

# **Overview of the Implementation of the Freedom of Information Legislation in South Africa**

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## **1. Introduction**

Section 32 of the Constitution of the Republic of South Africa (Constitution Act 106 of 1996) provides that “everyone has access to information held by the state, and any information held by another person and that is required for the exercise or protection of any rights”. Section 32(2) provides further that a national legislation shall be enacted to give effect to this constitutional right.

The Promotion of Access to Information Act 2 of 2000 (hereafter referred to as the Act or PAIA interchangeably) is the national legislation envisaged in section 32(2) of the Constitution. PAIA came into operation on 09 March 2001 except for sections 10, 14, 15 and 51, which came into operation on 15 February 2002; it may be argued therefore that PAIA came into full operation on 15 February 2002. This date is very significant in the implementation of PAIA because it was also on that date that the PAIA regulations (Regulation 187) came into operations. The regulations are a set of rules regulating the fees structure for requests for access to information, the development of the information manuals and the development and distribution of the Guide in terms of section 10 of PAIA. The regulations and their implications are discussed in details later in this paper.

When introducing this important piece of legislation it is important to reflect on the history behind its promulgation. The apartheid system of government in South Africa before April 1994 was characterised by secrecy, oppression and segregation; an ideal breeding ground for violation of human rights. It was therefore common cause during the negotiations that preceded the first democratic elections of 1994 in South Africa that the system of government after the elections should be transparent and accountable if it was to win the trust of all the people of South Africa. It was along those terms that the right of access to information was entrenched in the Bill of Rights in the Interim Constitution (Act 200 of 1993) and in the final Constitution of the Republic of South Africa. It is because of this background that South Africa is the only country in the world that has entrenched the right of access to information as one on the fundamental rights in its Constitution. This paper seeks to share our limited experience on implementation of this important piece of legislation. Limited only because PAIA is a fairly new legislation having been in operation for four years only. There are a fairly low number of cases of jurisprudential note that went through our courts in the past four years. However, we hope and believe that there is a lot that other countries can learn from our experiences especially because our legislation is very unique in that it derives from the Constitution and it applies to both public and private entities. In this paper I will try to briefly discuss the important features of PAIA while highlighting some of the challenges that go with implementing these features.

## **2. The application**

As indicated above the right of access to information is derived from the Bill of Rights in the Constitution. All the rights that are enshrined in the Bill of Rights including the right of access to information are applicable against the state and private persons including juristic persons. It is against these lines that PAIA provides for rights and obligation on both the state institutions (public bodies) and individuals and juristic persons (private bodies).

### **3. The information manuals**

The most importable obligation to both public and private bodies is the duty to develop information manuals in terms of section 14 for public bodies and section 51 for private bodies. These sections provide that within six months of the coming into effect of these sections, the private and public body must develop an information manual stating the details of the public or private body and the categories of the information that the public or private body is keeping.

The sections provide further that the manuals so developed must:

- Be lodged with the South African Human Rights Commission (hereinafter, the Commission) for public inspection during office hours,
- Be put on the website of the public or private body if any,
- Keep a copy of the manual in the offices of the public or private body,
- Public bodies are required to lodge the manuals at the places of the legal deposits in terms of the Legal Deposits Act,
- Public bodies are required to produce the manuals in at three official languages,
- Private bodies are required to lodge the manuals with the control bodies of the private body concerned such as the Law Society in the case of a law firm,

The requirement to publish the manuals on the Government Gazette was removed after the business community; especially the small private bodies complained to the Commission that it was too expensive and cumbersome to comply with the requirement.

While development of the manuals is an important exercise in as far as assisting the requester is concerned it turned out to be a very difficult requirement to implement especially by private bodies. The requirement to develop the manuals is applicable to public and private bodies meaning that everyone who is doing business in South Africa including small businesses such as sole proprietors and small shop owners are required to produce the manuals. The private bodies complained to the Commission that they cannot afford the cost developing the manuals. On three occasions the Commission had to approach the Minister of Justice and Constitutional Development (hereinafter, the Minister) to request him to postpone the due date for the submission of the manuals. On the last occasion the Commission requested the Department to consider exempting some categories of small public bodies from submitting the manuals for two years so as to give the Minister enough time to come up with an exemption policy for small private bodies. The Minister responded by exempting all private bodies except public companies from developing the manuals from 01 September 2003 to 31 August 2005.

