

PAIA Civil Society Network Shadow Report: 2011

The Promotion of Access to Information Act (PAIA) was passed in 2000 and commenced operation in March 2001. The PAIA Civil Society Network (the Network), established in 2009, is an umbrella body of organisations working to advance the right of access to information. The member organisations are committed to improving the implementation and usage of PAIA, raising awareness about the right amongst citizens and working with bodies subject to the Act to improve understanding.

This report reflects the experiences of the Network's member organisations in using PAIA during the 12 months commencing August 2010. It is a shadow report, produced annually by the Network, which is designed to complement the work done by the South African Human Rights Commission in monitoring the implementation of PAIA by providing a perspective on implementation from organisations that utilise the rights in the Act on a regular basis.

Summary of Civil Society's PAIA experience

The 12 month period from 1 August 2010 to 30 July 2011 has seen a significant increase in the number of requests made by civil society under PAIA. This increase in requests reflects an increased awareness amongst civil society of the right to information and the value of access to information as a practical and strategic advocacy tool in the work of civil society.

Unfortunately the increase in civil society awareness and activity around the Act has not been met by an increase in effective implementation by information holders. In fact the overall performance of information holders has decreased as compared to the Network's assessment of the preceding 12 months. In particular there has been a decrease in the release of information by information holders and a corresponding increase in refusals to provide access to information.

Most alarmingly there has been a substantial increase in deemed refusals, which reflect a failure by an information holder to respond to a request. Three quarters of the requests made by Network members that were refused in the first instance were deemed refusals. In instances where Network members lodged an internal appeal against a refusal of a request, three quarters of those appeals were also deemed to be refused.

That information holders are ignoring requests for information in such vast numbers demonstrates an urgent need for intervention on two levels. The first is the provision of training and the allocation of resources in respect of the implementation of PAIA. Information holders must receive training so that officers understand their obligations in terms of PAIA and are able to facilitate the right to information as well as meet their statutory obligations. In order for such training to occur, greater resources must be provided to the South African Human Rights Commission or to civil society organisations to undertake this training.

Furthermore, information holders must allocate adequate resources to the implementation of PAIA. In particular there is a need for resources to be allocated to establishing efficient and effective record keeping systems and engaging sufficient staff to manage requests. The Open Democracy Advice Centre, a member of the Network, suggests that 0.5 per cent of an information holder's budget should be allocated to the implementation of PAIA to ensure that the organisation is equipped to meet its statutory obligations.

The second intervention needed is the introduction of an independent, inexpensive and swift avenue for appeal, such as an information commissioner, which would allow ordinary citizens and civil society organisations to seek redress whenever they have been unfairly denied access to information.

As the South African History Archive has previously commented:

“The single most cited complaint about the implementation of PAIA is the lack of a cheap, accessible, quick, effective and authoritative mechanism for resolving disputes under the Act. What is sought is a forum which can be accessed after refusal of a request by a public or private body or rejection of internal appeal against refusal of a request by a public body, but before resort to court action.”¹

Currently applicants that are denied access to information held by public bodies may apply for an internal review of that decision. If they remain unsatisfied thereafter they must apply to court for relief. Where information is sought from private bodies there is no right to an internal review but rather requesters have to apply directly to the court for relief.

Applications to court are extremely expensive and therefore out of the reach of most South Africans and civil society organisations. Furthermore, where such a high volume of requests are being ignored, it is very difficult for civil society to assess the appropriateness of litigation. Specifically, uncertainty as to whether the information holder is in possession of the requested records or whether the records could be reasonably and lawfully denied to the requester makes the assessment of litigious prospects difficult.

Creating an information commissioner (or similar) with the capacity to review decisions under PAIA would provide for a less expensive, flexible and timely resolution of PAIA disputes by an independent, skilled arbiter.

Statistics and Case Studies

Information concerning PAIA requests made in the period from 1 August 2010 to 30 July 2011 was collected by the Centre for Environmental Rights, Khulumani Support Group, the Open Democracy Advice Centre and the South African History Archives. During that period those bodies submitted a total of 162 requests under PAIA. This is a significant increase in requests from the preceding 12 months, in which 111 requests were submitted.

Public bodies

Of the 162 requests submitted, 147 were submitted to a total of 49 public bodies. The greatest number of requests were submitted to the Department of Mineral Resources (30 requests), Department of Home Affairs (13 requests), National Archives (11 requests), Department of Justice and Constitutional Development (10 requests) and the South African Police Service (6 requests).

