

# **REASONS FOR ADMINISTRATIVE ACTION: WHAT ARE THE IMPLICATIONS FOR PUBLIC OFFICIALS?**

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## **ABSTRACT**

The right to be given written reasons when the rights of someone has been adversely affected by administrative action has been constitutionalised by the 1996-constitution and fleshed out in the Promotion of Administrative Justice Act of 2000 (PAJA). In the interests of creating a climate of accountability, transparency and accessibility in public administration, the obligation created by this right is welcomed. The purpose of this article is to determine what the deeper rationale is behind this obligation to furnish reasons. Also to determine who is entitled to reasons, how reasons can be obtained, and what other requirements do the affected people have to satisfy to secure the reasons? The article seeks to explain the procedural requirements on the part of the public administration when a request for reasons is considered. The effect of the duty to provide reasons on the public administration in terms of a failure to provide reasons, the possible exceptions to providing reasons, and the efficiency, accountability and other administrative effects of the obligation are also considered. There is no doubt that the giving of reasons is one of the fundamental features of good public administration.

## **INTRODUCTION**

The right to be given written reasons when the rights of someone has been adversely affected by administrative action has been constitutionalised by the *Constitution of the Republic of South Africa, 1996* and detail LED in the *Promotion of Administrative Justice Act, 3 of 2000 (PAJA)*. This is a particularly positive development in South Africa since in the past there was no general obligation in common or statutory law to furnish reasons for administrative decisions although some statutes did require reasons for some

decisions. When reasons were then provided they were mostly given as a matter of grace and not duty. In the interests of creating a need for accountability, transparency and accessibility in public administration, the obligation created by this right is welcomed. The purpose of this article is to determine what the deeper rationale is behind this obligation to furnish reasons. Also, the article is to determine who is entitled to reasons, how reasons can be obtained, and what other requirements do the affected people have to satisfy to secure the reasons? Can reasons simply be imagined up by public officials as a smokescreen to conceal the actual process of decision-making and the real reasons motivating the decision-maker? In an attempt to answer these and other questions the article explains the procedural requirements on the part of the public administration when a request for reasons is considered. The effect of the duty to provide reasons in terms of possible exceptions to providing reasons, efficiency, accountability and other administrative effects are also considered. There is no doubt that the giving of reasons is one of the fundamental features of good public administration.

## **CONSTITUTIONAL AND LEGISLATIVE IMPERATIVE**

By way of introduction the most notable and relevant sections to reason-giving of both the 1996-Constitution and the PAJA are identified and briefly highlighted.

The 1996-constitution imposes a duty on the public administration to give written reasons to everyone whose rights have been adversely affected by administrative action (section 33(2)). This constitutional imperative is detailed out in the *Promotion of Administrative Justice Act, 3 of 2000 (PAJA)* which stipulates that any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action, is entitled to request that the public official concerned should give him or her written reasons for the action (section 5(1)). Administrative action which materially and adversely affects the rights of any person must be procedurally fair and in an instance where rights were materially and adversely affected the public official must give an effected person adequate notice of his or her right to request written reasons for the action (section 3(2)(b)(e)). The PAJA (section 5(2)) stipulates that, upon request from an effected person, the public official should furnish adequate reasons in writing for the administrative action. Failure to provide adequate reasons (and in the absence of proof to the contrary) will lead to a presumption that the administrative action was taken without good reason (section 5(3)). If it is reasonable and justifiable in the circumstances, public official may depart from the requirement to provide adequate reasons (section 5(4)(a)). In order to promote efficient public administration a public official may provide automatic reasons for a particular group or class of administrative actions when rights are being adversely affected (section 5(6)). The preamble to the PAJA sets the goal of promoting an efficient public administration and good governance and of creating a culture of accountability, openness and transparency in the public administration.

Each of the above constitutional and legislative stipulations will now be analysed in more detail within the context of public administration.

## **DUTY TO GIVE REASONS**

**S**trictly speaking, the PAJA does not implement a right to reasons. Instead it merely implements a right to request reasons and a corresponding duty to provide reasons upon request (Currie & de Waal, 2005:681). This duty to give reasons has two components, which are to provide reasons on request and to notify an affected person.