The other problem with the development of the manuals is that it is very difficult to enforce compliance with the requirement especially among private bodies. The other problem is that the Act is not clear on the language that should be used in developing the manuals as a result some private bodies have produced manuals in their local languages such as Afrikaans in the Western Cape Province.

#### **The Cost of the Manuals to the Commission**

In terms of PAIA the Commission does not have to be the depository of manuals for the purposes of availing them for public inspection during office hours at the Commission. The obligation to receive and avail the manuals for public inspection was introduced through section 5 of the Regulations (187 of 15 February 2005), which provides that “the Human Rights Commission must, during office hours and

upon request, make available for public inspection copies of the manuals in all the official languages available”.

The effect of this regulation is that the Commission must develop an information management system to facilitate the sorting, storage and retrieval of manuals. Our rough estimate for the cost of establishing the relevant information management system was at R850 000.

While the Commission uses the manuals to develop and update the Guide in terms section 10, the additional obligation to avail the manuals to the public is expensive and to some extent unnecessary especially noting that each public body is required to keep a copy of the manual at its offices and many other places in terms of regulation 2. The Commission is continuing to receive the manuals but has not yet developed the information management system to store and process them for public inspection.

#### **4. The Section 10 Guide**

Section 10 of PAIA provides that within 3 years of the coming into operation of the section the South African Human Rights Commission must compile the Guide in as simple manner as possible in all official languages. Section 10 came into operation on 15 February 2002 together with sections 14, 15 and 51 of the Act. Section 10 was later amended by section 20 of the Judicial Matters Act 55 of 2003 to give the Commission more time to prepare the Guide. In terms of the amendment, the due date on which the Commission must compile the Guide was 15 February 2005. The Commission complied with the amendment and submitted a copy of the Guide to the office of the Director General of the Department of Justice and Constitutional Development as proof of compliance with the due date. The rest of the copies of the Guide were launched on 01 March 2005. The Commission is currently busy with the distribution of the first lot of the copies of the Guide to the places of legal deposits as required by the Regulations.

##### **Distribution Cost for the Guide**

In terms of section 2(1) of the regulations copies of the guide should be printed and distributed as follows:

- make a copy of the guide available in each official language to the head of GCIS
- make a copy available to every place of legal deposit in terms of section of the Legal Deposit Act 54 of 1997
- make a copy available at every tertiary education institution
- make a copy available upon request to the head of a private body
- make available in each official language to the information officers of public bodies such number of copies of the guide as the information officer concerned has indicated in order to comply with regulation 3(1) or 2
- make a copy available to the DG of Communications such number of copies of the guide as the DG has indicated in order to comply with regulation 3(3)
- publish the guide in each official language in the Gazette
- make a copy available for inspection at the commission in each official language
- make a copy available on the website of the Commission

The regulations provide further that the Commission must make copies of the guide available to heads of private bodies upon request. We have more than a million

private bodies in South Africa and if all of them would request a copy of the Guide then it would be a nightmare to the Commission.

The problem with this requirement is its financial implications. A rough estimate of the cost of production and publication of the Guide indicated that the Commission might have to pay something in the region of R1 million based on the above-mentioned requirements, calculated on one manual of about 400 pages costing about R150 a copy.

## **5. Enforcement mechanisms**

PAIA makes provision for internal appeal procedures where the information officer has refused access to a record of a public body or the fees charged are not in compliance with the regulations. The internal appeal procedure is applicable to government departments (at national, provincial and municipal sphere of government) only. All other public bodies and private bodies do not have an appeal structure. In the event of a refusal by the other public bodies and private bodies the only recourse available to the requester is to approach the court.

### **The Courts**

The accessibility of courts for PAIA cases is still a far dream to the majority of the people firstly because the magistrates have not been trained to deal with PAIA cases and secondly that the Rules Board (a body which is responsible for developing rules of procedure for courts) has not completed its work on developing rules and procedures for PAIA cases.

Section 79(1) of PAIA provide that “the Rules Board for Courts of Law, established by section 2 of the Rules Board for Courts of Law Act, 107 of 1985” must within 12 months after the commencement of this section make and implement rules of procedure for a court for the implementation of PAIA. Subsection (2) provides that before the implementation of the rules of procedure in terms of subsection 1(a) an application in terms of section 78 may only be lodged with the High Court or another court of similar status.

Even if the Rules Board would produce the rules and procedures for the Magistrates Courts it would not mean that all is well to ordinary citizens who cannot afford to take a matter to the Magistrates Courts; not to mentioned the fact that these courts are already overburdened and cannot cope with ordinary common law cases, hence the need for a cheaper and simpler enforcement mechanism in the form of the office of the information commissioner.

