

**Strengthening the Role of the South African Human Rights  
Commission in relation to the Promotion of Access to Information  
Act**

**A Report by the South African History Archive**

**July 2003**

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## The brief

1. The South African History Archive (SAHA) was commissioned by the South African Human Rights Commission (SAHRC) to conduct research on the Commission's performance of the obligations imposed on it by the Promotion of Access to Information Act (PAIA). More particularly, the SAHRC requested SAHA to address the following issues:
  - 1.1. Whether the South African Human Rights Commission is best placed to champion the right of access to information as enshrined in PAIA.
  - 1.2. If the answer to the above issue is in the affirmative; then how should the Commission restructure itself to achieve this task?
  - 1.3. Whether there would be a need for an amendment to PAIA, the SAHRC Act or/and the Constitution in this regard.
  
2. Our understanding of this brief is that it requests SAHA to take a critical look at the role of the SAHRC in giving effect to the right of access to information, with a view to making recommendations for legislative and/or organisational reform. Another way of phrasing the questions that we have been asked to answer is as follows: has the SAHRC done a good job of promoting the right of access to information and, if not, what steps can be taken to improve its performance?
  
3. Our understanding of the SAHRC's motivation in requesting this research is that the Commission wishes to hear two arguments made to it for purposes of further discussion. The end-result of this discussion will be recommendations to be made to Parliament for amendments to the PAIA in fulfilment of the SAHRC's mandate in s 83(3)(a) of the Act. SAHA has been requested to argue the proposition that the SAHRC, once appropriate legislative and/or organisational changes have been made, is best placed to champion the right of access to information. The Open Democracy Advice Centre (ODAC) has been asked to argue the proposition that the SAHRC is not the appropriate entity to champion the right of access to information and that an additional specialised information commission should therefore be created. While we value the opportunity to participate in what we regard as a fruitful way of approaching the difficult task of assessing the appropriate role for the Commission in relation to access to information, we must stress that the case that is made in this document is not necessarily the view of SAHA as an organisation in relation to the issues that are discussed here.
  
4. It is worth setting out our understanding of the concept of 'championing' in this context. The SAHRC's briefs to SAHA and ODAC draw the concept around two distinct functions:
  - 4.1. a *promotional* function: an entity must be established or an existing entity must be given the tasks of publicising the rights created by the Act, educating the public and officials about the Act, assisting members of the public to make requests, conducting research and publishing explanatory material about the Act, monitoring the Act's implementation and the use that is made of it and reporting to Parliament.
  - 4.2. an *enforcement* function: for the rights created by the Act to be enforceable there must be a dispute-resolution process by which disputes over access to records can be resolved by an independent entity with the power of making authoritative and binding decisions. This includes two possible forms of

dispute: disputes over alleged *maladministration* of the Act (eg. requests not answered, Manuals not submitted, bodies taking excessive time to answer simple requests) and disputes over the *substance* of decisions made in terms of the Act (eg. whether information in a record is subject to a particular ground of refusal).

Currently, these two functions are allocated to separate entities by the Act. The SAHRC has solely promotional functions, while the enforcement function is allocated to the Public Protector (maladministration) and the courts (substance). Our understanding then of the case that we have been asked to make is as follows: the goals of PAIA will be better achieved if the SAHRC is given dispute-resolution functions in addition to its current promotional functions.

## Methodology

5. Our research goals were the following:
  - 5.1. to analyse the SAHRC's current legislative duties to 'champion' the right of access to information;
  - 5.2. to assess whether the SAHRC has been successful in performing these duties;
  - 5.3. to identify deficiencies in the statutory framework and in the Commission's own organisational structures that inhibit the effective achievement of the objects of PAIA;
  - 5.4. to assess whether changes should be made to the legislative powers and duties of the SAHRC and/or its organisational structures to improve achievement of the objects of PAIA.
  