### **Provide reasons on request**

Both the 1996-constitution (section 33(3)) and the PAJA (section 5(1)) impose a duty on the public administration to give effect to the right to be given written reasons on request where rights have been materially or adversely affected. This means that the public official is not obliged to furnish reasons without a request from the person affected. The duty to provide reasons for administrative action come into effect only if there has been a prior request for reasons (section 5(2)). All that the public official needs to do is to give adequate notice of the right to request reasons which is the second component of the duty.

### **Notify an affected person**

The duty to give reasons is extended in the sense that a public official must, when notifying a person of a decision (which materially and adversely affects that person), inform the person affected by the administrative action of his/her right to request reasons (section 3(2)(b)(e)). This is required in the interest of practising procedurally fair administrative action (section 3(1)).

The duty to give reasons includes three basic qualifications for the person in need of the reasons:

- everyone is entitled to reasons;
- a request for reasons is need; and
- rights must have been materially and adversely affected.

The duty to give reasons includes three basic procedural requirements for the public administration:

- a deadline (within 90 days) for the provision of reasons;
- a requirement that reasons must be adequate; and
- a requirement that requests for reasons must be in writing.

The effects of the duty to give reasons on the public administration include, among others, the following four aspects:

- failure to provide reasons;
- exceptions to the provision of reasons;
- promoting an efficient public administration; and

- creating a culture of accountability.

## EVERYONE IS ENTITLED TO REASON

The right to request reasons is granted to any person. The 1996-Constitution refers to *everyone* (section 33(2)) and the PAJA refers to *any person* (sections 5(1) and 3(1)). The right therefore applies to all individuals whether they are young or old, white or black, male or female, rich or poor, worker or employer, and citizen or non-citizen. Thus, the right to request reasons can be used by citizens as well as foreigners legally within the country.

Given the low levels of literacy and rights consciousness in South Africa, it is likely that not many individuals will make use of this opportunity (Pfaff & Schneider 2001:81). It may therefore be useful to persuade public officials to give adequate reasons proactively for administrative action, even though this is not compulsory. Such a positive practice will not necessarily lead to inconvenience and intolerable workloads, but will promote transparency.

## REQUEST FOR REASONS

The right to request reasons has two components.

The first is that only a person whose rights have been materially and adversely affected by administrative action may request reasons (section 5(1)). The timing of the request is important as the request must be made by that person within 90 days after the date on which the person became aware of the action or might reasonably have been expected to become aware of the action (section 5(1)). The request for reasons must also be for a particular decisions or administrative action which implies that the affected person must identify the relevant administrative action for which reasons are sought. However, no formal requirements for the request are set in the PAJA to avoid a practice of onerous formal requirements which could complicate the requesting process.

The second component is that only a person who has not already been given reasons for a particular action may request reasons (section 5(1)). If a person has already received reasons for a particular administrative action that person has no right to request further reasons, and therefore there is no duty on the particular public official to provide such reasons. The explanation for this disqualification is twofold:

- *firstly*, to promote efficiency in public administration by avoiding the unnecessary duplication of administrative duties; and
- *secondly*, to encourage public officials to provide reasons proactively, without the need for a request (Currie & Klaaren 2001:138).

It is clear that the reasons which were proactively given must have been adequate. It should, therefore, not be permitted to manipulate and frustrate the purposes of the reason-giving requirement by proactively providing reasons that, if provided in response to a specific request, would be considered inadequate. The provision of oral reasons to

the affected person at the time of the decision will also not qualify as reasons already provided because the affected person has a right to written reasons.

## RIGHTS MATERIALLY AND ADVERSELY AFFECTED

The constitutional right to request reasons applies only where a person's rights have been *adversely* (i.e. negatively) affected by administrative action (section 33(2)). The PAJA follows the wording of the 1996-Constitution for the most part, but adds the requirement that the administrative action must also have *materially* affected the rights of the requester (section 5(1)). It seems as if the addition of the word *materially* will allow public officials to avoid the necessity of providing reasons for administrative action that are fundamentally insignificant in their effects on rights. Or to put it differently - the *materially affected* qualification refers to a test of significance - i.e. the effect of the action on the rights of the requester must have been of sufficient significance to warrant the provision of reasons (Currie & Klaaren 2001:136-137). The intention is clearly to allow public officials to avoid giving reasons for administrative actions that may be considered trivial and mundane in its effect.

