

# PAIA Civil Society Network Shadow Report: 2009

The Promotion of Access to Information Act (PAIA) was passed in 2000. Nearly nine years later it remains a relatively unknown and underutilised Act. The National PAIA Civil Society Network (PAIA CSN) was established in February 2009 in order to bring civil society together in an effort to improve the implementation and usage of PAIA in South Africa. This report serves to introduce the work of the PAIA CSN and offers a summary of Civil Society's experience of using this important Act.

## 1. Introduction

### 1.1. Context

Access to information is an essential element for a vibrant democracy. When implemented effectively, it facilitates transparency, accountability and good governance. In terms of human rights it is an enabling right that theoretically affords all people the opportunity to access information that can be used to respect, protect, promote and fulfill other human rights. In South Africa freedom of information has evolved through the process of transitioning from the end of apartheid to the establishment of democracy. Initiated by its inclusion in the 1996 Bill of Rights, the constitutional right of access to information has been taken forward by the adoption of enabling legislation, the Promotion of Access to Information Act, 2000, (PAIA).

The experiences of organizations and individuals from civil society that have submitted requests to access information in terms of PAIA, have demonstrated that an access to information culture in South Africa remains nascent. The effective, meaningful and equitable implementation of PAIA is hampered by a number of inter-related factors:

1. Historical and political context: South Africa has been shaped by generations of secrecy and an effective absence of the right to information under the apartheid regime. Contextual realities and operational norms also restrict levels of openness within the liberation movements and exile communities. Some attitudes and practices from this era continue to manifest within government, rendering compliance with PAIA difficult. The historical lack of the right of access to information and inherited socio-economic disadvantage also results in many South Africans having neither expectations nor skills to ensure PAIA is used optimally.
2. Poor records management: Access to records is dependent on appropriate creation and the subsequent management of records. The current situation underscores the importance of organizations committed to promoting public awareness of opportunities provided by PAIA, supporting requests for information regarding human rights, thereby testing the parameters of restrictions on access imposed by information-holding bodies and building an archive of material released under PAIA.
3. Lack of knowledge and awareness of PAIA: Despite being on the statute books since 2001, general levels of awareness and knowledge of the provisions inside PAIA remain extremely low.
4. Lack of resources: there is a severe lack of resources within the government and non-government sectors to ensure the effective implementation of PAIA.
5. Lack of training targeting civil society and, in particular, the Community-based sector: Training targeting this sector has been provided by civil society organisations including the Open Democracy Advice Centre (ODAC) and the South African History Archive (SAHA). However, if

efforts to build the capacity of Community Based Organisations (CBOs) to effectively utilize PAIA are to succeed, it is essential that other organizations supplement these efforts and commit to a more sustained engagement aimed at enhancing the quantity and quality of PAIA training in this sector.

Thus, the utilisation of South Africa's relatively generous freedom of information law remains limited. Only a handful of organisations across the country are actively involved in efforts to stimulate greater levels of engagement with the Act and it is evident that levels of understanding, knowledge and utilisation of PAIA remain exceedingly low. Of particular concern is the fact that those who could most benefit from the legislation have little or no knowledge that it exists, and how it might be employed. If a freedom of information culture is to take hold in South Africa all its citizens must have the opportunity to access PAIA and to realize their constitutional right to information.

## **1.2. Civil Society**

Despite efforts by various organizations to promote PAIA, the reality is that this message is simply not reaching all South Africans and for a large group of South Africans freedom of information remains an unfamiliar concept. A survey recently conducted by ODAC<sup>1</sup> found that more than one in ten people surveyed felt that they did not have the right to ask the government for information. Of those who did think they had a right to ask for information and who were aware of PAIA, they are most likely to be: white and male, speak English or Afrikaans, and educated to matric or tertiary level and in the higher income bracket. It is evident from the ODAC study that those with the least capacity to utilize PAIA (i.e. those who feel they don't have the right to access information from the government, who have no knowledge that PAIA exists, or who have knowledge that PAIA exists but don't know how to use it) are: black, Indian or colored; youth (16-34 years); speak Zulu, Xhosa or Sotho; have low levels of education (or none at all); and have a low income. This profile fits with those who benefit mostly from the work carried out by the majority of civil society non-government and community-based organisations.