6. Because of time constraints, our research has focused on the performance of only two of the institutions that have statutory responsibilities for the promotion and enforcement of PAIA: the SAHRC and the Public Protector. Interviews were conducted with SAHRC Commissioners Karthy Govender and Leon Wessels as well as with several of the SAHRC department heads: MC Moodliar of Legal Services, Tshiliso Thipanyana of Research and Documentation, Andre Keet of Education and Training (and acting head of Advocacy). In addition, interviews were conducted with Mothusi Lepheane, the head of the PAIA unit in the SAHRC, and with Stoffel Fourie and Shirley Thoke of the Public Protector. Documentation reviewed for this research includes: the SAHRC strategic business plan for 2003/4 – 2005/6, a 14 page compilation of the SAHRC legal files on access to information complaints pre-PAIA, the SAHRC 6<sup>th</sup> Annual Report 2001/2002, the SAHRC Presentation to the Justice Portfolio Committee on 11 June 2003, and the transcript of the PAIA Conference held on 22-23 May 2003 in Johannesburg. Internet research covered the institutional websites as well as [www.pmg.org.za](http://www.pmg.org.za) for the minutes of the Parliamentary Portfolio Committee.
  
7. It is necessary to emphasise that this research necessarily presents only an incomplete picture of PAIA implementation. A more complete assessment would have to include the other government institutions with PAIA responsibilities: the Department of Justice and the Government Communications and Information Service. As will be seen, concern has been expressed from numerous quarters about the effectiveness of the Act's dispute-resolution provisions. In short, High Court litigation is widely seen as too inaccessible and cumbersome to be an

effective way of enforcing the access to information rights. We have not been able to test these opinions by assessing the extent of PAIA litigation in the High Court and surveying the experience of the litigators. We were also unable to survey the experiences of the body of PAIA users: the individuals and civil society organisations who have made requests in terms of the Act.<sup>1</sup>

8. There are four further reasons to be cautious about drawing conclusions from the research conducted for this brief:
  - 8.1. PAIA has been in operation only since 9 March 2001. A little more than two years is probably not long enough to assess whether the institutional mechanisms set up for implementation of the Act have been successful or not.
  - 8.2. The Act is not yet completely operational:
    - 8.2.1. The deadline for the manuals required for most private and public bodies has been extended on two occasions and is currently the end of August 2003. These manuals are intended to provide essential guidance for requesters about how to make a request and what can be requested from a particular body. Until these manuals have been published, it is impossible to draw accurate conclusions about the success or failure of the Act.
    - 8.2.2. An important component of the Act's dispute-resolution structure, the designated magistrates' courts referred to in s 1 of the Act, have not yet been established. Parliament's intention in extending PAIA jurisdiction to magistrates courts was to counter some of the objections made about the inaccessibility of the High Courts. Arguably, the designation of magistrates courts able to hear PAIA cases will meet some of the complaints that have been made about the current dispute-resolution system. However, the argument cannot be tested at this point.
  - 8.3. A vital resource for researchers will be the statistics compiled by the SAHRC in terms of s 84 of the Act. These have not yet been published. There are no comprehensive independent empirical studies on the implementation of PAIA. In the absence of such studies, much of the evidence available to researchers is anecdotal.
  - 8.4. We have to emphasise a potentially complicating factor, namely the impending development of a Data Protection and Privacy Act and associated enforcement regime. New privacy legislation is in the very early stages of drafting, and it is clear that this legislation and PAIA will have to be carefully articulated. Equally clearly, any changes to the PAIA enforcement provisions will impact on the options considered for a privacy enforcement mechanism. Internationally experience shows that there are two principal models – either the separation of information and privacy enforcement mechanisms, or their combination in the authority of a single independent agency. We have deliberately not expressed a view on this matter. However, it will be essential for the legislature to assess recommendations relating to PAIA enforcement made by us and by ODAC in light of this broader context.

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<sup>1</sup> For two examples, see Open Democracy Advice Centre, 'Promotion of Access to Information Act: Implementation 2002' (April 2002) and South African History Archive, 'PAIA Update' (February 2003).

### **The statutory position**

9. PAIA is the national legislation referred to in s 32(2) of the Constitution. It is therefore legislation giving effect to the right of access to information in the Constitution. The goals of the Act, set out in detail in its Preamble and in s 9, can be summarised as follows:
  - 9.1. The Act, and the constitutional right on which it is based, are set against the ‘secretive and unresponsive culture’ of the apartheid-era government and private sector.
  - 9.2. The Act aims to give effect to the constitutional right of access to information and to limit that right. It does this by:
    - 9.2.1. Creating an enforceable right to request records in public and private hands;
    - 9.2.2. Requiring access to be granted to a requested record unless one or more of an exhaustive list of grounds of refusal applies to information in the record.
  - 9.3. To promote transparency, accountability and effective government in public and private bodies and to promote a human rights culture.