The phrasing *have been* of this requirement suggests that the entitlement to reasons accrues only after the submission of proof that rights have already been materially and adversely affected. It seems as if the onus is on the applicant to show that rights have been materially and adversely affected before he/she will be entitled to reasons (Govender, 2002:61). Obviously if a person has not been adversely affected he/she will not demand of reasons for an administrative action.

## DEADLINE

The public official must, within 90 days after receiving a request, provide adequate reasons in writing for the administrative action (section 5(2)). It has been around that this rather long time period creates an inherent danger as it allows for ample time to fabricate reasons which should have been the basis of the decision and therefore immediately available (Beukes & Southwood, 2007:597).

## ADEQUATE REASONS

The PAJA requires that a person whose rights have been materially and adversely affected is entitled to *adequate* reasons (section 5(2)&(3)&(4)). However, the Act offers no criteria for determining what is considered adequate. It is suggested that the term *adequate* refers to sufficient, satisfactory or what is proportionate to the requirements. The term *adequate reasons* therefore set the standard of the reasons to be provided (Beukes & Southwood, 2007:597). But what is the content of the standard and what kind of reasons would objectively be considered as adequate? The standard of adequacy is clearly an open-ended and flexible one. It is suggested that adequate reasons should consist of at least of the following:

- There must be a factual and legal basis for the reasons.
- A reasoning process should be followed which leads to an objective conclusion, i.e. reasons which set the administrative action/decision in context.
- Evidence must be submitted of applying one's mind and be visible in the reason, i.e. provide evidence of a fair procedure.
- In some cases the more complex the administrative action taken, the more detailed the reasons should be, i.e. the complexity of the matter will determine the comprehensiveness of the reasons (more explaining is needed).
- A single-line statement of reasons may quite adequately explain a straightforward decision (even with far-reaching consequences).
- The reason(s) provided must that actually have influenced the public official in taking the decision and must thus be relevant to the decision in question. The reasons cannot be a smokescreen to hide the real reasons which motivated the decision-maker.

Reasons will be regarded as adequate if they serve the purposes which the PAJA sought to further by imposing a duty to give reasons upon request. It is suggested that the reason-giving requirement principally serves a justificatory function (to justify the administrative action), i.e. to explain to the affected person why a particular decision was made. Adequacy is, therefore, to be assessed from the point of view of the recipient of the reasons, rather than that of the public official. A statement of reasons will, therefore, be regarded as adequate when it is unambiguous and intelligible to the person requiring the reasons and is of sufficient precision to provide that person with a clear understanding of why and how the decision was reached (in terms of rationality and reasonableness) (Stander, 1990:94-95). Reasons will be regarded as adequate when an affected person can state: "Even though I may not agree with it, I now understand why the decision went against me." (Currie & Klaaren, 2001:144). It is clearly better to have a disappointed (but informed) requester than a frustrated (and disillusioned) requester. Frustration and disillusionment is the result when it seems to the affected person that justice was not done and that the decision was probably taken arbitrarily. The provision of adequate reasons has the advantage of illustrating that proper consideration of the issue did take place. Adequate reasons also have the added value that it sets standards which may serve as guidelines to treat similar administrative action and decisions in the same fashion in future. This is likely to increase administrative consistency but it may also, to some extent, reduce administrative flexibility (Currie & Klaaren, 2001:135-136).

## WRITTEN REASONS

**T**he reasons provided by the public official must be written reasons (section 5(1)) and not provided orally. However, if reasons (i.e. an informal provision of reasons) were given orally at the time of a decision that should not disqualify a person from subsequently requesting for written reasons (Currie & De Waal, 2005:682). Reasons stated in writing are likely to have been properly considered because a public official who is

compelled to give reasons must at least consider the appropriate factors to be able to justify the decision (Asimow, 1996:619).