Overall, the knowledge and use of PAIA by NGOs and CBOs remains worryingly low. In July 2007, SAHA commissioned a feasibility study to identify possible interventions in this sector by its Freedom of Information Programme (FOIP) in consideration of existing awareness and usage of the Act.<sup>2</sup> Almost half of the forty-two organizations interviewed had very poor knowledge and one third had a fair knowledge of PAIA. It is indicative from this study that civil society remains adversely affected by the problem of poor implementation of PAIA. Nevertheless, PAIA retains its potential to be an extremely effective strategic tool for these organizations to facilitate and achieve their core objectives. A continued lack of awareness and engagement with such a tool severely hinders future advocacy: impacting negatively on their client base; restricting the opportunity for all to access basic rights. If freedom of information is to become part of South Africa's institutional and public culture, it is essential that those with the least knowledge of PAIA are educated.

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<sup>1</sup> *Whistle Blowing, the Protected Disclosure's Act, Accessing Information and the Promotion of Access to Information Act: Views of South Africans*, Open Democracy Advice Centre, 2007.

<sup>2</sup> Belvedere, Dr Florencia. M., *Scoping Project of Civil Society Organisations: Identifying Future Possible Interventions by SAHA's Freedom of Access to Information Program*, South African History Archive, July 2007.

### **1.3 Public bodies**

It is important to view this problem in terms of the apparent lack of political prioritization given by public bodies to put in place the necessary infrastructure that will enable groups and individuals to access records in terms of the Act. A 2007 Public Service Commissioner report<sup>3</sup> found a disturbingly high number of problem areas within government departments that compromise the process for responding to requests for records in terms of PAIA. For example, a quarter of government departments have not appointed a Deputy Information Officer (DIO) despite this being a mandatory and basic compliance element of the Act. A 2008 Public Service Commission report<sup>4</sup> found that, whilst implementation of PAIA in the public sector is improving, compliance is still extremely poor. For example, whilst the Act requires all government departments have produced a PAIA Manual and make it available to members of the public by June 2001 only 40% had complied by 2008. Of even greater concern is the fact that only 36% of government departments had a system for managing requests for information in terms of PAIA, after eight years of implementation.

This report highlights the numerous obstructions presented to those submitting requests for access to records in terms of PAIA. Civil society's experience of the poor implementation of PAIA within public bodies has demonstrated that, in many cases, unless one has exceptional knowledge of the Act, an abnormally high level of persistence and access to unlimited resources, one is unlikely to achieve a legitimate outcome to one's PAIA Request. Those with an understanding of the Act who are prepared to be persistent when following-up on the progress of their request and have access to resources (fax, phone and email) can best address an ongoing lack of cooperation from public bodies.

Ideally public body staff have an awareness of their responsibilities in terms of the Act but in many cases staff have never heard of the Act; often transferring requesters to their Information Technology team.

It is important to view this problem in terms of the apparent lack of political prioritization given by government to put in place the necessary infrastructure that will enable groups and individuals to access records in terms of the Act. Whilst President Zuma's recently appointed cabinet appears to display a commitment to greater accountability in the public sector, it remains a grave concern that the President himself avoided any need to be open and accountable in terms of his own actions in the month leading up to the 2009 elections.

### **1.4 Private Bodies**

Whilst PAIA applies to private as well as public bodies usage of PAIA in order to access information held by private bodies remains extremely low. Whilst there are many explanations for this there have been no studies conducted that specifically address the implementation and usage of PAIA in relation to the private sector. This sector will be viewed in greater detail in future PAIA Civil Society Network reports.

