

Submission on behalf of South African History Archive

on

Proposed Amendments to the Promotion of Access to Information  
Act, 2000 (PAIA) in terms of section 83 of PAIA

to

The South African Human Rights Commission

18 March 2016

## Purpose of document

### Background

1. The South African History Archive (SAHA) is an independent human rights archive dedicated to documenting, supporting and promoting greater awareness of past and contemporary struggles for justice through archival practices and outreach, and the utilisation of access to information laws.
2. Through one of its two core programmes, the Freedom of Information Programme (FOIP), SAHA has, since 2001, been seeking to use PAIA to extend the boundaries of freedom of information and to build up an archive of materials released under the Act for public use. As part of this access to information work, SAHA is an active, founding, member of the PAIA Civil Society Network (“the CSN”), a network established in November 2008 in response to a need for greater collaboration and cooperation amongst organisations and individuals working to achieve a culture of openness and accountability through the effective implementation of PAIA. Members of the CSN 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 of the Act.
3. On 19 February 2016 the current Chair of the CSN, Centre for Environmental Rights, received communication from the South African Human Rights Commission (SAHRC) inviting the CSN to make submissions to the SAHRC on recommendations that members of the CSN may have for inclusion in the Commission’s section 83 report to the Minister on proposed amendments to PAIA. Section 83(3)(a) of PAIA provides for recommendations to be made by the Human Rights Commission on the “development, improvement, modernisation, reform or amendment” of PAIA or any legislation “having a bearing on access to information held by public and private bodies.” Given time constraints, the CSN was unable to collate suggestions from members into one joint submission and therefore agreed to members making their submissions as individual organisations. To this end, the Freedom of Information Programme (FOIP) at SAHA submitted the following proposals to the South African Human Rights Commission for consideration:

### Proposed amendments

4. SAHA notes that this year marks the 15<sup>th</sup> anniversary of the coming into effect of PAIA, the law intended to give effect to the constitutional right of access to information. SAHA has been an active user of PAIA since it first came into effect and has made over 1800 requests for information, largely to public, but also to private bodies. SAHA therefore has a wealth of experience in the use and interpretation of PAIA.
5. SAHA submits that in order to give effect to the express purpose of PAIA, that is to ensure “effective access to information”<sup>1</sup> the following sections of PAIA require amendment:

### Section 1 – definitions

6. Amendment to the definitions of “public” and “private” bodies, to bring them in line with the Constitution.<sup>2</sup> Section 32 of the Constitution provides for information from the “state” and “another person” the definitions in PAIA of “public body” and “private body” do not align with the definition in the Constitution of “state” and the clear meaning of “another person”. Specifically the definitions do not cater for State owned companies (SOCs) that are not created by the Constitution or other legislation.

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<sup>1</sup> The Preamble of PAIA

<sup>2</sup> Constitution of the Republic of South Africa, 1996.

7. Amendment to the definitions of “information officer” and / or “relevant authority” and amendment to Part 4 of PAIA in order to provide for an appeal mechanism with respect to public bodies that fall within part “(b)” of the definition of “public body”.
8. Amendment to the definition for “individual’s next of kin” through the addition of the word “and” after “;” in part (b) of the definition.
9. The addition of definitions for “trade secrets” and “commercial information” – terminology used in sections 36 and 64. These definitions become necessary because other Acts that govern commercial transactions in South Africa, such as the Patent Act 57 of 1978, the Trade Marks Act No. 194 of 1993, the Copyright Act No. 98 of 1978, the Companies Act 71 of 2008, the Close Corporations Act 69 of 1984, the Protection of Personal Information Act, the Public Finance Management Act 1 of 1999 and the Banks Act 94 of 1990, do not make mention of either “trade secrets” or “commercial information”. In fact, the only other legislation that makes mention of the terms is the Income Tax Act which makes mention of the imparting of commercial knowledge and information to be subject to tax if royalties accrue from the impartation of that knowledge and information. Thus if PAIA is using these terms as a mandatory refusal whilst the terms are not mentioned, let alone defined, in commercial legislation, there is a wide discretion left for public and private bodies to manoeuvre and refuse requests arbitrarily by relying on these vague terms.

#### **Section 5 – supremacy of PAIA**

10. Amendment to make provision for the supremacy of PAIA, as legislation giving effect to the Constitutional right of access to information, with respect to legislation enacted after the enactment of PAIA; that is, to specify that the provisions of section 5 of PAIA specifically also applies to legislation enacted after the enactment of PAIA. The basis for this assertion is the fact that the right of access to information is a constitutionally protected right in the bill of rights. To claim that the enabling legislation for that constitutionally protected right only applies retrospectively to legislation enacted prior to its enactment and not to all subsequent legislation is as a matter of fact violating the constitutionally protected right of access to information. Thus, PAIA should clearly establish its supremacy over any delegated legislation unless “expressly provided otherwise.”

#### **Section 15 and 52 – proactive / automatic disclosure**

11. Amendment to make provision for penalties for bodies that fail to provide, in the manner described in those notices, access to records described in their section 15 / 52 notices.
12. Amendment to provide for the mandatory addition to a requestee body’s section 15 notice, every record that has been released in terms of a PAIA request, with an exception in the case of personal information released to a personal requester.

