



PAIA CIVIL SOCIETY NETWORK SHADOW REPORT 2014

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For and on behalf of the PAIA Civil Society Network

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INTRODUCTION

*‘Everyone has the right of access to (a) any information held by the state;
and (b) any information that is held by another person
and that is required for the exercise or protection of any rights’¹*

The Interim Constitution, passed in 1993, in anticipation of South Africa’s first democratic elections in 1994, first entrenched the right of access to information in the country, a right that was thereafter protected by section 32 of the 1996 Constitution. When the law intended to give effect to the constitutional right of access to information, the Promotion of Access to Information Act, 2000 (PAIA), came into operation in 2001, it was internationally viewed as one of the most progressive laws of its kind. By extending the right to privately-held information, South Africa expanded the right far beyond internationally accepted norms. PAIA also allows for the right to be exercised by foreign nationals, not resident in South Africa, and was drafted with the express intention of incentivising proactive disclosure of information as government departments are absolved from having to comply with individual requests if the information sought is already in the public domain.

However, after 20 years of democracy, an access to information culture in South Africa still remains worryingly nascent. While PAIA was enacted to foster a culture of transparency and accountability in public and private bodies, and to prevent and counteract the secretive and unresponsive culture that led to an abuse of power and human rights violations in the apartheid era, a number of recent government initiatives, including the controversial passage of the Protection of State Information Bill, appear aimed at restricting the constitutional right to information in South Africa. While public opposition to the Protection of State Information Bill has been extensive, with many prominent lawyers and commentators opining it is unconstitutional,² the government used its majority to push the bill through Parliament.

Read alongside other recent controversies - including the Nkandla-gate saga,³ the Spy Tapes scandal,⁴ the ‘missing’ Khampepe Report⁵ and the use of apartheid-era legislation to increase numbers of

¹ Section 32(1) of the Constitution. Section 32(2) requires national legislation to be enacted to give effect to this right.

² In a call for public submissions the National Council of Provinces (the second house of parliament) received 263 written submissions on the bill. Of particular note is that the government’s alliance partner, trade union federation COSATU, opposed the bill, as did two key government oversight bodies established under the Constitution: the South African Human Rights Commission and the Public Protector. Written submissions from those selected to make oral submissions are available online: <http://www.pmg.org.za/minutes/889>. Of particular note are the initial comments of veteran human rights lawyer, George Bizos, who presented to Parliament on his concerns with the bill, including its unconstitutionality, on 28 March 2012. A copy of Advocate Bizos’ written and oral submission on behalf of the Legal Resources Centre is available at: <http://www.pmg.org.za/files/doc/2012/120217lrc-submission.pdf>. More recent commentary issued subsequent to amendments made to the bill still express concern about the unconstitutionality of the current version of the bill – see, for example, <http://constitutionallyspeaking.co.za/new-improved-secrecy-bill-still-bad-still-unconstitutional/>, <http://citizen.co.za/203708/afriforum-submits-legal-opinion-secrecy-bill/>, and <http://mg.co.za/article/2014-05-03-info-bill-must-go-to-constitutional-court-sanef>.

³ See <http://amabhungane.co.za/article/2012-10-08-nkandla-home-is-where-the-heart>

National Key Points, at times expressly in order to limit access to information - a worrying shift towards more secretive practices on the part of government emerges.⁶ This culture of secrecy is not limited to the state but mirrored in the private sector where, as a general rule, transparency is not only not the default position, but is seen as a form of business risk.

It is within this context that the latest shadow report (2013–2014)⁷ has been produced by the PAIA Civil Society Network (CSN), a cluster of organisations committed to expanding the parameters of freedom of information in South Africa. This report reflects the experiences of the PAIA CSN’s member organisations in using PAIA during the 12 months commencing August 2013. 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 – through the submission of PAIA requests, tracking proactive disclosure, challenging non-compliance through the courts, tracking legislative developments with implications for PAIA by providing a perspective on implementation from organisations that utilise the rights in the Act on a regular basis.

While statistics relating to the PAIA CSN’s submission of requests reveals that there has been a slight increase in the dismal levels of compliance recorded by the PAIA CSN in 2013, openness and transparency by public bodies in terms of PAIA still requires significant work:

- An unacceptably high number of requests are simply not responded to at all. This year 26% of all initial requests received no response at all.
- 44% of internal appeals were also ignored, and 35% were denied.

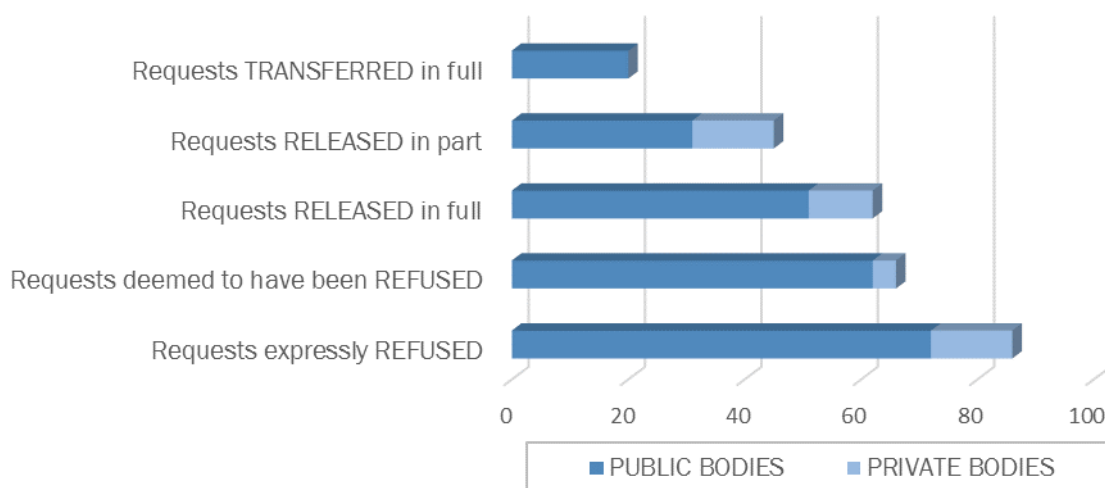


CHART 1: Nature of responses to initial requests submitted to public and private bodies
(excluding requests pending at end of reporting period)

⁴ See <http://www.corruptionwatch.org.za/content/zuma-loses-spy-tapes-appeal>

⁵ See <http://mg.co.za/article/2013-02-01-00-khampepe-report-keeping-you-in-the-dark>

⁶ A shift that is illustrated in ‘The SAHA’s body of PAIA requests was the basis for the analysis on access to information in South Africa - See <http://www.r2k.org.za/2014/09/09/r2k-secrecy-report-2014/>

⁷ See <http://foip.saha.org.za/static/paia-network>

- Even where requests were responded to, most responses were received outside prescribed statutory timeframes, with only 37% of responses meeting the requirements at initial request stage, and only 19% meeting the legislated deadlines on internal appeal.
- Public bodies are routinely ignoring their obligations to consider severance or whether the all-important public interest override may apply when reviewing requests and appeals for access to records.
- The private sector's response to information requests also remains worrying, with less than half of requests being responded to within statutory timeframes, and a refusal rate of 40% of requests made to private bodies by PAIA CSN members, a rate that is unlikely to change unless improved compliance from public bodies compels private bodies to follow suit.