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<sup>3</sup> *Implementation of the Promotion of Access to Information Act, [Act 2 of 2000] in the Public Service, August 2007, The Public Service Commission (PSC), Pretoria, 2007.*

<sup>4</sup> *The 2008 Public Service Commission's Fifth Consolidated Public Service Monitoring and Evaluation System Report, Research Cycle 2007/2008, Pretoria, July 2008.*

## 2. The PAIA Civil Society Network

### 2.1 The context

Eight years after the enactment of PAIA research was conducted by the South African History Archive (SAHA) in order to determine what work has been done by civil society in the development of an 'access to information culture' in South Africa. There have been a number of positive developments including training, publications, submissions concerning key developments in related legislation, precedent setting litigation as well as seminars, conferences and forums. Thus far collaboration between civil society actors has been ad-hoc, for example organisations such as the Nelson Mandela Foundation and the South African History Archive have made several joint submissions concerning the Protection of Information Bill, and the Human Rights Commission has worked closely with the Open Democracy Advice Centre in order to establish and coordinate the Deputy Information Officer's (DIO) Forum. Whilst these ventures have been successful in isolation there has not yet been a concerted effort by civil society actors to collectively strategise to bring about improved implementation and usage of PAIA.

The South African History Archive (SAHA) met with key actors from civil society who play a role in advancing an 'access to information culture' in South Africa in October-December 2008. Each organisation identified the need to establish a national network and a proposal document was circulated to gain consensus. The first PAIA Civil Society Network (PAIA CSN) meeting was held in Johannesburg in February 2009, hosted by SAHA, with members funding their own transport so they could attend the meeting from different parts of the country.

Whilst membership is open the networks' founding members are those who have pioneered the usage and implementation of the Act and who share the goal of improving the implementation of PAIA in South Africa with a particular focus on enhancing understanding and usage at the grassroots level. Founding members of the PAIA CSN are (in alphabetical order): the Freedom of Expression Institute (FXI), the Legal Resources Centre (LRC), the Nelson Mandela Foundation (NMF), the Open Democracy Advice Centre (ODAC), Professor Jonathan Klaaren (a member in his personal capacity), Public Service Accountability Monitor (PSAM), the South African History Archive (SAHA) and the South African Human Rights Commission (SAHRC).

These individuals and organizations have been at the forefront of pushing the boundaries of PAIA; insisting on its correct and effective usage and working to develop awareness amongst broader society. For example, SAHA's *Freedom of Information Project: Capacity Building in the Community Based Sector* works to overcome the current limitations on understanding and the ineffective implementation and utilization of PAIA by CBOs; ODAC has supported and represented a number of CBOs in litigation relating to PAIA and hosts a vital helpline free of charge where expert legal advice is offered concerning PAIA and the Protected Disclosure Act and PSAM works tirelessly using PAIA as a means to improve service delivery for those who most need it in the Eastern Cape. Through the network members share their experiences, lessons learnt and product development, as well as learning from Network colleagues, so that the impact of one isolated case goes beyond the scope of an independent organization.

Membership of the PAIA CSN is expected to grow and it is hoped that there will be representation from every sector of civil society; from organizations concerned with environmental issues to an individual who uses PAIA as an independent citizen. In September 2009 the PAIA CSN will hold its second meeting, hosted by the SAHRC. Representatives from partner CBOs who have been trained through SAHA's multi-level capacity building project will be introduced and will join the PAIA CSN in September 2009.

## **2.2 Purpose**

The purpose of the network is to assist public and private bodies as well as to support and enable civil society. A commitment was made during the first PAIA CSN meeting in February 2009 to work towards better collaboration and the development of concrete facts concerning the implementation of PAIA from the perspective of civil society. Members agreed to collaborate in five key areas: (i) training, (ii) monitoring of PAIA Requests, (iii) monitoring of litigation, (iv) advocacy and (v) self-reflection of the Network itself. This will be done by way of sharing information including experiences, lessons learnt, reports and other relevant documentation, opinions and organizational strategies; providing service providers with more structured and thorough feedback on the implementation of PAIA outside of government analyses; and coordinating responses to key issues related to relevant Policy and Law reform and significant events.

## **2.3 Impact**

Just six months from its inception the impact of the PAIA CSN is hard to measure. Nonetheless members believe in the potential impact the Network could have. In practical terms the Network hopes that its work will play a useful role in helping public and private bodies measure the effectiveness of its work in terms of PAIA and, more broadly, in developing South Africa towards a more open and accountable, and thus democratic, society. The Network hopes that in working together its work will also have a broader impact overseeing better awareness-raising, capacity building and support of CBOs and individuals at the grassroots level.