### **Proposal on the Establishment of an Information Commissioner**

The following is summary the structure and function of the South African Human Rights Commission and the work done which lead to the proposal for the establishment of the office of the information commissioner within the Commission.

The Commission as a constitutional body established to strengthen constitutional democracy (Chapter 9 Constitution) is mandated to uphold, protect, promote and ensure the fulfilment of all human rights in the Constitution, including the rights of access to information. Towards the realization of this mandate, particularly with regard to the right of access to information, the Commission delegated/assigned Commissioner Leon Wessels the task of ensuring that the obligations of the

Commission in terms of section 32 of the Constitution, the South African Human Rights Commission Act 54 of 1994 (hereinafter, the HRC Act) and PAIA are met by the Commission.

At the Secretariat or operational level the Commission appointed me to facilitate the establishment of a unit (PAIA Unit) to coordinate matters of the implementation or operationalising the mandate of the Commission under PAIA

The PAIA Unit was established in 2002 and its mandate is broadly to implement the broad mandate of the Commission through consultation, research, monitoring, briefing, education and advocacy.

The PAIA unit is responsible for advising the Commission on issues of policy development and the improvement and development of the right of access to information as enshrined in PAIA. Towards this mandate the unit has done the following:

**22 and 23 March 2003** - hosted an indaba (conference) on PAIA to address problems pertaining to the implementation of the Act. A document was circulated amongst the participants for discussion at the conference.

**June 2003** – Supervised a commissioned research to look at the exemptions under PAIA and the enforcement mechanisms. The following organisation conducted the research and produced reports:

- a) the South African History Archive, which was mandated to investigate whether the Commission was best placed to champion the right of access to information as enshrined in PAIA<sup>1</sup>.
- b) The Open Democracy Advise Centre was briefed to examine the feasibility of the establishment of the office of the information commissioner as part of the Chapter 9 Institutions or as an independent body<sup>2</sup>.
- c) Bowman Gilfillan, a firm of attorneys based in Sandton, Johannesburg was commissioned to look at the exemption of certain private bodies from the requirement to produce manuals in terms of section 51 of PAIA<sup>3</sup>.

**18 July 2003** – The Unit hosted an Internal Indaba to look at the findings of the abovementioned commissioned research reports and to take the recommendations forward. The Internal Indaba was open to members of the Commission only.

**2 – 3 February 2004** – Hosted the Second International Conference of Information Commissioners in Cape Town, where national and international delegates were invited to comment on the enforcement mechanisms of PAIA in South Africa.

**4 February 2004** – National Conference on PAIA where delegate mainly national PAIA stakeholders discussed the enforcement mechanism and problems pertaining to the implementation of PAIA.

**20 to 27 February 2004** – Study-tour of Canada. The unit with the financial assistance from CIDA conducted a study tour in Canada, to get a firsthand

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<sup>1</sup> See the Indaba Report page 131.

<sup>2</sup> Indaba Report page 149.

<sup>3</sup> Indaba Report page 102.

experience on how the Canadians implement/enforce compliance with their freedom of information legislation.

**Communication with the Department of Justice** – Written to the Department of Justice, submitting a proposal in October 2004, calling for amendments to the Act and the regulations to accommodate the proposed enforcement mechanism.

**Cooperation with the Department of Justice** –The Unit established an ad hoc committee, the (Working Session Committee) with the PAIA and other relevant units in the Department of Justice to act as a forum to discuss issues pertaining to urgent matters on PAIA, policy development and legislative amendments.

**Second set of recommendations, 2005** – The Unit prepared a list of urgent issues which need to be attended to by the Department of Justice and Parliament. This list was forwarded to the office of the CEO, copied to the Commissioner responsible for the right of access to information.

**Plenary meeting 16 and 17 March 2005** – The Unit tabled a proposal that the Commission should consider housing the office of the information commissioner within the current establishment of the Commission. The Plenary meeting resolved to accept the proposal on condition that the Unit will prepare a detailed plan on how the office will function within the current establishment.

### **The Office of the Information Commissioner**

The proposal to establish the office of the information commissioner within the Commission is a product of serious discussions and consultation as reflected above. Initially the debate was about whether South Africa needs the office of the information commissioner as an enforcement mechanism for the right of access to information and compliance with PAIA. The debate has now moved to whether such an office should be housed in the Commission and if so, then how? At its Bosberaad (annual strategic planning meeting) held on 4, 5 and 6 May 2005, the Commission resolved to establish the office of the Information Commissioner within the current structure of the Commission.