Despite this dismal environment, the investment made in collaborative action by civil society appears to be bearing fruit, albeit very slowly. By submitting most PAIA requests through a single online platform, the PAIA Tracker⁸, PAIA CSN member were able to increase the number of PAIA requests submitted and are better able to detect, share and develop strategies to combat key patterns in non-compliance. The number of requests being ignored by both public and private bodies has also dropped this year, perhaps because of the reminder email functionality within the PAIA tracker, which automatically sends follow-up emails to non-responsive public and private bodies.

In addition to the recent, hard won victory by the Mail & Guardian in securing the Khampepe Report, there has been other PAIA litigation with positive outcomes in bolstering PAIA in the course of the year – SAHA was able to secure legal support for the R2K Campaign, of which many members of the PAIA CSN are members, in order for the two organisations to take forward a court challenge for access to the National Key Points. CER, on behalf of the Vaal Environmental Justice Alliance (VEJA), won a significant court victory in the battle for access to information and greater corporate transparency and accountability in a case against ArcelorMittal. And another judgment handed down in the Nkandla PAIA matter in which SAHA served as *amicus curiae* clearly highlighted the devastating impact of public bodies' disregard of their duties in creating and managing records on the constitutional right to access to information in South Africa. But what remains clear is that without the cultivation of political⁹ and business champions and the development of a competent and committed infrastructure within government and industry to deliver, the potential of PAIA, as a critical accountability tool, is likely to "wither on the vine"⁹.

⁸ The PAIA Request Tracker is an online information management tool developed by the South African History Archive (SAHA), with funding from the Open Society Foundations. The purpose of this tool is to manage requests made under PAIA in South Africa, both by SAHA and by other members of the PAIA CSN in order to monitor compliance with PAIA, tracking the extent to which both public and private bodies are meeting their obligations in terms of making information accessible to South Africans – see http://foip.saha.org.za/request_tracker/search

⁹ Catherine Kennedy & Piers Pigou, "Democracies die behind closed doors: battling for the right to know." M&G online, 23 September 2014, Available at <http://mg.co.za/article/2014-09-23-democracies-die-behind-closed-doors-battling-for-the-right-to-know>

PAIA REQUEST STATISTICS

Information concerning PAIA requests made in the period from 1 August 2013 to 31 July 2014 was collected by the Centre for Applied Legal Studies (CALs), the Centre for Environmental Rights (CER), Corruption Watch, Khulumani Support Group, Public Service Accountability Monitor (PSAM) and the South African History Archive (SAHA)¹⁰. During that period, these organisations submitted a total of 306 requests under PAIA.¹¹

REQUESTS SUBMITTED TO PUBLIC BODIES

Of the 306 requests submitted, 260 were submitted to a total of 63 public bodies. This is a slight increase on the 2012–2013 period in terms of the number of requests submitted, but constitutes a decrease in the number of bodies from which records are being requested, particularly to provincial and local government departments.

Compliance with statutory time frames

Only 37% of public body requests were responded to within the statutory time frame. This remains a significant failure in the implementation of PAIA to achieve the constitutional right to information. That said, there appears to be a slight increase in the utilisation of the extension of time for responding to requests by public bodies. This practice, in combination with the fact that there is still, by and large, a failure to respond to requests within statutory timeframes, 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.

Outcomes of initial PAIA requests

Of the 260 initial requests submitted, 23 remain pending (the statutory time frame for responding had not expired). Of those requests to which a response was received or deemed to have been received¹², 51 (21.5%) were decisions to release in full, 31 (13%) were decisions to release in part and 20 (8.5%) were decisions to transfer to other public bodies. Alarming, 134 (56.5%) of these decisions were decisions, or deemed decisions, to deny the requests in full. And in only 72 of these refusals, the requester was actually notified of a decision not to release any records requested.¹³

¹⁰ The statistical component of this report was finalised in October 2014 using PAIA request data for the reporting period compiled before, and last updated at that point – the status of PAIA requests is based on records supplied to, and on file with, SAHA at that time

¹¹ 264 (86%) requests were submitted through the PAIA tracker by CALS, CER, KSG, and SAHA, and can be viewed at http://foip.saha.org.za/request_tracker/search. The remaining 42 (14%) requests were submitted manually by CALS, Corruption Watch and PSAM.

¹² In cases where the requestee has failed to comply with various aspects of PAIA in the manner in which they have responded to the request, but the response is treated as a response, despite these deficiencies.

But, the most worrying trend evident in the responses to initial requests submitted by the Network is that 62 of the denied requests were deemed refusals, that is, the information holder simply failed to communicate if a decision had been made at all within the statutory timeframes of PAIA.

