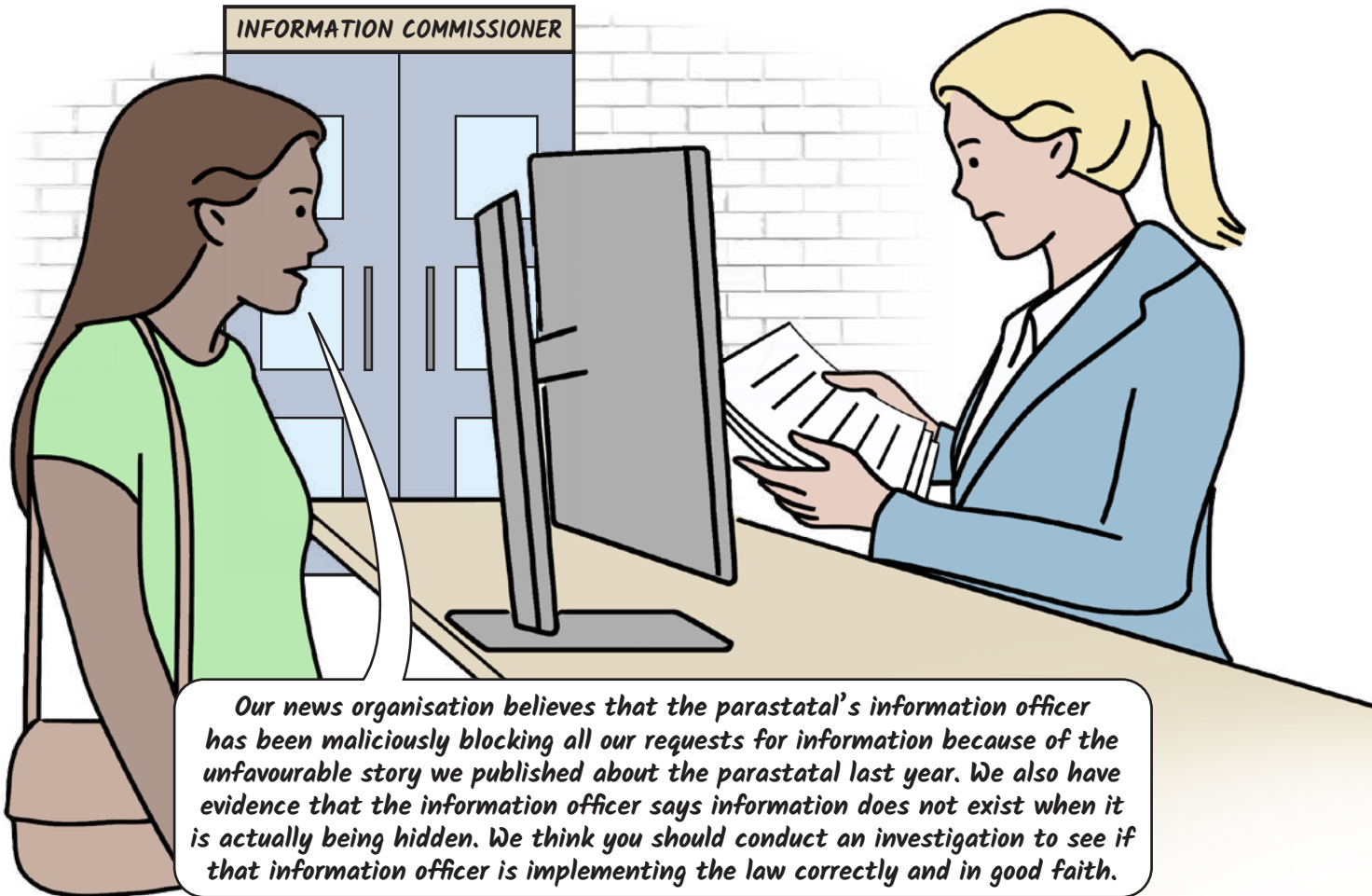
Access to Information Act, section 81

INVESTIGATIONS

The Information Commissioner has a broad power to institute investigations into matters related to access to information. Investigations operate in a similar manner to appeal hearings. This mechanism could be used to hold information officers and entities accountable under the law.

Access to Information Act, sections 9(2)(c), 56-62

An investigation could uncover information that leads to an administrative fine or a criminal prosecution. See **Access to Information Act**, section 18(2)



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