The spread of requests indicates that there has been an increase in the use of PAIA as a strategic advocacy tool. Network figures for the preceding 12 months indicated that most

¹ Esarbica Journal, Vol. 22 (2003), p 51.

requests were made to the National Archives for access to information about individual requesters or their immediate families. The increase in requests to the Department of Mineral Resources and Department of Home Affairs, in particular, reflects an increase in the use of PAIA by Network members to obtain information that will inform and enhance advocacy work being undertaken by those organisations or their partners. This reflects an increase in the understanding of the importance and value of the right to information in achieving advocacy goals and realising other human rights.

Of the bodies to which a high number of requests were submitted, the South African Police Service (SAPS) proved to be the highest performing in terms of responsiveness and release of information. Of the six requests that were made to SAPS, one is pending (the statutory timeframe for responding to the request has not expired) and in the remaining five instances a full release of information was granted. Furthermore, in four out of the five instances in which a response has been received, it was provided within the statutory time frame in the Act.

The high performance of SAPS evidences the importance of establishing a unit dedicated to the provision of information and the adoption of a culture of cooperation and openness. It also suggests that SAPS have undertaken effective training among officers, as the high performance reflects a sound understanding of the Act and a fair and just application of the grounds for refusal.

The performance of the Department of Mineral Resources proved to be the most concerning of those bodies to which a high volume of requests was made. Of the 30 requests submitted to that department, 15 received no response at first instance (and therefore constitute a deemed refusal under the Act). Furthermore, of the 13 internal appeals submitted in respect of refusals, none have received any response despite the expiration of the statutory timeframe. The failure by the Department to engage at all with requesters represents a denial of the constitutional right to information and suggests, at best, an ignorance of, or at worst, a blatant disregard for, its statutory obligations.

In addition to a repeated failure to respond to requests, it is the experience of the Network that where the Department of Mineral Resources does respond to requests for information it very often does so with a standardised letter which indicates a partial release of the requested information and a partial denial. The basis for the denial is stated to be that the requested record contains information that, if released, would cause harm to the commercial or financial interests of a third party (section 36(1)(b) of PAIA) or contains information obtained by the department for the purpose of formulating a policy or taking a decision in the exercise of a power or duty imposed by law (section 44(1)(a) of PAIA). By sending a standardised letter it is clear that the department is not turning its mind to the individual circumstances of each case as required by PAIA. Indeed the experience of the Centre for Environmental Rights, a member of the Network, is that in some instances the department has used the standard letter that refuses access to prospecting and mining works programmes, even where that information has not been requested. Furthermore, while the department regularly indicates that it has granted partial access to information, in only 4 of the 11 cases where access has been granted have the records actually been provided to the requester. The failure to provide access to the records poses a great difficulty for requesters,

as PAIA does not expressly provide any right of appeal (either internally or to court) where access has been granted but is not provided.

Private bodies

The remaining 15 requests were submitted to 15 different private bodies. While this is a significant increase from the 9 requests submitted to private bodies in the preceding 12 months it still indicates a failure by civil society to adequately explore this aspect of PAIA. It may also indicate that many civil society organisations find it challenging to demonstrate that a record requested from a private body is required for the exercise or protection of any right. This is compounded by the strict interpretation of the term 'required' that has been applied by the courts (in *Unitas v van Wyk* 2006 (4) SA 436 (SCA) it was found that in order to meet the threshold the requester must show that the records are 'essential or necessary' for the exercise or protection of a right, not just 'useful or relevant'). Certainly in the experience of the South African History Archive in training civil society organisations in the use of PAIA, many have expressed difficulty in understanding what this additional requirement means in terms of requesting information from private entities and a tendency to avoid such requests as a result.

Of those requests that were submitted to private bodies there has been a marked improvement in responsiveness as compared to the preceding 12 months, which may reflect an increased awareness among private bodies of their obligations under the Act. Of the 15 requests submitted, one is pending (the statutory time frame for responding has not expired), six resulted in a full or partial release of records and eight were refused. Half of the refusals reflect a failure to respond at all (deemed refusals), three were refused on the basis that the document did not exist or could not be found and one was refused on the basis that it contained confidential information.

The refusal of 57 per cent of requests made to private bodies indicates a serious problem in the realisation of the constitutional right to information of private bodies, particularly given the lack of any appeal mechanism other than a court action. This is particularly significant when half of the requests refused were deemed to be refused because of a failure by a private body to respond to the request. Without an inexpensive and timely avenue for appeal a portion of private bodies are therefore avoiding their legal obligations and denying the constitutional rights of citizens to information by simply ignoring requests.

Timing

Only one quarter of requests were responded to within the statutory time frame. While this is an increase from the Network's experience in the preceding 12 months (where only one fifth of requests were responded to within the legal timeframe), it remains a significant failure in the implementation of PAIA to achieve the constitutional right to information.

The increase in the utilisation of the extension of time for responding to requests (claimed 8 times in this 12 month period as opposed to only one occasion in the preceding 12 months) may partly explain the increase in compliance with timelines. It may also indicate a growing understanding and sophistication on the part of information holders in engaging with the Act.