### **Comparative models**

10. In many respects, the Act resembles the numerous Freedom of Information Acts that have been developed in other jurisdictions. Research conducted by the international NGO Article 19 has produced ‘model’ freedom of information legislation, based on what the researchers consider the ‘best practice’ of those jurisdictions that have enacted such legislation.<sup>2</sup> This model law shows that an FOI Act will typically and at a minimum contain the following provisions and mechanisms:
  - 10.1. An individual right of access to records held by government bodies on request.
  - 10.2. Provisions requiring bodies to respond to requests for records.
  - 10.3. An exhaustive list of exemptions or grounds on which requests for access may be refused.
  - 10.4. Provisions for the resolution of access disputes by an independent entity/entities.
  - 10.5. Provisions for the promotion of the goals of the legislation.
11. The focus of this research is on the fourth and fifth of these aspects: dispute-resolution and promotion. It is worth setting out in more detail the typical measures adopted in foreign jurisdictions for dispute resolution and promotion of the cause of freedom of information.
  - 11.1. For the right of access to information to be more than a right on paper, provision must be made for resolution of access disputes in some form of independent tribunal. The tribunal must be easily accessible and it must be able to decide disputes authoritatively, cheaply, quickly and effectively.

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<sup>2</sup> The model law is available at the organisation’s website: <http://www.article19.org>.

Because of the expense and inefficiencies associated with litigation in the ordinary courts, most jurisdictions opt for dispute-resolution by a specialised information commission or by specialised administrative tribunals.

- 11.2. For the right of access to information to succeed in its goals of securing an open and transparent democracy, it is essential that citizens know of their rights under the Act and that officials know about their duties under the Act. This requires mechanisms to be put in place for educating the public about the Act and training officials in responding to requests. Promotion of the goals of the Act also requires mechanisms for assisting members of the public to make requests. Provision should be made for compiling statistics on the use made of the Act with the aim of identifying and remedying defects in the legislation and/or in official compliance with it. Again, most jurisdictions impose these tasks on a specialised information commission.

### **Allocation of promotional and dispute-resolution functions in PAIA**

12. The Act has its origins in draft legislation produced by a Task Team on Open Democracy appointed by Deputy-President Mbeki in 1994. The Team produced a set of policy proposals in January 1995<sup>3</sup> and, subsequently, a draft Open Democracy Bill.<sup>4</sup> The recommendations of the Team in relation to dispute resolution were the following:

- 12.1. Information officers: each government body should appoint an official to consider requests for access to information held by that body.
- 12.2. Internal appeals: if a request for information is refused, if there is undue delay in responding to the request, or if a fee charged is excessive, the requester should be entitled to appeal to the head of the public body.
- 12.3. Information Court: if the internal appeal is unsuccessful the requester would be entitled to appeal to an Information Court. This was envisaged as a superior court, established in each division of the High Court and staffed by High Court judges but operating under rules designed to ensure that they were accessible, cheap, simple, informal and expeditious.<sup>5</sup>
- 12.4. High Court: the decisions of the Information Court would be reviewable in the High Court on administrative-law grounds.

13. The recommendations of the Task Team on promotion of the rights created by the Act were the following:

- 13.1. Public Protector: the Public Protector would have the responsibility of facilitating the exercise of the rights in the Act by:
- 13.1.1. intervening on behalf of an information requester;
- 13.1.2. mediating between the requester and the government;

<sup>3</sup> Task Team on Open Democracy *Open Democracy Act for South Africa: Policy Proposals* (1995).

<sup>4</sup> The draft Bill is available at <http://www.polity.org.za/html/govdocs/bills/1995/odb9/toc.htm>

<sup>5</sup> Policy Proposals pp 8—9. An alternative to the Information Court considered by the Team but rejected on the grounds of cost was a specialised information tribunal.

13.1.3. investigate complaints about maladministration of the Act and make recommendations to the government or Parliament;

13.1.4. representing requesters, or intervening in the public interest before an Information Court or the High Court.

13.2. The Human Rights Commission could intervene in cases when the rights created by the Act overlapped with the constitutional right of access to information. This could entail investigating any alleged violation of right and assisting anyone adversely affected by the violation to secure redress.<sup>6</sup>

13.3. Open Democracy Commission: a small, independent Commission should be established to monitor the effectiveness of the Act and to report annually to Parliament. The Commission could propose amendments to the Act based on conclusions drawn from its monitoring of the implementation of the Act.

