

Attention: Ms Phumzile van Damme

Democratic Alliance
Marks Building
Parliament
Plein Street
Cape Town

By email: phumzilevd@da.org.za; natachiap@da.org.za

Date
4 March 2018

Dear Madam

Request for access to records of MultiChoice (Pty) Ltd

1. We refer to your request for access to records held by MultiChoice (Pty) Ltd ("**MultiChoice**") in terms of the Promotion of Access to Information Act 2 of 2000 ("**PAIA**"), dated on 2 February 2018 ("**your request**").
2. Your request is for access to a report "*compiled by the MultiChoice Audit and Risk Committees*" pertaining to "*concerns about MultiChoice's relationship with ANN7 and questions about how it lobbied Government*" ("**the requested report**").
3. We do not believe that MultiChoice is under a legal obligation to provide you with any records pursuant to your request. Your request is thus refused for the reasons set out below.
4. **The exercise or protection of a right**
 - 4.1 You request fails to set out sufficient particulars to enable MultiChoice to identify the rights which you are seeking to exercise or protect or to ascertain why the requested report is required for the exercise or protection of those rights.
 - 4.2 Insofar as your request relies on the right of access to information, we point out that that right is protected by the provisions of PAIA itself and it is therefore circular and impermissible to rely upon it to trigger the provisions of PAIA.
 - 4.3 In any event, your request does not provide any explanation of why the requested report is required for the exercise or protection of the right of access to information.

- 4.4 When asked to explain why the requested report is required for the exercise or protection of a right, your request merely states that:

"this information is of public interest as it might lead to job losses and might allude to information which could constitute a substantial contravention or possible failure to comply with the law".

- 4.5 "Public interest" is not a recognised right. Furthermore, the fact that the information contained in the requested report *"might lead to"* possible job losses and *"might allude to"* a suspected failure to comply with the law (which is in any event denied) is insufficient to demonstrate that the requested report is necessary to protect or exercise the right to access to information (upon which you rely).

- 4.6 Your request thus fails to set out the minimum particulars required in terms section 50(1)(b) read with section 53(2)(d) of PAIA and your request fails to establish that the requested report is required for the exercise or protection of any rights, as required by section 50(1)(a) of PAIA.

5. Grounds of refusal

- 5.1 Even if it is found that your request meets the requirements for a valid PAIA request (which we deny), your request is refused on the following grounds:

5.2 Mandatory protection of confidential information

- 5.2.1 Section 65 of PAIA provides that:

"a private body must refuse a request for access to a record of the body if its disclosure would constitute an action for breach of a duty of confidence owed to a third party in terms of an agreement."

- 5.2.2 MultiChoice's agreements with its channels contain confidentiality clauses. The requested report contains terms and conditions of MultiChoice's channel agreements. Disclosure of the requested report will accordingly breach the duty of confidentiality which MultiChoice owes in relation to its channel agreements.

5.3 Protection of legally privileged information

- 5.3.1 Section 67 of PAIA states that -

"a private body must refuse a request for access to a record of the body if the record is privileged from production in legal proceedings unless the person entitled to the privilege has waived the privilege."

5.3.2 Your request states that the requested report *"was strengthened by the engagement of the services of attorneys Webber Wentzel (legal advice on lobbying and contracts)"*.

5.3.3 As you will be aware, legal advice provided by attorneys is legally privileged. To the extent that the report contains legally privileged information, such information is automatically protected against disclosure.

5.3.4 In any event, the requested report is covered by legal privilege as it was prepared to seek legal advice in contemplation of litigation

5.4 Protection of commercial information

5.4.1 Section 68(1) of PAIA states that a PAIA request for access to a record may be refused if such record:

"(b) contains financial, commercial, scientific or technical information, other than trade secrets, of the private body, the disclosure of which would be likely to cause harm to the commercial or financial interests of the body;

(c) contains information, the disclosure of which could reasonably be expected-

(i) to put the private body at a disadvantage in contractual or other negotiations; or

(ii) to prejudice the body in commercial competition"

5.4.2 The requested report contains terms of contracts entered into by MultiChoice with various news channels, as well as details of negotiations entered into by MultiChoice prior to and during the conclusion of its channel contracts. Should such contractual terms and negotiation details be divulged, MultiChoice's bargaining position in future contractual negotiations will be severely prejudiced.

5.4.3 It is therefore clear that the requested report contains commercially sensitive information, the disclosure of which will cause harm to the commercial interests of MultiChoice and will put MultiChoice at a disadvantage in its contractual negotiations.

6. Public interest override

6.1 Your request seeks to invoke the "public interest" as a ground for access to the requested report.

6.2 Section 70 of PAIA provides that a private body must grant a request for access if

"(a) the disclosure of the record would reveal evidence of-

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

(ii) imminent and serious public safety or environmental risk; and

(b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in [any other PAIA] provision in question."

6.3 As explained in MultiChoice's press statement dated 31 January 2018, the requested report does not reveal evidence of a contravention of, or failure to comply with, the law. The requested report in fact demonstrates the opposite.

6.4 Whilst there may be public curiosity in the content of the requested report, curiosity does not equate to public interest. As has been discussed above, the requested report is not required to exercise or protect a recognised right. In addition, there is no reasonable or justifiable basis upon which commercially sensitive and legally privileged information can or should be made available to the public.

7. MultiChoice accordingly refuses your request in terms of sections 50(1)(a), 50(1)(b), 53(2)(d), 65, 67 and 68(1) of PAIA.

8. Please note that you may, within 180 calendar days from the date of receipt of this refusal, lodge an application in the High Court of South Africa against the refusal of your request in terms of sections 56(3)(c) and 78(2)(d) of PAIA, and seek the appropriate relief in terms of section 82 of PAIA.

Yours faithfully



Calvo Mawela

CEO, MultiChoice (Pty) Ltd.