## **FAILURE**

**A**dministrative inconvenience alone cannot justify the failure to provide reasons. The provision of reasons may be irksome to some public officials. For this reason, if they can find an excuse to do so, they may probably refuse to give reasons (Dlamini, 2000:720). However, the refusal to provide reasons may lead to a situation of uncertainty and distrust of the public administration by the affected person. That is why the PAJA stipulates that failure to provide adequate reasons (and in the absence of proof to the contrary) inevitably leads to a presumption that the administrative action was taken without good reason or in bad faith (section 5(3)). However, a failure to provide reasons does not imply that the administrative action is unlawful.

When a request for reasons is refused the public official must provide reasons for such refusal, because it is likely that such action will have a material and adverse effect on the rights of the affected person (Currie & Klaaren, 2001:139-140).

## **EXCEPTIONS**

If it is reasonable and justifiable in the circumstance a public official has a discretion to depart from the requirement to provide adequate reasons (section 5(4) (a)). However, the public official must immediately inform the affected person of this deviation. It is apparent that such a deviation will not be easy to justify. The PAJA makes provision for the following substantive criteria which need to be considered to determine whether a deviation is reasonable and justifiable: the objects of the empowering provision; the nature, purpose and likely effect of the administrative action concerned; the nature and extent of the departure; the relation between the departure and its purpose; the importance of the purpose of the departure; and the need to promote an efficient public administration and good governance (section 4(b)). Taking all of these factors into account makes it difficult to envisage a situation where the refusal of the providing adequate reasons will be reasonable and justifiable. Departures from the requirement to provide adequate reasons will only be allowed in exceptional circumstances. It is important to note that this deviation is not applicable to the 90-day deadline for providing reasons or the requirement that reasons must be in writing.

## **PROMOTING AN EFFICIENT PUBLIC ADMINISTRATION**

**S**oon after the so-called interim Constitution (1993-Constitution) was implemented in 1994 there was a profound concern about the possible negative effect of a general duty to provide reasons on the efficiency of the public administration. The estimated cost, time and skills needed to furnish reasons in writing seemed to be a daunting prospect. (Du Plessis & Corder, 1994:169). To counter this prospect of

a possible excessive workload the following limitations (to a general duty to provide reasons) were devised:

- The 1996-Constitution makes provision for recourse rights should have been adversely affected (section 33(2)) and the PAJA added that rights must have been materially and adversely affected (section 5(1)).
- Reasons for the particular administrative action must not have been given already to the affected person (section 5(1)).
- In addition to this the PAJA stipulates that reasons must be requested by the affected person (section 5(2)).
- The PAJA stipulates that reasons must be requested within 90 days after the date on which the affected person became aware of the action (section 5(1)).
- A public official may depart from the requirement to furnish reasons if it is reasonable and justifiable in the circumstances (section 4(a)) and one such circumstance may be the need to promote an efficient public administration (section 4(b)(vi)).

It is clear that the above measures to limit the workload in the interest of an efficient public administration were designed to maintain a balance between workload and accountability (Devenish, 1999:457). However, the current South African public administration the dictates of an open and transparent public administration by far outweigh the possible inconvenience which the provision of reasons may cause. It simply does not matter whether the provision of reasons inconveniences the public administration if required it must be provided. (Dlamini, 2000:718). The dictates of an accountable public administration is more important than inconvenience.

In order to promote efficient public administration the PAJA stipulates that a public official may provide automatic reasons for a particular group or class of administrative actions when rights are being adversely affected (section 5(6)). This implies that reasons will automatically be furnished to the persons concerned without them having to make a request. It is clearly the intention of the PAJA to encourage individual public officials to act on their own initiative to promote the aims of the Act. For this practice to really promote efficient public administration the provision of reasons automatically must certainly release the public official from the duty to provide reasons (in terms of section 5(2)). However the Act does not explicitly state that reasons provided will in the course of the action not qualify as adequate.