14. Cabinet opted not to accept the Team's recommendations in relation to the establishment of Information Courts and an Open Democracy Commission. The Open Democracy Bill as introduced in Parliament<sup>7</sup> provided instead for access disputes (after exhaustion of an internal appeal process in the case of public bodies) to be litigated in the High Courts. The Bill was then substantially amended during the Parliamentary process.<sup>8</sup> In PAIA as enacted, the dispute-resolution and promotional duties that had been identified by the Task Team were re-allocated as indicated in the following table:

Table: Allocation of enforcement and promotional duties

<u>Duty</u>	<u>Draft Open Democracy Bill</u>	<u>PAIA</u>
<b>Promotional duties</b>		
Statistical monitoring and annual report to Parliament	Open Democracy Commission	SAHRC <sup>9</sup>
Annual review of Act and other laws bearing on openness and recommendations for amendment	Open Democracy Commission	SAHRC <sup>10</sup>
Monitoring of implementation and administration of the Act	Open Democracy Commission	SAHRC <sup>11</sup>
Development and conducting of educational programmes for the public and for officials; promotion of the objects of the Act among bodies	Open Democracy Commission	SAHRC <sup>12</sup>
Publication and dissemination of a guide on the Act	Open Democracy Commission	SAHRC <sup>13</sup>

<sup>6</sup> Policy Proposals pp 10.

<sup>7</sup> Bill 67 of 1998.

<sup>8</sup> The principal purpose of the Parliamentary amendments was to give more comprehensive effect to the right of access to information in private hands than either the draft Bill or Bill 67 of 1998 had done.

<sup>9</sup> Section 84 PAIA.

<sup>10</sup> Section 83(3)(a) PAIA.

<sup>11</sup> Section 83(3)(b) PAIA.

<sup>12</sup> Section 83(2) PAIA.

<sup>13</sup> Sections 10 and 83(1)(a) PAIA.

Receiving and archiving manuals	Open Democracy Commission	SAHRC
Assisting requesters to make requests	Public Protector	SAHRC <sup>14</sup>
Receiving and investigating complaints about maladministration of the Act <sup>15</sup>	Public Protector	Public Protector <sup>16</sup>
<b>Enforcement duties</b>		
First-instance internal appeals against refusals of requests, against fee decisions, against slowness or non-responsiveness.	Internal appeals to heads of public bodies	Internal appeals to heads of type (a) public bodies.  No internal appeals for type (b) public bodies or for private bodies.
Appeals to independent tribunals	Appeals to Information Courts  Administrative-law review of Information Court decisions by High Court	Appeals to magistrates courts or High Courts.  No review of High Court decisions. <sup>17</sup> Appeals against magistrates' court decisions.

15. The above table indicates that in both versions of the legislation:

15.1. There is a rigid separation of the functions of promotion and enforcement: the former is to be performed by the Open Democracy Commission (in the ODB) and the SAHRC (in PAIA); the latter is to be performed by Information Courts (in the ODB) or by the High Court (in PAIA). The model adopted by many foreign jurisdictions, of having a specialised information commission with duties of promotion and powers of dispute-resolution is not followed.<sup>18</sup>

15.2. A further distinction is made in the legislation between dispute-resolution in the sense of disputes over the substance of access decisions made in terms of the Act and dispute-resolutions about what can be called administrative failures or maladministration of the Act. The former type of

<sup>14</sup> Section 83(3)(c) PAIA.

<sup>15</sup> Though neither the draft Open Democracy Bill nor PAIA is particularly clear about this, it seems that the intention was for the Public Protector to investigate maladministration in the sense of a failure by a body to comply either on a systemic or individual level with the duties imposed by the Act. It was not intended that the Public Protector investigate the merits of any substantive dispute about the interpretation or application of the Act (eg, the merits of a refusal to grant access on one of the grounds listed in the Act). This was the province of the appeal provisions and the Information Courts.

<sup>16</sup> Section 91(b) PAIA.

<sup>17</sup> This appears to be the effect of the ouster in para (ii) of the definition of 'administrative action' in the Promotion of Administrative Justice Act 3 of 2000: 'any decision taken, or failure to take a decision, in terms of any provision of the Promotion of Access to Information Act, 2000' is not administrative action.