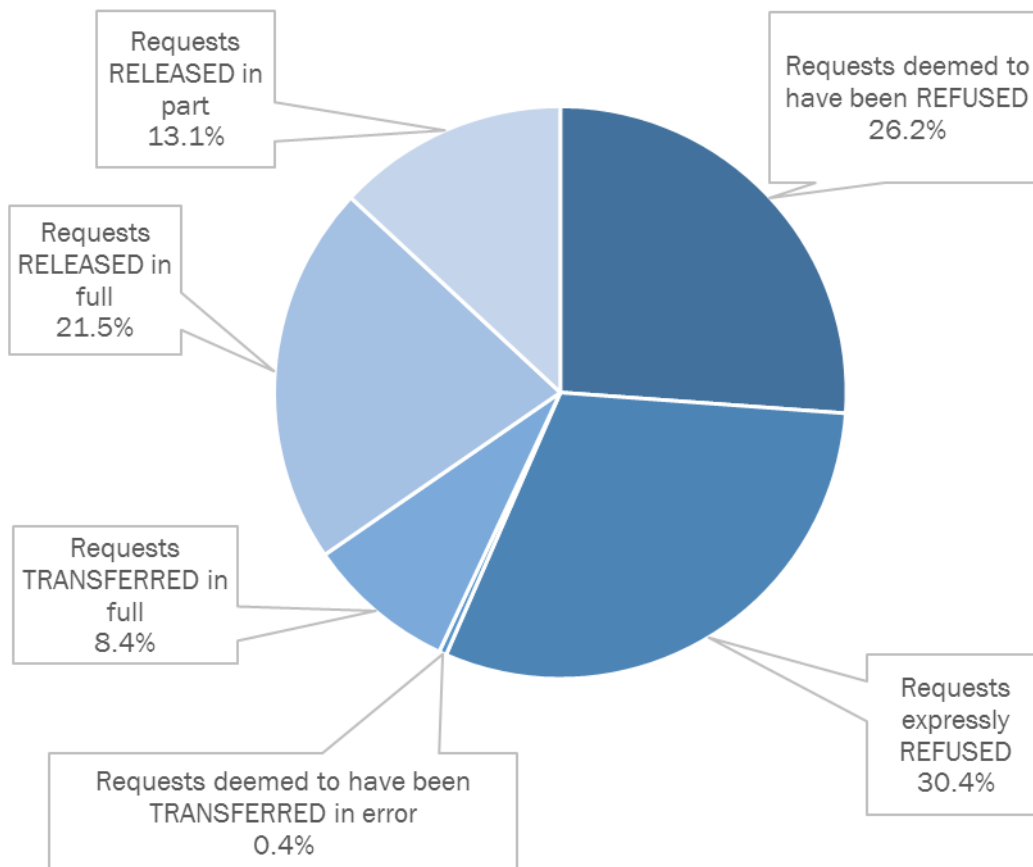


CHART 2: Nature of responses to initial requests submitted to public bodies
(excluding requests pending at end of reporting period)

Grounds for refusal

As has been the case in previous years, the most common ground for refusal was that the records do not exist or cannot be found (s23). The application of this ground is worrying as it points to poor records management within government departments. Other grounds commonly mentioned are detailed in the table below.

In only 46% of requests that were expressly denied, either in full or in part, were the grounds for refusal as well as the relevant section of PAIA providing for that ground, actually stipulated in the decision provided to the requester, as is required by section 25(3) of PAIA. In 15% of these denied or partially denied requests, the relevant bodies failed to provide any information at all about why access to some or all records requested was refused.

When public bodies fail to cite PAIA correctly when refusing access to records, there is a greater chance that errors will be made in the communication of the decision. By way of example, the Deputy Information Officer at the Department of Justice and Correctional Services (formerly the Department of Justice and Constitutional Development) has on more than one occasion, referred to a section that simply does not exist in PAIA when refusing access to records when refusing access to records. This form of non-compliance places an unreasonable burden on the requester to attempt to decipher or interpret the reasoning behind a refusal in order to assess whether it may be appropriate to appeal the decision.

And finally, in 54% of these requests, the relevant public body failed to notify the requester of the right to appeal the refusal.

GROUNDS FOR REFUSAL PROVIDED	No. of times cited	No. of times implied
s23 - Records do not exist or cannot be found	10	53
s37 - Mandatory protection of certain confidential information, and protection of certain other confidential information, of third party	16	6
s39 - Mandatory protection of police dockets in bail proceedings, and protection of law enforcement and legal proceedings	5	7
S34 - Mandatory protection of privacy of third person	11	0
s36 - Mandatory protection of commercial information of third party	9	0
s44 - Operations of public bodies	8	0
s45 - Manifestly frivolous or vexatious requests, or substantial and unreasonable diversion of resources	8	10

Levels of compliance by different public bodies

The five public bodies receiving the greatest number of requests from PAIA CSN members were:

- Department of Defence
- Department of Justice and Correctional Services
- Department of Mineral Resources
- National Archives
- South African Police Services

Of these bodies to which a high number of requests were submitted, only the Department of Mineral Resources responded to more than half of the requests submitted to them by actually releasing records. In contrast, the other four bodies denied access to requested records in more than 75% of initial requests submitted to them, either by denying access actively, or by simply ignoring the requests. (Although it must be noted that the National Archives Services is generally compliant in the manner in which they respond to PAIA requests – their high level of refusal is more indicative of poor records management within the state as a whole than an unwillingness to release records in terms of PAIA.)

The following public bodies failed to provide a decision, within the timeframes provided for by PAIA, to any of the initial requests submitted to them by the PAIA CSN during the reporting period:

- City Power Johannesburg
- Department of Arts and Culture
- Department of Correctional Services
- Department of Energy
- Department of Public Works
- Gauteng Department of Local Government and Housing
- Gert Sibande Municipality
- KZN Department of Education
- Makana Local Municipality
- Mpumalanga Department of Agriculture, Rural Development, Land and Environmental Affairs
- Mpumalanga Department of Economic Development, Environment and Tourism
- Mthatha General Hospital
- Nuclear Energy Corporation of South Africa
- Pikitup Johannesburg (SOC) Limited

Internal Appeals

58 internal appeals were submitted to 17 public bodies, in response to express or deemed refusals to release records. Responses to 13 of these appeals were still pending at the end of the reporting period (the statutory time frame for responding has not expired).

The internal appeal mechanism appears to be working only slightly better than it has in the past. While six refusals at the initial requests stage were substituted with decisions on appeal to release the requested records, either in full or in part, in 15 instances, the decisions on appeal were to deny access on the basis of grounds provided for in PAIA. The number of appeals to which requesters simply never received a response remains high - 44% of internal appeals submitted are deemed to have been dismissed. This is a slight improvement on the same statistics for the 2012–2013 period, but still points to the need for an independent regulator that would provide civil society with an independent, inexpensive and swift review process.

Most worryingly, the following public bodies failed to respond within timeframes, in over 75% of initial requests submitted to them **AND** to over 75% of internal appeals submitted to them by the Network during the reporting period:

- Department of Defence
- Department of Justice and Correctional Services
- Department of Public Works
- Department of Water and Sanitation
- Gauteng Department of Local Government and Housing

As reported in previous years, the Department of Justice and Correctional Services' performance remains disturbingly poor. All requests submitted were either denied or deemed to have been refused (excepting those that were still pending at the end of the reporting period). Similarly all internal appeals were either deemed to have been denied, or in the case of requests originally ignored at the initial request stage, were simply denied with (often questionable) grounds upon appeal. This poor performance is particularly concerning, given the department's responsibility for ensuring compliance with PAIA.

Ironically, PAIA requests for access to the records of the much lauded South African Truth and Reconciliation Commission (TRC) have been repeatedly refused,¹⁴ this despite the fact that, as stated in its preamble, PAIA had, in part, been enacted to counteract the secretive and unresponsive culture in public and private bodies that led to an abuse of power and human rights violations in the apartheid era. This lack of openness, as it relates to records of apartheid violations that the TRC was tasked with uncovering, points to an unacceptable conflation of pre- and post-apartheid realities in the treatment of state records and arguably amounts to a continuation of the old frame. This is in stark contrast with emerging international principles that call for records relating to violations of international human rights to be treated as having a higher presumption of overriding public interest.¹⁵

¹⁴ http://www.archivalplatform.org/blog/entry/opening_the/

¹⁵ See, for example, access to information laws in other transitional justice contexts such as Guatemala, Uruguay and Mexico, as well as Principle 10 of the [Global Principles on National Security and the Right to Information \(Tshwane Principles\)](#)

REQUESTS SUBMITTED TO PRIVATE BODIES

The remaining 46 requests were submitted to 32 different private bodies. While this is an increase from the 22 requests submitted to 16 private bodies by the Network in the 2012–2013 reporting period, 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 a right¹⁶. Another challenge that has arisen for one of the PAIA CSN members, SAHA, in the reporting period is the difficulty in securing *pro bono* legal support for disputes with private bodies from the *pro bono* units of large law firms because of conflicts of interest arising within those firms should these matters be taken on.