However, the failure to respond within the statutory timeframe in three quarters of the requests submitted suggests that under-resourcing, poor communication and poor record

keeping continue to present obstacles to the realisation of the right to information in South Africa.

Release of documents

Of the 162 initial requests submitted, 17 per cent remain outstanding, 22 per cent of requests were released in full, 8 per cent were released in part and 53 per cent were refused (including by virtue of a non-response; a deemed refusal).

Unfortunately the percentage of requests resulting in a full release of records has fallen from 34 per cent in the preceding 12 month period and the number of refusals has increased dramatically from 34 per cent to 53 per cent. Perhaps most concerning is that in the instances that access was refused, 74 per cent of the refusals resulted from a failure by the information holder to respond to the request.

This failure is further compounded by the absence of an internal appeal mechanism in respect of private bodies and a failure by public bodies to meet their statutory obligations in respect of reviewing decisions on appeal. Of those initial requests made to public bodies that were deemed to be refused, internal appeals were submitted in 25 instances. In 18 of those cases the public body again failed to respond to the request.

Where requests were responded to but denied in the first instance, the internal appeal mechanism is also failing. Of those initial requests made to public bodies that were refused on the basis of a ground for refusal in the Act, internal appeals were submitted in three instances. In all three cases the public body failed to respond to the appeal.

The failure by information holders to respond to requests and internal appeals highlights the desperate need for an independent regulator that would provide civil society with an independent, inexpensive and swift review process.

Court

Despite the high number of refusals at both the initial request and appeal stages, no court applications were lodged during the period analysed. This reflects the under-resourcing of civil society organisations and the large costs involved with litigious action, which makes the pursuit of litigation unachievable in all but the highest priority cases with a substantial likelihood of success.

The lack of litigious action is particularly unfortunate when one considers the need for a body of precedent to assist requesters and information officers in applying the grounds for refusal in PAIA. In almost all instances where PAIA matters have proceeded to court, the court has ordered the release of information, indicating that information officers are not accurately applying the grounds for refusal. Without further direction in this area, incorrect applications of the law which result in a denial of information will continue to occur.

These problems again highlight the need for an independent regulator that could not only resolve disputes but could contribute to creating a more thorough body of precedent relating to the application of PAIA.

The changing landscape of access to information in Africa

When South Africa passed PAIA in 2000 it was the first African country to pass access to information legislation. However, since that time there has been a wave of activity on the continent in respect of the right to information. Since 2005, Uganda, Ethiopia, Liberia, Niger, Guinea, Nigeria and Tunisia have all passed access to information laws. Additionally, both Kenya and Morocco have passed new constitutions which enshrine the right to information.

A number of the new African laws contain provisions that are more favourable to requesters than the South African legislation. If similar provisions were adopted in South Africa it would likely lead to an increased realisation of the right to information in this country. For example, the Liberian legislation contains informal request procedures which permit any person to make a request orally and also establishes an independent oversight body empowered to hear disputes regarding the failure to release information. The Nigerian legislation recognises the often time bound value of information by requiring requests to be responded to within seven days.

Furthermore, in April 2011 the African Commission on Human and Peoples' Rights passed a resolution authorising the Special Rapporteur on Freedom of Expression and Access to Information in Africa to initiate the process of developing a model access to information law for Africa. Consultation is currently being undertaken on the first draft of the model law, which will thereafter be amended and presented to the African Commission for adoption in April 2012.

The model law also contains informal request procedures and establishes an independent oversight body with broad powers to deal with disputes arising under the legislation.

These developments enhance the need for a review of PAIA to address not only implementation issues that are evidenced by the statistics and case studies above, but also to ensure that South Africa remains abreast of best practice developments on the continent.

Conclusion

The right of citizens to hold government and private industry accountable for their actions is an essential part of any well-functioning democracy. PAIA is a vital tool in exercising that right in South Africa. This report evidences a clear need for greater awareness of PAIA, the allocation of greater resources to its implementation and the introduction of an information commissioner (or similar body) empowered to determine disputes arising under the Act. The Network will continue to work toward achieving these goals.

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For and on behalf of the PAIA Civil Society Network

The PAIA CSN consists of Black Sash, Centre for Environmental Rights, Endangered Wildlife Trust, Freedom of Expression Institute, Khulumani National Support Group, Legal Resource Centre, Media Monitoring Africa, Nelson Mandela Foundation, Open Democracy Advice Centre, Open Society Foundation, Public Services Accountability Monitor, Socio-Economic Rights Institute, South African History Archive, South African Litigation Centre, University of Witwatersrand and Vaal Environmental Justice Alliance.