<sup>18</sup> See, for example, Ireland. The Irish Freedom of Information Act 1997 creates an Information Commissioner with powers to review the decisions of public bodies and to make binding decisions on access to records. The Commission also has a number of tasks that could be categorized as promotional: reviewing the operation of the Act, fostering attitudes of openness in government bodies and encouraging voluntary disclosure of information and the publication of guidance material on the practical operation of the Act.



dispute is the province of the courts. The latter type of dispute is the province of the Public Protector. The Public Protector is therefore given a role similar to that performed by the Ombudsman in jurisdictions such as Australia.<sup>19</sup>

### **The reality**

16. How well are the SAHRC and the Public Protector performing the tasks allocated to them by the Act? Is the current allocation of tasks adequate to ensure the effective achievement of the goals of the Act?
17. There are several indicators of weaknesses or inadequacies in the current PAIA implementation scheme:
  - 17.1. Enforcement: persons interviewed for this research were nearly unanimous that the courts were an inaccessible and lengthy enforcement option, out of the reach of ordinary people and inferior as a PAIA enforcement option.
  - 17.2. Promotion: in the opinion of those interviewed, the activities undertaken to promote the objects of the Act have not resulted in anything approaching a decisive and thoroughgoing cultural shift in the public sector (or the private sector) towards open and transparent operation. Civil society advocates do not see sufficient public championing of PAIA at higher levels of government.

### *Resources spent and outputs achieved: SAHRC*

#### Inputs

18. The SAHRC's total budget for 2002/2003 was R27.4 million (excluding donor funds of 2.9 m).<sup>20</sup> The SAHRC's MTEF allocations for 2003/4 to 2005/6 are R32.7m, R37.5m, and R40.6m. There has been no dedicated donor funding for direct PAIA activities. The portion of this budget specifically dedicated to PAIA is relatively small. In 2003/4, R2.3m was requested by the SAHRC and R0.5m was received. Thus, the percentage of the SAHRC budget directly dedicated to PAIA was 1.5%.

#### Outputs

19. The outputs of the SAHRC can be looked at in terms of casework, training sessions held, and statutory duties performed.

#### Casework

- 19.1. Casework: In terms of cases dealt with, in 2001/2002, the Legal department of the SAHRC received a total of 3001 constitutional complaints.

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<sup>19</sup> In terms of the Federal Freedom of Information Act 1982, complaints about procedural failures are investigated by the Commonwealth Ombudsman. Appeals against refusals of requests are made to the Administrative Appeal Tribunal.

<sup>20</sup> Source: SAHRC *Annual Report* (currently in preparation).

Of these constitutional complaints, 40 related to access to information. These were pre-PAIA complaints and were dealt with in terms of the SAHRC's jurisdiction over complaints over constitutional violations. Of these pre-PAIA complaints, 29 were dealt with in that reporting period, 11 of the complaints remained outstanding, as well as 9 cases received prior to 2001/2002.

- 19.2. The number of complaints received by the SAHRC is in general on the increase. In 2002/2003, the SAHRC received 5591 complaints.
- 19.3. The Legal department has provided some documentation relating to 59 cases dealt with by the Legal department that involved the right of access to information. It is apparent from a quick perusal of these complaints, that in many instances the right of access to information was raised as part of a broader complaint about rights violations. For instance, an allegation of racism in the failure of a medical student was accompanied by a refusal on the part of the educational institution to release the results of an intelligence and emotion test administered to the student.
- 19.4. After the coming into effect of PAIA, there have been 9 PAIA-related cases brought to the Legal department of the Commission. In addition, there may be informal compliance action taken by other officials within the SAHRC, particularly of the Research and Documentation department. Seven of these nine cases fell within the purview of the Legal department. These matters were no longer considered to be constitutional complaints and instead were considered to be "requests for assistance in terms of s 83 of PAIA". However, they were dealt with in the same way as the constitutional complaints detailed below. Two of these seven cases were relatively substantive. One involved a request by a losing party of students within the Wits SRC elections. Another case concerned a contractor to the Johannesburg Metro for cleaning mobile toilets and the government procurement process.
- 19.5. None of these pre-PAIA complaints or of the post-PAIA assistance requests were referred to the Public Protector. There is no ongoing contact between the Legal department and the Public Protector with respect to PAIA cases.