Of the 46 requests submitted, 10 were still pending at the close of the reporting period (the statutory time frame for responding has not expired). Of the 36 remaining requests, 11 resulted in a full release, 10 resulted in a partial release of records and 18 requests were refused, with four of these 18 refusals reflecting a failure by the private body in question to respond at all (deemed refusals).

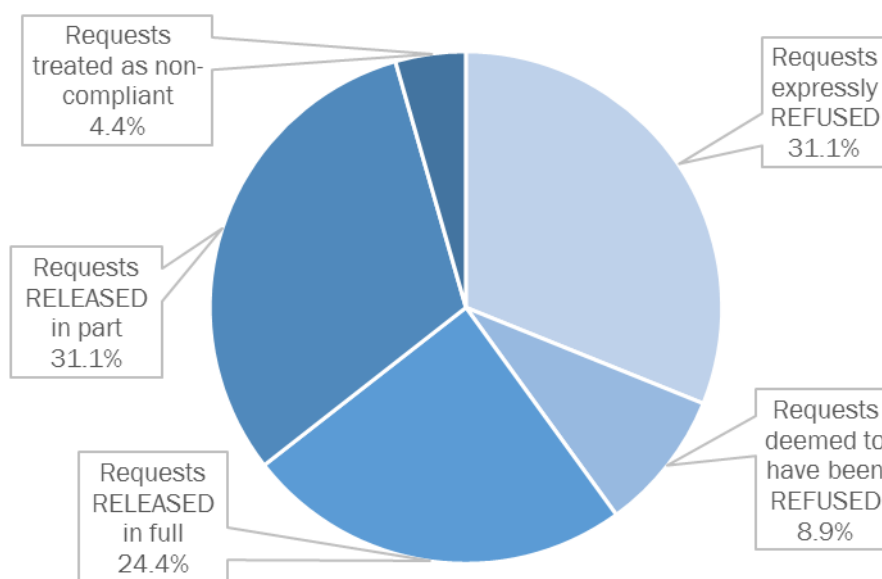


CHART 3: Nature of responses to initial requests submitted to private bodies
(excluding requests pending at end of reporting period)

This represents a slight improvement on the performance of private bodies reflected in previous PAIA CSN shadow reports. That said, it is important to note that, given the small sample sizes, one should be cautious about drawing inferences in changes over time. Furthermore, any deemed refusals of requests

¹⁶ In terms of section 40 of PAIA, the right to records of a private body is more limited than the right to records from a public body and requires the requester to provide reasons about why the record is “required for the exercise or protection of any rights.” However PAIA does not provide any guidance on the meaning of the term ‘required’ in the context of the right to records of private bodies so both requesters and private bodies have struggled with the meaning of the term ‘required’ and the type of rights a requester must be exercising or protecting. For more information on how the courts have attempted to grapple with this issue, see SAHA’s 2012 publication, *PAIA Unpacked*, p.15 - 16

made to private bodies, no matter how few, indicates a potential problem in the realisation of the constitutional right to information of private bodies, given the lack of any appeal mechanism other than in the form of a court action. Without an inexpensive and timely avenue for appeal, by simply ignoring requests, a portion of private bodies are therefore avoiding their legal obligations, and denying the constitutional rights to information of people living in South Africa.

Private bodies who actively refused all requests submitted to them:

- BHP Billiton Energy Coal South Africa
- Cape Gate (Pty) Ltd
- Ezxaro
- Glencore Xstrata
- National Petroleum Refiners Of South Africa (Pty) Ltd
- Sasol Limited
- Shell and BP Petroleum Refinery

Private bodies who ignored requests submitted to them (deemed refusals):

- Africa Rainbow Minerals
- ASA Metals (Pty) Ltd
- Engen Petroleum Limited

EMERGENT PATTERNS OF NON-COMPLIANT RESPONSES

In addition to the statistical patterns outlined above, members of the PAIA CSN have detected some worrying practices by bodies in the way in which they appear to be (mis)interpreting aspects of PAIA when communicating with PAIA CSN members, more often than not in their attempts to refuse access:

1. Rise in number of transfers

In SAHA's experience, during the reporting period, there appears to be a significant increase in the number of full transfers¹⁷, often in what appears to be an attempt to shift the responsibility to respond to a PAIA request to another body.

2. Failure to recognise supremacy of PAIA

During the reporting period, SAHA received a number of decisions not to release requested information that appeared to flout section 5 of PAIA which clearly sets out the supremacy of PAIA over other laws relating to information disclosure. Over a six month period, a number of public bodies as diverse as the

¹⁷ Because it can be difficult for requesters to identify the correct public body to which to make a request, as the division of responsibilities between public bodies is complex and regularly changing, section 20 of PAIA requires a public body that receives a request that should have been made to another public body to transfer the request to the correct body as soon as reasonably possible, but within 14 days of the request being received.

Office of the Auditor-General, the South African Reserve Bank and the Companies and Intellectual Property Commission, all asserted that specific legislation regulating their activities limited their ability to disclose information under PAIA. In response to this concerning trend, SAHA sought a statement from the South African Human Rights Commission reiterating the supremacy of PAIA over other legislation. The resultant PAIA notices¹⁸ issued by the SAHRC in April 2014 provided assurance that PAIA overrides contrary legislation. This was confirmed generally as well as specifically in relation to the Companies Act, 2008, as set out in *Davis v Clutchco* 2004 (1) SA 75 (C), as well as in relation to other contrary legislation recently relied on by public bodies, including the Public Audit Act, 2004 and the South African Reserve Bank Act, 1989, and confirming that the PAIA fee regime overrides other contradictory fee arrangements.

3. Failure to supply affidavits where records do not exist or cannot be found

There is an obligation in PAIA for affidavits/affirmations to be provided when access is refused on the basis of the fact that requested records do not exist or cannot be found. Such an affidavit must confirm, whether the records requested do not exist, or, while in existence, cannot be found, and must outline what steps were taken to attempt to locate the requested records. This obligation is more often than not simply ignored by bodies, or the information provided wholly inadequate.