#### **Sections 18 and 53 – form of request**

13. Amendment to 18(2)(f) and 53(2)(f) in order to provide specifically for records that are required to be submitted (e.g. “copy of identity document of requester and written authorisation”) in order to prove “capacity in which the requester is making the request”. The current terminology: “to the reasonable satisfaction of the [information officer / head]” has resulted in vastly differing requirements set by different bodies and leaves these sections open to abuse.

## **Sections 22 and 54 – fees**

14. Scrapping of request fees, at R35 / R55 the administration costs of collecting the fee is higher than the fee collected; alternatively provision should be made for a higher request fee but with a higher exemption threshold for individual requesters and an exemption for NGOs acting in the public interest.
15. Amendment that the phrase “before further processing the request” be scrapped so as to clarify that any confirmation of payment has no effect on the timeline given under PAIA but merely whether the records can be released or not. Further suggestions in this regard can be found in 9.2.2. of the Centre for Environmental Rights equivalent submission made to the SAHRC.

## **Section 39 – police dockets and bail proceedings**

16. Amendment in order to provide for an express time limitation with regard to information that can be expected to “impede prosecution” or “prejudice the investigation” where no steps have been taken to prosecute. For instance, the release of records related to crimes committed during the 1980s, where no steps have been taken in the intervening period of time to prosecute, cannot at this point in time be anticipated to “impede [any] prosecution” or “prejudice” any further investigation.

## **Sections 46 and 70 – public interest override**

17. Removal of the word “substantial” prior to the word “contravention” – alternatively there should be amendment to the definition section through the addition of a definition for “substantial contravention of, or failure to comply with, the law”.
18. Amendment through the addition of a subsection under subsection (a) which additional subsection should provide for records of gross human rights violations to be regarded as in the public interest. Such an amendment would bring PAIA in line with international best practice in this regard.<sup>3</sup>

## **Sections 49 and 73**

19. Amendment in order to provide for the provision of notice, by a requestee body to the requester, of the date on which every third party was informed - this will enable calculation by the requester of the date on which a decision will become due.

## **Section 74(1)**

20. Amendment through the addition of a new subsection in order to create the ability to appeal against a failure to grant access to a record in circumstances where a decision was taken under section 25(2) to grant access and the requester has paid the prescribed access fee under section 22 and a reasonable, quantified time period has passed since the payment of the access fee.

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<sup>3</sup> See “PAIA CSN Shadow Report 2014” available online at: [http://www.foip.saha.org.za/uploads/images/PCSN\\_ShadowRep2014\\_final\\_20150202.pdf](http://www.foip.saha.org.za/uploads/images/PCSN_ShadowRep2014_final_20150202.pdf) accessed 15 March 2016.

## Section 74(1)(b)

21. Amendment through the addition of the figure “20” after the word “section” and before the figure “22” – in order to provide for appeals against decisions to transfer. In SAHA’s experience decisions to transfer are sometimes patently inappropriate and should be appealable. (By way of example, SAHA has had a request to a department for a record created by that department in the course and scope of that department’s duties, transferred by that department to another department – in the decision letter by the latter department it noted that (a) it does not hold the record and (b) it takes the view that the first department, if it did not hold the record, should have provided a decision instead of transferring the request). Further the CSN has noted a growing trend in the use of transfers in circumstances that often suggest transfers way of shifting the decision making responsibility.<sup>4</sup>

## Section 78(2):

22. Amendment through the addition of new subsections making provision for a court application in circumstances where a:

- 22.1. Part “(a)” public body took a decision on an appeal, under section 77, to grant access to a requested record(s) and the requester has paid the access fee and a reasonable, quantified time period has passed since payment of the access fee, with no access granted; and
- 22.2. Part “(b)” public bodies [unless amendment is made, as suggested, to allow for internal appeals against the decisions of part “(b)” bodies] and private bodies have failed to grant access to a record in circumstances where a decision was taken under section 25(2) or 56(2), as the case may be, to grant access and the requester has paid the prescribed access fee under section 22 and a period of reasonable, quantified time period has passed since the payment of the access fee.

## Conclusion

23. In SAHA’s experience, ambiguity in the wording of many of the abovementioned provisions, or lacunae which have only become apparent through practice, has led to interpretations that have been used to, or at least have had the effect of hampering rather than advancing access, transparency and accountability. SAHA therefore thanks the Commission for the opportunity to provide input into this process and trust that the above will be of assistance to the Commission in the execution of its duties under section 83 of PAIA.

Prepared by: the Freedom of Information Programme at the South African History Archive  
For more information, please contact:  
Toerien Van Wyk  
Coordinator of the Freedom of Information Programme  
E-mail: [toerien@saha.org.za](mailto:toerien@saha.org.za)  
Phone: 011 718 2560

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<sup>4</sup> See page 12 of the “PAIA CSN Shadow Report 2014” available online at: <http://www.foip.saha.org.za/static/paia-reports-and-submissions> accessed 15 March 2016.