#### Training

- 19.6. In 2001/2002 the SAHRC made 2 presentations on access to information. This accelerated significantly the following year. In 2002/2003, the PAIA Unit made nine provincial briefings on PAIA. Additionally, the Education and Training department conducted 13 education interventions with professional bodies or similar institutions regarding the PAIA. These were special day-long programmes. Finally, PAIA is one quarter of the content of the 21 omnibus educational interventions this department conducted in 2002/2003 (along with human rights in general, socio-economic rights, and equality).
- 19.7. The SAHRC has adopted a deliberate strategy with respect to education and training around PAIA. The initial focus was on government institutions. However, from August 2003 with the final deadline of the manual, the strategic plan is to switch to targeting the potential users of PAIA, communities of ordinary people.

### Statutory duties performed

- 19.8. In terms of statutory duties performed, the SAHRC is given the primary responsibility for implementing the PAIA. This may be seen to have three components. The SAHRC is in charge of general promotion of the PAIA. Additionally, it has a role in receiving “requests for assistance”. Finally, it has a set of statutory duties that are intended to monitor the implementation of the PAIA. Internally (as discussed more fully below), the SAHRC has a sub-programme on access to information, the PAIA Unit.
- 19.9. In 2001/2002, the PAIA Unit developed a resource manual on PAIA for use by the training centre. In 2002/2003, the unit also prepared and launched the required section 14 manual for the SAHRC itself. The Unit has also provided assistance to private and public bodies in preparing their manuals. As one indicator, the number of website hits of the SAHRC took a sharp spike in February 2003, nearly quadrupling, before the first manuals deadline was extended. In 2002/2003, the PAIA Unit received over 800 email queries regarding the PAIA, over a thousand telephone queries, and around a hundred postal queries. The Unit mailed out 1092 guidelines on the manual to private bodies and 156 copies to public bodies.
- 19.10. In addition, the PAIA Unit has engaged in the collection of section 32 reports and other required PAIA statistics. These figures for 2002/2003 will be part of the upcoming report to Parliament. Beyond 2002/2003, this unit envisions working towards a report like the Socio-Economic Rights report. This will draw upon the monitoring systems of the PAIA as well as other sources.

### *Resources spent and outputs achieved: Public Protector*

20. The annual reports of the Public Protector do not give any specific figures for PAIA. There is no specific PAIA budget within the Public Protector. This is consistent with the vision that the PAIA work of the Public Protector falls within the scope of duties that the Public Protector would in any event exercise. However, the Public Protector has engaged in informal action in support of the PAIA. Complaints or inquiries received at the Public Protector are often dealt with by means of a telephone call or other relatively informal action. There have been instances where this kind of informal action was undertaken in support of the PAIA. This treatment is not recorded formally.
21. As a *recipient* of PAIA requests, the Public Protector has reported six cases, two of relatively major significance. One is a matter involving the National Library. The other is the high-profile Richard Young/arms deal PAIA request where the Public Protector has been the second respondent in several court hearings.
22. The office of the Public Protector appears to be under serious strain at the moment. On 12 June 2003, the Public Protector, ML Mushwana, told the Parliamentary Committee on Justice and Constitutional Development “There is an unprecedented delay in investigations of cases.”<sup>21</sup> In 2002/2003, the Public

<sup>21</sup> Section 5.3.10 of Presentation. Accessed at [www.pmg.org.za](http://www.pmg.org.za)

Protector finalized 21,707 cases, with 6 641 cases remaining on the docket. On this date, the presentation and other documents presented to the Committee by the Public Protector did not mention PAIA.

*Co-ordination between the SAHRC and the Public Protector*

23. Neither institution reported either receiving or referring any PAIA matters to the other. Additionally, there is no specific protocol or co-ordination between the SAHRC and the Public Protector for handling access to information complaints. In the absence of any specific protocol, the model of the existing co-ordination between these two bodies (and the Gender Commission) is presumed to operate. This co-ordination calls for systemic violations of Chapter Two rights to be within the mandate of the SA Human Rights Commission rather than the Public Protector.<sup>22</sup>