A final proposal will be tabled before plenary meeting in June 2005 where the details of the information commissioner's office will be finalised. Commissioner Wessels and I are preparing the final proposal in this regard. While there is no consensus yet on the matter, we can safely say that in principle the office of the information commissioner will be established along the following considerations:

### **Legislative Amendments**

Ideally such office should be established through legislative amendment but the legislative amendment might take some time before it could be implemented while the need to have the office is urgent. It is along these lines that the Commission is considering establishing the said office within its current structure while legislative amendments are being considered. What is now outstanding is for the Commission to take a policy decision on the following questions:

- What power or legal status would the office have? To some extent the Commission is in favour of a commissioner with order making powers even

though we are cautious of the fact that the Commission as it stand does not have order making powers and we would need to amend the HRC Act to obtain those powers.

- Should the office be responsible for implementing all the obligations of the Commission under the Act or will it deal with compliance matters only?

These issues form part of the final brief to be tabled in the next plenary meeting in June 2005.

## 6. Monitoring

Section 84 provides that the Commission must monitor the implementation of the Act and submit a report to the National Assembly annually. Thus far the Commission has produced two annual reports to the National Assembly covering the period from 09/03/02 to 08/03/03 and 09/03/03 to 08/03/04. Section 84 specifically provides that the report must contain the following information:

- a) any recommendation in terms of section 83(3)(a); and
- (b) in relation to each public body, particulars of—
  - (i) the number of requests for access received;
  - (ii) the number of requests for access granted in full;
  - (iii) the number of requests for access granted in terms of section 46;
  - (iv) the number of requests for access refused in full and refused partially and the number of times each provision of this Act was relied on to refuse access in full or partially;
  - (v) the number of cases in which the periods stipulated in section 25(1) were extended in terms of section 26(1);
  - (vi) the number of internal appeals lodged with the relevant authority and the number of cases in which, as a result of an internal appeal, access was given to a record or a part thereof;
  - (vii) the number of internal appeals which were lodged on the ground that a request for access was regarded as having been refused in terms of section 27;
  - (viii) the number of applications made to every court and the outcome thereof and the number of decisions of every court appealed against and the outcome thereof;
  - (ix) the number of applications to every court which were lodged on the ground that an internal appeal was regarded as having been dismissed in terms of section 77(7);
  - (x) the number of complaints lodged with the Public Protector in respect of a right conferred or duty imposed by this Act and the nature and outcome thereof; and
  - (xi) such other matters as may be prescribed.

Section 32 of PAIA provides that information officers of public bodies should submit reports to the Commission providing the Commission with the abovementioned information for the purposes of monitoring the implementation of the Act and the report to Parliament. The statistics from these reports show that many people are using PAIA in South Africa.

Some departments have really done their bit in educating their officials about the right of access to information and the spirit of transparency and accountability. For instance during the 2003 to 2004 reporting period the Department of Police Services

received about 14 000 requests for access to their records and out of that 11 000 requests were granted in full.

## **7. Conclusion**

Despite the general teething problems that are mentioned above, the information regime is succeeding in South African. I may not be able to reflect on the latest statistics because we were in the process of compiling the statistics for 2004 to 2005 at the time of writing this paper; but if the 2003-2004 statistics are anything to go by, then we can comfortably say that South Africa is getting there.

The information regime is an expensive regime, especially if governments do not want to open up. Our legislation make provision for grounds of refusal where the information officer is satisfied that his right to protect the record takes precedence over the rights of the requester to the record. In the spirit of promoting openness, accountability and responsibility, the Act also provides for voluntary or proactive disclosures. Sections 15 and 52 provide that the information officer or the head of the private body should produce a list of information that is freely available from the public or private body. Our experience has shown that the state would spend less money if they would put most of their non-classified information of the voluntary disclosure list.

On 29 September 2004 the Supreme Court of Appeal dismissed an appeal by the Minister for Provincial and Local Government against an order directing him to allow, an association representing 46 traditional leaders, access to a report of a commission of enquiry. The state was ordered to pay costs of the appeal. It is my view that such costs should and could be avoided had the Minister put the report on the voluntary disclosure list especially because it turned out that there was nothing which warranted secrecy on the report, in fact it was a public document.

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