4. Failure to consider severance

In the experiences of both SAHA and PSAM, it has become increasingly apparent that bodies are choosing to refuse access to records in their entirety, rather than applying their minds as to whether section 28 (public bodies) – that is, the obligation to consider severance – might apply. This has been borne out in judgments addressing this failure.¹⁹

5. Failure to consider applicability of the public interest override

Not a single public or private body indicated to network members that the public interest override in PAIA had been considered when responding to any of the PAIA requests submitted during the reporting period. Given that there are various judgments²⁰ in which the courts have ruled that the public interest override should have been applied, this widespread failure by public and private bodies alike to even demonstrate a basic consideration of this key section of PAIA suggests, at best, a fundamental lack of understanding of the right of access to information, and, at worst, a highhanded disregard of the fact that the public interest in certain information is paramount.

¹⁸ See <http://www.sahrc.org.za/home/index.php?ipkContentID=117&ipkMenuID=97>

¹⁹ *Mandag Centre For Investigative Journalism And Another V. Minister Of Public Works And Another* (67574/12) [2014] ZAGPPHC 226 (29 April 2014); *Independent Newspapers (Pty) Ltd And Others V African National Congress And Another* (12164/11) [2011] ZAWCHC 436 (29 November 2011)

²⁰ See, for example, “Application of the public interest override by the courts” on p.41 of SAHA’s 2012 publication PAIA Unpacked, as well as recent PAIA judgments detailed in the litigation section of this report.

6. Treating internal appeals as initial requests

Both CER and SAHA have noticed that, where a request is deemed to have been refused and an internal appeal is submitted, the appeal is almost never decided upon, instead, if a response is received, it is generally presented as a response to the initial PAIA request, rather than to the internal appeal. This is potentially problematic in that it not only delays the process, but may be a legally deficient response - the person responding to the appeal is not the person authorised under PAIA to do so. This practice effectively subverts the check that PAIA has put in place for the decision or deemed decision of the person responsible for the initial decision being reviewed by a different person.

7. Unnecessarily deferential use of third party notices

In the experience of CER, public bodies appear to be exceedingly cautious when dealing with requests related to third parties (i.e. private companies). There is often a knee-jerk response to notify private companies whenever a private party is mentioned in a request, even when not required by PAIA; often there is also failure by public bodies to apply their minds to objections raised by third parties in the context of third party notifications. Public bodies therefore generally take the view that they are obliged to refuse the request if a third party objects to the release of records, which is an incorrect interpretation and application of PAIA.

8. Failure to provide records

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 records are not actually provided. This problem is well demonstrated by the failure of the PAIA unit at the Department of Justice and Correctional Services to release a workable copy of the TRC database to SAHA by the conclusion of this reporting period. This is despite the Minister having overturned the initial refusal to release this to SAHA nearly 4 years earlier, in September 2009. In 2014, Khulumani Support Group encountered a similar problem with the very same public body.

PAIA LITIGATION

While litigation should always be the rare exception, rather than the rule, given the low levels of compliance by bodies at the initial request stage, and in the case of public bodies, the internal appeal stage, the inadequate funding provided to the PAIA Unit at the SAHRC to engage with complaints, and the lack of a functional Information Regulator to date, the slow and costly process of mounting court challenges is often the only option available to civil society and the communities with whom they partner. Both SAHA and CER have been fortunate enough to secure funding and / or *pro bono* legal support in order to pursue a few key PAIA matters through the courts. Tellingly, all matters adjudicated to date have met with positive outcomes, which underscores the levels of non-compliance by public and private bodies, along with the profligacy of state departments in using tax-payers money to defend their non-compliance.

VAAL ENVIRONMENTAL JUSTICE ALLIANCE (VEJA) V. ARCELORMITTAL SOUTH AFRICA

In this case, the CER represented community organisation VEJA who has been trying to access environmental records related to ArcelorMittal South Africa (AMSA)'s Vanderbijlpark and Vereeniging plants, previously owned by Iscor. VEJA's first request for records under PAIA, made in 2011, was for a copy of AMSA's so-called Environmental Master Plan, compiled by the company in 2002 for rehabilitation of its Vanderbijlpark site. In 2012, VEJA also requested records relating to the closure and rehabilitation of the company's Vaal Disposal Site, situated in Vereeniging, after the company had illegally dumped hazardous waste there. VEJA made these requests on the premise that it is in the public interest, and more specifically, the interest of the Vaal community, to know what impact AMSA has on the environment and people's health.

AMSA refused access to the records, which left VEJA with no option but to institute legal proceedings to compel compliance with PAIA. In court, AMSA argued that VEJA had no right to these records, and that they were trying to "usurp" the role of the state. In his judgement handed down on 10 September 2013, Acting Judge Carstensen rejected AMSA's arguments and ordered the company to deliver the records to VEJA, and to pay VEJA's costs. He also stated that:

"The participation in environmental governance, the assessment of compliance, the motivation of the public, the mobilisation of public, the dissemination of information does not usurp the role of the State but constitutes a vital collaboration between the State and private entities in order to ensure achievement of constitutional objectives."

AMSA was granted leave to appeal the judgement, and by the end of the reporting period, the matter was headed for the Supreme Court of Appeal.²¹ In a hard-hitting judgment handed down on 26 November 2014, the SCA ordered AMSA to release the Master Plan and other records to VEJA, and to pay VEJA's legal costs. The impact of this judgement, of course, resonates far wider, and confirms the right of fence-line communities to have access to environmental documents of corporate polluters, so that they can be in a stronger position to protect their constitutional rights to a safe and healthy environment.²²

CONSERVATION SOUTH AFRICA V. THE DIRECTOR-GENERAL: DEPARTMENT OF MINERAL RESOURCES AND OTHERS

CER submitted a PAIA request on behalf of Conservation South Africa (CSA) for certain documents relating to the transfer of 7 mining rights by De Beers. The Department of Mineral Resources (DMR) refused access on the basis that the documents contain information that could cause harm to the financial or commercial interests of a third party, which was incorrect. CSA submitted an internal appeal but DMR failed to take a decision on the appeal.

In March 2014, an application was launched to compel the DMR to produce the requested information. As a result, DMR reconsidered its response to the PAIA request and undertook to provide the information requested as, on consideration, it did not deem the information to be "privileged" (a significant concession). However, before the DMR could disclose the requested records, De Beers opposed the legal proceedings. In response, the DMR withdrew its undertaking to provide the records. De Beers thereafter failed to file an answering affidavit to explain why any of the requested documents should not be released to CSA and on 2 September 2014, CER obtained a court order directing De Beers to file its answering affidavit within 7 days. While still not resolved, this case clearly demonstrates the extent to which public bodies apply (or fail to apply) their minds to PAIA requests and internal appeals. If requests are properly considered from the get go, costly litigation can be avoided.