*SAHRC Organisational Operation*

24. SAHA was specifically requested by the SAHRC's brief to examine the internal structuring of the SAHRC with respect to the right of access to information.
25. There are two structures specializing on PAIA within the SAHRC. The first is the PAIA unit, currently managed by Mothusi Lepheane. This unit is set within the Research and Documentation department of the Commission. In addition to occupying the unit's head full-time (in addition to two other full-time staff members), the head of the Research and Documentation department, Tshiliso Thipanyana, also devotes significant energy and time to the operation of the unit.
26. The second specialist unit is the structure called 'PAIA.com':
- 26.1. This is an internal committee of the SAHRC. The Commissioner responsible for the implementation of the PAIA, Commissioner Leon Wessels, chairs the Committee. It includes the Chief Executive Officer, Lindiwe Mokate, as well as the Deputy CEO, the five heads of department, the PAIA Unit manager, and an additional member from the Legal department is the chair of the committee. The heads of department give reports every two weeks about the PAIA work in their respective departments. The deputy CEO gives reports on the PAIA work of the five provincial offices of the SAHRC. The PAIA Unit manager is the convenor and an ex officio member of PAIA.com and his office keeps the minutes and records of the Committee.
- 26.2. The primary business of PAIA.com is to manage the line function work of the SAHRC with respect to PAIA. Thus reports of legal complaints to the Legal department, reports of training done or planned by the education and training departments, and status of the work undertaken by the PAIA Unit are all reported to and placed before PAIA.com. In addition, the CEO and the deputy CEO function as the information officer and the deputy information

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<sup>22</sup> SAHA itself has experience of a complaint submitted to the Public Protector being shelved on the grounds that it had already been submitted to the SAHRC.

officer for the SAHRC. Thus requests for access to information held by the Commission are also reported to PAIA.com.

26.3. It was apparently 'PAIA.com' that decided on the SAHRC's attitude towards two of the high-profile access to information requests directed at the SAHRC over the past year: the request for information by Richard Young with respect to the arms deal (a case in which ODAC was an amicus curiae) and the request for information by SAHA with respect to 34 boxes of TRC archive material. In neither of these cases did the SAHRC become closely involved.

27. In addition to these specialized units, the Legal department has dealt with and continues to deal with complaints/requests related to the right of access to information. The usual operation of the Legal department with respect to a case is to attempt to resolve the case through informal action. If cases cannot be dealt with at this level, they may be taken to the Complaints Committee. Three Commissioners sit in on the meetings and decisions of the Complaints Committee. There is an intermediate step where a complaint must be taken to the "mini-CC", the mini complaints committee. This appears to function as a screening committee for the Complaints Committee.

### **Options for reform**

28. Our brief is to examine the actual and possible role of the SAHRC in championing the right of access to information. Our understanding of this term is that it describes two functions: promotional and dispute-resolution (enforcement) functions. Currently, the Act divides these functions between, on the one hand, the SAHRC (promotional) and the Public Protector and the courts (dispute-resolution) on the other. In our interviews, we surveyed the views of the SAHRC and Public Protector on the adequacy of this arrangement and on whether there is a need to reform it. In a number of fora, there have been calls for amendments to the Act to create some form of dispute-resolution mechanism between internal appeals and court litigation.<sup>23</sup> This prospect, and various options for achieving it, was specifically raised with the interviewees to obtain their input.

### *SAHRC Section 8 recommendations*

29. The SAHRC currently has powers to remedy disputes. Section 8 of the Human Rights Commission Act gives the Commission the power to endeavour to resolve by mediation, conciliation or negotiation any dispute or rectify any act or omission in relation to a fundamental right. Any recommendation or finding made by the Commission as a result of such a process is not directly binding on a public or private body. However, public bodies are under a constitutional duty to assist the Commission to ensure its effectiveness and, in the Commission's

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<sup>23</sup> See, for example, 'Proposed Amendments to the Promotion of Access to Information Act (PAIA): Report on a Workshop Convened at the University of the Witwatersrand, 4 October 2002' available at [http://www.wits.ac.za/saha/paia\\_amendments.doc](http://www.wits.ac.za/saha/paia_amendments.doc).

experience, its recommendations made in terms of s 8 are usually acted on by public bodies.<sup>24</sup>