## CREATING A CULTURE OF ACCOUNTABILITY

**A**dministrative accountability for the purposes of this article means that the public administration has to justify its decisions to the clients it serves. It is important to recognize the constitutional requirement to promote an efficient public administration when reasons are provided (section 33(3)(c)), but certainly not at the cost of accountable public administration. To attain this ideal the proverbial balance between effective and accountable public administration must be achieved. The right to be given reasons is therefore also aimed at *facilitating accountability* on the part of the decision-



maker. The importance of establishing accountability in public administration (preamble to the PAJA) is emphasized by the fact that accountability is one of the core values of the 1996-Constitution (section 1 (d)). The accountability of the public official to the community is specifically emphasized in chapter 10 of the 1996-Constitution prescribes the basic values and principles governing public administration (section 195).

The absence of reasons creates an impression of secrecy and arbitrary administrative action. The very purpose of providing reasons is, therefore, to facilitate a *transparent and open* mode of administrative action and decision-making, thereby furthering the aims of administrative accountability. This is indeed compatible with both the letter and spirit of accountable public administration as reflected in the 1996-Constitution. It also provides a safeguard against arbitrariness as it is likely that a public official will be exposed if he/she acted arbitrarily. The conduct of public officials should, therefore, be above reproach so that account can readily be given of it in public. The provision of reasons will ensure that an affected person will accept administrative action and decisions more readily. This may contribute to public confidence in public administration because it demonstrates that the decision-maker has acted *bona fides* (Stander, 1992:100-102).

Reasons are crucial building-blocks of not only accountability but also *fairness*. The provision of reasons satisfies an important desire on the part of the affected person to know why a decision was reached which contributes to procedural fairness in public administration (Baxter, 1984:568). The affected person needs to know why an application for a passport was turned down; why an application for a business license was refused; why a permit to hold a public meeting was denied; why a disability grant was terminated or discontinued; why an application for a pension was turned down; or why an application for a temporary residence permit was declined. If a public official has to explain why a particular decision was reached it will be expected of that official to apply his/her mind to the relevant factors which need to be considered in order to reach a decision. It is important to note that this relates only to the fairness of the procedure and not to the merits of the decision. Justice should not only be done but should be seen to be done. This is not only fair - it may also be conducive to public confidence in the administrative decision-making process.

At the heart of the realization of the objective of accountability lies the need for a *correct and proper decision-making* process to be followed by the public official. The provision of reasons may have a positive effect on the decision-making process in the sense that reasons may provide the evidence of proper decision-making (i.e. formalized, structured and reasoned) which inevitably may lead to improved decision-making and may assist in promoting the acceptability of the decisions. Or to put it differently: *reasons justify the decision* (Currie & Klaaren, 2001:135). It is common knowledge that an efficient decision-maker will formulate his/her findings and reasons before making the decision. Reasons, therefore, may improve the process of decision-making and encourage consistency and rationality. The necessity of explaining why a particular decision was taken requires the decision-maker to apply his/her mind to the facts of each case before coming to a decision. However, it would be presumptuous to assume that a required provision of reasons would automatically improve the quality of all decisions since

some decision-makers may simply design the reasons to suit their decisions (Baxter, 1984:233).

Accountability by its very nature implies *public scrutiny* of public administration. Public scrutiny is made possible through the provision of reasons which exposes the decision-making process. Rational criticism of a decision can only be made when the reasons for that decision are known. It is indeed the prospect of this criticism which may be the major reason for the reluctance to provide reasons.

Reasons may also serve an *educative purpose*, for example where an application has been refused on grounds which may be corrected in future applications. In this sense the provision of reasons fulfil an information function.

## CONCLUSION

Some of the core values of an accountable public administration, which are supported by the 1996-Constitution are openness and responsiveness of administrative action; participation in decision-making, justification for decisions made; and accountability for administrative action. These are indeed the very values that the 1996-Constitution and the PAJA are meant to give effect to through the duty to provide reasons. It is clear that the duty to provide reasons can be of profound significance to the public administration in terms of the promotion of accountability, fairness, justice and the improvement of the quality of decision-making. The duty to provide reasons has the potential to make a significant contribution to restoring the much needed respect for and trust in South African public administration. Then the provision of reasons must be more than a mere formality, it must indeed be a true reflection of the well known principle that justice should not only be done, but should also manifestly be seen to be done.

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