It is worth noting that when CSA approached the court to compel De Beers to file its answering affidavit, the matter was heard in the Western Cape High Court because CSA is ordinarily resident in Cape Town –

²¹ Read more about this case and access the full judgment at <http://cer.org.za/news/vejas-victory-against-arcelormittal-is-a-victory-for-pollution-affected-communities-across-the-country>

²² During this reporting period, CALS, in partnership with the South African Human Rights Commission and One Way Up Productions, produced a short documentary film about access to information, entitled *Breaking the Steel Wall; the documentary* tells this story of VEJA's struggles to access the information they needed in order to protect their environmental rights. The documentary is also designed as an educational tool to assist communities in understanding how PAIA is relevant to their broader struggles and how to go about the nuts and bolts of submitting a PAIA request. The documentary is available in both isiZulu and English here: <https://www.youtube.com/watch?v=iuLSAo1IKbE> and here: http://www.wits.ac.za/academic/clm/law/cals/newcalssite/16869/rule_of_law.html

the definition of “court” in PAIA provides that jurisdiction can be determined by the area within which the requester concerned is domiciled or ordinarily resident.

MAIL AND GUARDIAN CENTRE FOR INVESTIGATIVE JOURNALISM AND ANOTHER V. MINISTER OF PUBLIC WORKS AND ANOTHER

SAHA served as *amicus curiae* in this much publicised matter in which the Mail & Guardian Centre for Investigative Journalism sought review of a response to the PAIA request submitted to the Department of Public Works for procurement details about President Zuma's Nkandla estate. This matter presented an important opportunity to highlight elements of this case that seem to reflect worrying trends that SAHA has detected in submitting over 1800 PAIA requests since PAIA came into effect, namely:

- The culture of unchecked secrecy that seems to pervade many public bodies; and
- A reliance on apartheid-era legislation and the misapplication of PAIA's security exemptions to withhold information.

Drawing on SAHA's experience as an activist archive with longstanding expertise in access to information matters, SAHA also made submissions on the extent to which poor record-keeping practices within government fundamentally undermines the right of access to information. It was this final point that was particularly highlighted in the judgment handed down in this matter:

“Failure to keep record or a tendency to lose documents, or to hide them or to deal with government business under a cloud of secrecy where it is not justified or, like in this matter to confine disclosure to the project managers documents, in situations where a government department is taken to task or where the shoe might pinch certain officials in government, constitutes a dereliction of one of the most important obligations on a government, which is to keep proper records. Such conduct on the part of government does not advance the values espoused in our Constitution, that of a democratic, transparent and accountable government. It is in the public interest to keep record in order to give credence to the business of government itself and to those who govern”.²³

RIGHT2KNOW CAMPAIGN AND ANOTHER V MINISTER OF POLICE AND ANOTHER

On 5 September 2013, SAHA and the Right2Know Campaign (R2K) served court papers on the Minister of Police challenging the South African Police Service's (SAPS) refusal to provide access to a public list of National Key Points in response to a PAIA request, submitted by SAHA on behalf of R2K in 2012. SAHA and R2K maintain that it is possible to disclose the list of National Key Points without harming

²³ Mandag Centre For Investigative Journalism And Another V. Minister Of Public Works And Another (67574/12) [2014] ZAGPPHC 226 (29 April 2014) – available at <http://www.saflii.org/za/cases/zagpphc/2014/226.html>

national security. In fact, even if there are legitimate national security concerns, PAIA compels public bodies to consider, when trying to strike a balance between openness and the need to protect legitimate security concerns, whether requested records can be partially severed.

PAIA also contains an all-important public interest override that requires public bodies to disclose records, even if there may be legitimate reasons to refuse access, if the records contain information that the South African public clearly has the right to know. It is the failure by SAPS to consider either of these key transparency checks contained within PAIA that is at the centre of this court challenge, as greater openness about the implementation of security laws is the only way to guard against their abuse and irrational application.

While this matter had not yet been heard by the end of the reporting period, a favourable judgment was recently handed down in the South Gauteng High Court²⁴.

²⁴ See http://www.foip.saha.org.za/request_tracker/entry/sah-2012-sap-0008 for details of the request, copies of the court papers, judgment and the released National Key Points list.

AUDITING SECTION 14 COMPLIANCE – PAIA MANUALS

The submission of formal requests is only one of the ways in which PAIA is intended to give effect to the right of access to information. Section 14 of PAIA compels information holders to produce, for that body, clear and readily accessible information, in the form of so-called “PAIA manuals”, about:

1. The structure and function of the body,
2. The contact details of officials responsible for decisions under PAIA and
3. The categories of records automatically available from that body without the need to put in a PAIA request.

This last provision is clearly intended to encourage the proactive disclosure of records.

Further, section 14(1) of PAIA, read with Regulation GNR.187 of 15 February 2002, requires public bodies, such as national government departments, to publish their PAIA manuals on their websites.

In 2014, CALS, on behalf of the PAIA CSN, conducted an audit of national government departments’ websites²⁵ to determine their baseline compliance with the requirements set out in section 14 of PAIA.

Findings

According to the results of the audit, a total of 76% of national departments (35 out of 46) published a PAIA Manual on their website.²⁶ It is interesting to note that of those 76% national departments:

- Only 2.8% did not list the name and contact details of their information officer;²⁷
- Only 8.57% failed to provide a list of the categories of records automatically available;²⁸ and
- 37% made the PAIA manual accessible on their home page.

This is a marked improvement on the previous year, although it must be noted that this audit did not assess the quality, currency or accuracy of the information provided within the available PAIA manuals.

²⁵ 46 national departments were listed on South Africa Government Online, accessed on 9 October 2014 at <http://www.gov.za/aboutgovt/dept.htm> .

²⁶ The 11 departments who did not publish a PAIA manual are the Civilian Secretariat of the Police, the Department of Justice & Constitutional Development, the National Planning Commission, the National School of Government (previously Palarma), the National Treasury, the Office of the Chief Justice, the Department of Public Enterprises, the Department of Public Works, the State Security Agency, the Department of Traditional Affairs and the Department of Women.

²⁷ The only department that failed to do so was the Department of Environmental Affairs.

²⁸ These three of 35 departments include Statistics South Africa, the Department of Sport and Recreation SA and the Department of Public Service and Administration.

The following national departments had no PAIA manual available on their website:

NAME OF DEPARTMENT	NAME OF MINISTRY	WEBSITE
Justice & Correctional Services	Justice & Correctional Services	http://www.justice.gov.za/
National Planning Commission	The Presidency	http://www.npconline.co.za/
National School of Government (previously Palama)	Public Service & Administration	http://www.palama.gov.za/
National Treasury	Finance	http://www.treasury.gov.za/
Office of the Chief Justice	Justice & Constitutional Development	http://www.judiciary.org.za/
Public Enterprises	Public Enterprises	http://www.dpe.gov.za/
Public Works	Public Works	http://www.publicworks.gov.za/
Small Business Development	Small Business Development	<i>no website</i>
State Security Agency	State Security	http://www.ssa.gov.za/
Traditional Affairs	Cooperative Governance and Traditional Affairs	http://www.dta.gov.za/
Women	The Presidency responsible for Women	http://www.women.gov.za/

Given that this requirement first came into force over a decade ago, the levels of non-compliance reflect the extent to which long established public bodies fail to understand or treat as important their obligations in terms of PAIA, and section 32 of the Constitution.