## **2.4 Statistics and Case Studies<sup>5</sup>**

Currently, the only report evincing the level of effectiveness of the implementation of PAIA is the *Implementation of the Promotion of Access to Information Act in the Public Service* written and published by the Public Service Commission (PSC). Whilst this report is an invaluable tool by which to measure the effectiveness of the Act's implementation in the public service it is by no means sufficient. One report from one source is inadequate in terms of identifying the realities of how well the Act has been implemented and, more importantly, what this means for the people who are served by the work of the public service; the public.

The PAIA CSN will publish a comprehensive report in 2010 detailing statistics and case studies evincing the experience of PAIA from civil society's perspective from 01 August 2009 – 31 July 2010. The 2009 Report offers an introduction to the work of the Network and provides statistics and analysis of the experience of its members from 01 January – 31 July 2009. Whilst this limits the

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<sup>5</sup> The South African Human Rights Commission does not practice the submission of PAIA Requests and is therefore incapable of providing statistics for the purpose of this report.

content of the inaugural report these dates have been chosen to coincide with Right to Know Day on 28<sup>th</sup> September. The PAIA CSN Shadow Report will be published and presented at the SAHRC/ODAC DIO Forum to be held on Right to Know Day 2009.

Of all PAIA Requests submitted by the PAIA CSN from 01 January – 31 July 2009 only one was submitted to a private body. PSAM submitted a request to private sector provider FAEC concerning a project commissioned by the Eastern Cape Department of Roads and Transport. In this case the records requested were partly provided. The remainder of statistical evidence relates to PAIA Requests that were submitted by the Network to public bodies at the national, provincial and municipal level.

Of those PAIA Requests submitted by the network within the specified time period just 12.7% were responded to by the public body within 30 days. The remaining 87.3% of requests were not responded to within the required time period; either as a result of the public body neglecting to adhere to its responsibilities in terms of Section 25 or as the result of an agreement between requester and requestee to extend the period with which the relevant authority must respond to the request in terms of Section 26. In the majority of cases it is not possible to comment on the outcome of the PAIA Request as the results are pending either the decision of an internal appeal or litigation. Just one third (34.5%) of PAIA Requests have resulted in the records requested being granted in full.

Civil society has spoken for many years about the brick wall faced by the majority of South Africans when attempting to access information held by a public body. This experience has been reported anecdotally to PAIA CSN members by those who have attended PAIA workshops and meetings. For example, a middle-aged (55-64 years old) woman from Small Farm requested a copy of the budget and expenditure for the Evaton Urban Renewal Project but was advised by a municipal officer that this information was confidential and meant “for senior management only”. This is not only factually inaccurate; this kind of response is inconsistent with the objects of the Act and demonstrates a small part of the culture in which civil society is operating.

Another barrier met by civil society is the reluctance with which public bodies are willing to respond to PAIA Requests, in cases where access to information is refused or partially refused, by referring to legitimate grounds for refusal citing relevant sections of the Act. This is partly illustrated by the high volume of PAIA Requests submitted to public bodies that necessitate the lodging of an Internal Appeal. Internal Appeals were lodged in support of more than half (54.6%) of all PAIA Requests lodged by PAIA CSN Network members. Whilst PAIA CSN members have the capacity to write, lodge and follow up on Internal Appeals for the majority of South Africa’s civil society this is an impossible task. Within the six month period monitored for the purpose of this report just 11% of PAIA Requests have resulted in an application to court. Nonetheless, considering the short timeframe represented and considering the time it takes from the date of submission to the date of application to court (150-180 days or five months at best<sup>6</sup>) this demonstrates that the need to apply to court was necessary in a much higher percentage of cases.

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<sup>6</sup> Section 78(2) states that the requester or an individual representing the requester must apply to court within 30 days after exhausting the appeal mechanisms. This has been extended to 180 days as a result of the Brummer vs the Department of Social Development case where Alison Tilley of ODAC was the attorney.

The PAIA CSN wishes to assist in the process of developing greater awareness within public bodies. Through greater efforts to ensure the necessary infrastructure is established to support implementation of the Act it is hoped that there will be less of a burden placed on civil society; in particular for individuals with low levels of education and poor access to resources. Put simply, PAIA should not be about access to information being dependent on one's access to resources.