

Review of the Promotion of Access to Information Act 2 of 2000:

The civil society experience

PAIA Civil Society Network – October 2011

Introduction

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 the Promotion of Access to Information Act (PAIA), raising awareness about the right amongst citizens and working with bodies subject to the Act to improve understanding.

When introduced, PAIA was heralded as representing new international best practice, largely because of its inclusion of the right to information held by the private sector. However, PAIA has been plagued by implementation issues, preventing the practical realisation of the right to information. Furthermore, now a decade after its introduction, there have been significant advancements in best practice internationally and, in particular, regionally, that have resulted in South Africa lagging behind its counterparts in affording the right to information.

The Network has therefore undertaken a review of PAIA from the perspective of civil society organisations. Set out below is a summary of the observations and recommendations of the Network. The more thorough reviews undertaken by member organisations, on which the summary is based, are attached.

Executive Summary

The experiences of Network members demonstrate that PAIA is not working. Requesters face challenges at every step of the process – from submitting a request to seeking redress for an information holder's refusal to provide access to information.

Submitting a request is made particularly difficult by the failure of information holders to prepare and update manuals providing contact details for information and deputy information officers. Frontline staff have little or no training in PAIA and are rarely able to assist requesters by identifying and providing contact details of the relevant officers. These difficulties result in significant time delays, waste resources and cause considerable frustration for civil society organisations. For community members without access to the internet and with limited resources to make phone calls, these difficulties often prove prohibitive to making requests independently. Furthermore, the requirement that a request for information be submitted in a prescribed form presents significant difficulties to community members who are unable to access forms online and for whom literacy rates are low. Experience has

shown that regulators and private bodies do not respond well to informal requests by civil society (requests for information without submitting a PAIA request form). When requesters have informally requested information (either by a letter or telephone call) they have generally been told that a request in terms of PAIA must be submitted.

Despite the challenges associated with making requests for information, in the 12 months from August 2010 to July 2011, members of the Network submitted 162 requests for information. Unfortunately an analysis of the outcomes of those requests demonstrates a low level knowledge and implementation of PAIA within information holders and a systemic failure among public bodies, in particular, to comply with their statutory obligations in respect of the right to information.

Only one quarter of requests submitted were responded to within the statutory timeframe and in forty per cent of cases the information holder failed to respond at all, despite numerous follow up attempts in some instances. Furthermore, of the 55 requests where access to information was granted (either at first instance or on appeal), the body failed to provide the records in 15 instances. This poor performance appears to be caused by a low knowledge of PAIA within information holders, poor record keeping practices and a failure by bodies to establish PAIA units or designate deputy information officers or to monitor the performance of junior officials charged with receiving and (in some instances) processing the requests.

The failure of information holders to grant access to and release information is compounded by the limited avenues available to requesters for seeking redress. A requester refused access to information by a public body may apply for internal appeal in respect of that decision. Failing a satisfactory outcome the requester has no recourse outside of an application to court. In some instances the initial request is ignored and the appeal is ignored. Given the prohibitively costly nature of court applications, regulators are then escaping obligations by simply ignoring requesters completely. A further problem that exists in respect of a decision of a private body is the absence of a right of internal appeal, which makes a court application the only available avenue of appeal.

The experience of Network members demonstrates that lodging an internal appeal infrequently results in a reversal of the original decision of the information holder. For the period August 2010 to July 2011 only 18 per cent of appeals lodged by members resulted in the release of the requested information. Perhaps more disturbingly, 75 per cent of appeals received no response.

Despite the high number of refusals received by Network members and the very limited success in having decisions overturned on appeal, no applications were made to court for a review of decisions. This reflects the prohibitively expensive and time consuming nature of court applications and evidences the desperate need for

the establishment of an information commissioner or ombud to conduct independent, inexpensive and expeditious reviews of decisions.

While PAIA is currently receiving an ad-hoc review through the drafting of the Protection of Personal Information Bill and the Protection of State Information Bill, with some potentially positive and negative outcomes, PAIA itself must be reviewed if the right to information is to be realised in South Africa. To be effective, such a review must include a revision of the Act as well as addressing the failings in respect of implementation.

The Network recommends that any review should address the following in respect of legislative amendments:

- the adoption of an informal request process, removing the requirement that requests be made in a prescribed form and allowing requests to be made orally;
- removal of the request fee;
- the inclusion of a time period for providing records once access has been granted and the right of appeal in respect of a failure to do so;
- lowering the threshold for making a request from a private body, allowing requesters access to information of a private body where that information 'may assist' in the exercise or protection of any right;
- lowering the public interest threshold, removing the need for the record to evidence a contravention of, or failure to comply with, the law or a serious public safety and environmental risk; and
- the establishment of an information commissioner or ombud with powers in respect of enforcement and appeals.

The Network further recommends the following in respect of implementation:

- the allocation of 0.5 per cent of an information holder's budget line to PAIA;
- the permanent delegation of the role of deputy information officer to a specific individual(s) within a relevant body and, where necessary due to the volume of requests received by a body, the establishment of a PAIA unit;
- the training of all staff in respect of their obligations to create, maintain and release records;
- training of frontline staff to respond to PAIA enquiries;
- training of information and deputy information officers in the implementation of the Act, specifically in relation to the obligation to prepare manuals, timelines for responding to requests, third party notification obligations, the obligation to release information, the breadth and application of grounds for refusal and the effect of releasing information; and
- the creation and implementation of adequate records management systems within information holders.

The Network would welcome the opportunity to assist in a review of PAIA by providing more detailed submissions on the challenges with the current law, providing a proposed amendment bill, hosting consultations or dialogues on the issue or in any other way that may be of assistance.

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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, Public Services Accountability Monitor, Socio-Economic Rights Institute of South Africa (SERI), South African History Archive, South African Litigation Centre, University of Witwatersrand and Vaal Environmental Justice Alliance.