During the reporting period, CER in the course of their work reviewed the most recent PAIA Manual for the Department of Water Affairs (DWA), dated July 2014. While the manual provides that water use licences, among other documents, will be automatically available in terms of section 15(1)(a) of PAIA. The PAIA manual also states that access is subject to third party notification (in terms of section 47 of PAIA). CER has expressly requested the Department of Water & Sanitation (the DWA's successor) to amend its PAIA manual to ensure that water use licences are automatically available without the need for third party notification.

DEVELOPMENTS IN THE LEGAL FRAMEWORK

No law exists in isolation – PAIA intersects with a whole suite of other information legislation. During the reporting period, PAIA CSN members have been monitoring legislative developments that may have implications for the ways in which PAIA works.

PROTECTION OF PERSONAL INFORMATION ACT

Civil society has long been calling for the inclusion of an independent, informal, appeal mechanism with enforcement powers, such as an information commissioner, to consider appeals under PAIA.²⁹ That call has finally been answered in the Protection of Personal Information Act (POPIA), signed into law by the President on 26 November 2013. Certain sections of the Act were declared in effect by the President, by proclamation in the Government Gazette, on 11 April 2014. These included Part A of Chapter 5, which provides for the establishment of the Information Regulator empowered to review decisions made in terms of PAIA.

Implications for PAIA

Currently PAIA provides very limited avenues for appeal - the right to appeal to the political head of a public body rarely results in a reversal of the original decision, while the high costs associated with court applications makes that avenue of appeal inaccessible to most individuals, communities and civil society organisations. The introduction of the Information Regulator will therefore allow individuals, communities and civil society organisations to hold public and private bodies accountable for the decisions they make under PAIA.

Requesters who have been refused access to information by public or private bodies may submit complaints to the Information Regulator. The Information Regulator will investigate complaints received and may serve a notice on the information officer of the relevant body notifying them either that their decision to deny access has been confirmed or ordering them to release the requested information. If the Information Regulator directs the information officer to release the information to the requester and they fail to do so, the information officer will be guilty of an offence and can be fined and/or imprisoned for a period of up to 3 years. While decisions of the Information Regulator will not be final, and may be appealed to court, the introduction of an independent, inexpensive and swift avenue for appeal is expected to have a substantial impact on the realisation of the right to information.

²⁹ See, for example, the PAIA CSN's PAIA Review of October 2011 – available at <http://foip.saha.org.za/static/paia-network>

However, since the declaration of effect of the sections of POPIA providing for an Information Regulator, there has been a worrying silence around the establishment of the Regulator and it remains unclear when the Regulator will be up and running and able to accept complaints.

THE PROTECTION OF STATE INFORMATION BILL

In September 2013 the President sent what has been dubbed 'The Secrecy Bill' back to Parliament for reconsideration. Some amendments were made, although not all concerns raised by civil society³⁰ have been adequately addressed (e.g. definitions for classification of information is still overly broad). This bill is now again with the President awaiting signature.

Implications for PAIA

The section in the Bill permitting applications for the declassification of classified information is in conflict with principles of transparency in PAIA. While PAIA promotes, and provides for, the right to access information held by a public body and a private body in order to protect or exercise a right, the Bill allows the classification and monitoring of information to be centralised by the State Security Agency (SSA). The centralisation of information is problematic as the body is expected to be the only legal entity to make decisions on accessing, retaining and disseminating information, leading to potential delays while bodies seek declassification of records requested under PAIA. Given the extent to which cultures of secrecy pervade among many public bodies, without a 'reviewer' in the form of a watch dog body to oversee the declassification by the SSA, there is a real risk that this secrecy culture will continue, or worsen.

The Bill, if enacted, will also make it a criminal offence to obtain information in any way deemed by the SSA as being improper or unlawful. The Bill does not speak to exemptions to allow release of documents in the public interest. Instead it criminalises whistle-blowers who, in many instances expose corruption and maladministration, and proposes heavy sentences, which will discourage whistle-blowing.

PROPOSED AMENDMENTS BY RULES BOARDS FOR COURTS OF LAW

SAHA, together with the Network, made submissions in early 2014 on amendments proposed by the Rules Board for Courts of Law that are aimed at bringing uniformity to the rules applicable in the magistrates and high courts for litigation brought in terms of PAIA. The Rules Board has proposed those amendments, in part, on the basis that "different procedures are only likely to cause problems to applicants, and give respondents an opportunity to raise dilatory or obstructive defences."

³⁰ See, for example, the submission made by the PAIA CSN to the National Council of Provinces in February 2012, available from <http://foip.saha.org.za/static/paia-network>

Implications for PAIA

SAHA warns that these proposed amendments, whilst commendable on paper, may just amount to empty promises, unless additional efforts are taken to remove the current impediments to commencing a PAIA application in the Magistrates' Court. In an environment where PAIA litigation is the only mechanism for appeal against decisions of private bodies, and there has been a substantial increase in deemed refusals by public bodies, all efforts to remove obstacles to applicants bringing PAIA applications before the courts are vital to strengthen openness and transparency in South Africa. SAHA and the Network therefore call for greater public information about the Magistrates that have been trained and designated to hear PAIA litigation matters in the Magistrates' Court.

PUBLIC ADMINISTRATION MANAGEMENT BILL

During July 2013, PSAM gave a written submission to the Department of Public Service and Administration on its proposed Public Administration Management Bill. The submission noted that there was no explicit reference in the Bill to PAIA or use of the word “transparency”. It was proposed by PSAM that the Bill should explicitly promote the objectives contained in PAIA. It was also proposed by PSAM that the Bill require the disclosure of employees’ declarations.

The Bill has since been amended and adopted by Parliament’s Portfolio Committee dealing with Public Service and Administration. Whilst PSAM’s submissions did not succeed in accordance with the terms proposed, the current version of the Bill contains the following at clause 5 which deals with Basic Values and Principles and which goes some way to give effect to PAIA although it is not explicitly referred to: “The Bill therefore requires each institution as defined in section 1 to—

.....

(g) foster transparency by providing the public with timely, accessible and accurate information;”³¹

³¹ The Public Administration Act was since signed into law in December 2014. This provision is now in Section 4(g) of the Act

RECOMMENDATIONS

The right of individuals, organisations and communities to hold government and private industry accountable for their actions is an essential part of any well-functioning democracy but the right to access to information seems to be more at risk in South Africa today than ever before. Within this context, the need for information activism and promoting awareness and use of PAIA in order to strengthen the right to know, seems increasingly pressing.

Recommendations put forward by members of the PAIA CSN include the following:

- Senior government officials must make resources available for PAIA training within public bodies, with particular emphasis on local government. The fact that information holders are ignoring requests for information in such vast numbers demonstrates an urgent need for the provision of training so that officers within public bodies better understand their obligations, in terms of PAIA, to facilitate the right to information.
- Information holders must allocate adequate resources to the implementation of PAIA. In particular, there is a need for resources to be allocated to maintaining efficient and effective record-keeping systems and to engaging sufficient staff to manage requests.³²
- The National Archives must be sufficiently resourced and records management expertise and implementation strengthened at national, provincial and local levels, in order to ensure the records necessary to hold government to account are being created and managed in line with legal requirements. Without functional records management and retrieval systems to enable effective identification and retrieval of records on demand, and to undertake processes like redaction responsibly, the right of access to information is profoundly hampered.
- All national government departments should ensure instant compliance with the PAIA manual requirements, thus leading the way for their provincial and local counterparts.
- The Department of Justice and Correctional Services, as the department with the mandate to promote the implementation of PAIA, should get its own house in order as a priority and strategise ways to provide support to other government departments, preferably, in consultation with the SAHRC and civil society.
- The Information Regulator must be appointed and set up quickly and must also be sufficiently resourced to meet the demands of its mandate. The Information Regulator should prioritise consultation with organisations who have attempted to monitor and identify systemic challenges to PAIA compliance, such

³² In an audit undertaken by the South African Human Rights Commission between 2008 – 2012, it was revealed that less than 15% of the audited institutions had specifically budgeted for PAIA implementation and compliance requirements - <http://www.sahrc.org.za/home/21/files/Consolidated%20PAIA%20Audit%20Report%202012.doc2.pdf>

as current and former staff of the historically under-resourced PAIA unit at the South African Human Rights Commission, and civil society efforts like the PAIA CSN in order to capitalize on this opportunity to harmonise in practice efforts to balance the rights of privacy and access.

- Public Bodies to invest in educating public servants on PAIA and compliance requirements to ensure that public servants are well informed and better equipped to service the public in accessing information from the State.
- In line with the Constitutional imperative and the South African government's commitments to international accountability initiatives like the Open Government Partnership (OGP),³³ public bodies must consider what records should routinely and automatically be made available, without the need for a PAIA request, so as to foster transparency through the pre-emptive provision of timely, accessible information to the public. Notably, Network members active in the environmental justice sector continue to advocate for the creation of a publicly available registry of environmental authorisations by public bodies, as access to basic regulatory information continues to hamper realisation of environmental rights. This would enable members of the public and civil society organisations to assist public bodies in monitoring compliance by licence holders.
- Records relating to human rights violations, especially from the apartheid era, should, as a matter of course, be treated as records in the public interest.

Commitments on the part of the PAIA CSN members in the coming reporting period include:

- Increase the number of PAIA requests being submitted to local and provincial public bodies, in order to assess and encourage PAIA compliance where it is most likely to affect positive changes in people's everyday lives;
- Increase the number of PAIA requests being submitted to private bodies, in order to test and forward corporate transparency;
- Proactively engage with the Information Regulator, once this has been appointed;
- Pursue opportunities to work with public and private bodies to encourage proactive disclosure;
- Collaborate constructively with public bodies interested in enhancing their knowledge and capacity around PAIA;
- Use the courts to hold public bodies to account for repeated failures to respond to requests (patterns of deemed refusals), as well as failures to consider both the obligation to sever the confidential aspects of a record from the non-confidential, and the applicability of the public interest override.

³³ The Open Government Partnership, of which South Africa is a founding member, is intended to be a key international government driver in the promotion of proactive disclosure of government data. The election of a South African, Mukelani Dimba (the Director of ODAC), to the civil society steering committee in 2014 presents an enhanced opportunity for civil society to participate in moving this agenda forward.

APPENDIX: MEMBERS OF THE PAIA CSN

The PAIA CSN consists of:

CENTRE FOR ENVIRONMENTAL RIGHTS (CER)

The Centre for Environmental Rights is a NGO established in October 2009 to provide legal and related support to environmental CSOs and communities. Its mission is to advance environmental rights in South Africa, and its vision is to facilitate civil society participation in environmental governance that is stronger, more streamlined, and better legally and scientifically equipped. As part of its work, CER uses PAIA to promote transparency and accountability in environmental governance.

www.cer.org.za

CENTRE FOR APPLIED LEGAL STUDIES (CALs)

Founded in 1978, the Centre for Applied Legal Studies is a registered law clinic and human rights centre housed within the School of Law at the University of the Witwatersrand. CALs' vision is the dismantling of systemic harm, the meaningful implementation of human rights and a rigorous dedication to justice. Our mission is to use the law to implement and protect the human rights of individuals, to facilitate the development of a politically and economically just and sustainable society, to challenge systems of power and act on behalf of the vulnerable through a combination of litigation, advocacy and research, and to act with courage against impunity.

www.wits.ac.za/law/cals

CORRUPTION WATCH

Corruption Watch is a non-profit organisation launched in January 2012. It aims to ensure that the custodians of public resources act responsibly to advance the interests of the public. By shining a light on corruption and those who act corruptly, Corruption Watch promotes transparency and accountability and protects the beneficiaries of public goods and services.

www.corruptionwatch.org.za

KHULUMANI SUPPORT GROUP

The Khulumani Support Group is a non-profit membership-based organisation formed in 1995 by survivors and families of victims of the political conflict of South Africa's apartheid past. Khulumani has an extensive community outreach programme, which includes PAIA education, and has used PAIA internally to inform its work regarding issues arising from the Truth and Reconciliation Commission.

www.khulumani.net

OPEN DEMOCRACY ADVICE CENTRE (ODAC)

The Open Democracy Advice Centre is a NGO which promotes openness and transparency in South Africa's developing democracy. Its primary aims are to foster a culture of accountability in the public and private sector and to assist people in South Africa to realise their human rights. It offers support and advice on two key pieces of legislation: PAIA and the Protected Disclosures Act.

www.opendemocracy.org.za

PUBLIC SERVICE ACCOUNTABILITY MONITOR (PSAM)

PSAM is a monitoring and research institute based at Rhodes University in Grahamstown which aims to improve public service delivery and the progressive realisation of constitutional rights by using various social accountability monitoring tools to monitor the public resource management cycle. PSAM has utilised PAIA to access numerous documents of Government to assist in its monitoring work.

www.psam.org.za

SOUTH AFRICAN HISTORY ARCHIVE (SAHA)

The South African History Archive (SAHA) is an independent human rights archive dedicated to documenting and providing access to archival holdings that relate to past and contemporary struggles for justice in South Africa. SAHA's Freedom of Information Programme (FOIP) is dedicated to using South Africa's Promotion of Access to Information Act, 2000 (PAIA) in order to extend the boundaries of freedom of information and to build up an archive of materials released under the Act for public use.

www.foip.saha.org.za