30. It is a matter of interpretation whether these powers can currently be used to resolve PAIA disputes. The Commission's own view is that they can. This view is based on a reading of s 8 and the requirement to give assistance in s 83(3)(c). In our view however, s 8 cannot be used to resolve PAIA disputes. This is because PAIA disputes, it can be argued, do not directly relate to a fundamental right. They relate instead to the interpretation and implementation of a statute that gives effect to a fundamental right and are therefore at one remove from the Commission's direct jurisdiction in terms of s 8 of its enabling Act. The Commission's powers to remedy PAIA disputes must therefore be found in the letter of the PAIA itself. We have argued that the scheme of the Act is that the Commission's functions are intended to be solely promotional and the task of dispute-resolution and enforcement is allocated to the Public Protector and the courts. There is a weakly-phrased enforcement power in s 83(3)(d) of PAIA - the power to 'recommend to a public or private body that the body make such changes in the manner in which it administers this Act as the Commission considers advisable.' This appears at most to permit recommendations to be made to correct systemic deficiencies in the way a body deals with its duties under the Act. It does not give the Commission dispute-resolution duties or powers.
31. It would be a relatively simple matter to amend PAIA to permit the SAHRC to use its s 8 mediation, conciliation and negotiation powers to remedy access to information disputes. These could be disputes of both the administrative type and disputes of substance. The recommendations of the Commission made in terms of its ordinary powers would not be binding.
32. There are foreign models for the combining of promotional and dispute-resolution functions (with recommendation powers only) within a single body. The best example is the federal Information Commissioner in Canada.
33. If this route is taken, the SAHRC's dispute-resolution powers would overlap considerably with the Public Protector's functions. It would be necessary to review whether the Public Protector's current PAIA functions should be retained.
34. It is also necessary to consider whether the system of internal appeals should be retained in its current form. Currently, an internal appeal is compulsory and must be exhausted before an application can be made to court. Will it be possible to approach the Commission for dispute-resolution before completing an internal appeal or should the appeal be exhausted?
35. If the dispute-resolution powers of the SAHRC are purely recommendatory, it is clear that there should be no compulsion to make use of this mechanism before approaching a court. In other words, the SAHRC process will be optional.

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<sup>24</sup> According to Leon Wessels, only two of the Commission's recommendations have not been complied with.

36. Any amendment to PAIA would have to include a timeframe for the hearing of disputes by the SAHRC. A party bringing a complaint would then have the right to seek relief from the courts if a dispute were not settled within the prescribed timeframe.
37. The principal shortcoming of this route is that it would give the SAHRC only recommendation powers and not order powers in dealing with disputes. The Canadian model referred to above relies on a context in which the access regime applies only to public bodies and in which a culture of transparency and accountability is well-established. These conditions do not apply in South Africa. In our view the problems identified in this report in relation to PAIA enforcement will only be addressed effectively if any alternative enforcement mechanism accommodates order powers.

#### *Giving the SAHRC order powers*

38. On the assumption that order powers are placed within the SAHRC, there would need to be appropriate amendments to PAIA and consequential amendments to the SAHRC Act and regulations. The points made in paragraphs 33, 34 and 36 above would need to be considered. PAIA's permissive language relating to the duties of the Commission (eg, 'may . . . if reasonably possible' etc) would have to be reformulated.
39. A crucial consideration would be the appropriate placement of an enforcement mechanism within the SAHRC. It is recommended that neither of the two currently specialized PAIA structures be tasked with this responsibility. Nor would this responsibility sit well with the current Legal department.
40. One possibility within these parameters is to include a statutory designation of one or two commissioners (perhaps to be chosen by the Chairperson) to decide specific PAIA matters. Such a specialized body within the SAHRC would presumably route the relatively high profile cases to this body and the lower profile ones to the Legal department. Opinions on this question differ within the SAHRC. Some feel that the SAHRC can carry collective responsibility, with specific commissioners assigned to specific mediations. They argue that dedicated commissioners within the HRC would interfere with the collective vision of the institution (and that a retired judge added to the structure would be worse). Others feel that dedicated commissioners are necessary. The argument for dedicated commissioners is that the volume of cases is likely to increase and to demand a large proportion of a senior person.
41. Whatever structural/organisational option is selected, it is clear that the SAHRC would need a massive infusion of resources (including specialist expertise) if the enforcement mechanism were to be successfully accommodated. This would probably necessitate a separate budget allocation for the PAIA dispute-resolution resolution functions of the Commission. As this report demonstrates, lack of resources has severely compromised the Commission's capacity to fulfil its current relatively modest promotional functions.

*Greater mediation power within SAHRC*

42. An alternative to both the options described above would be to grant a court a power to refer a PAIA dispute to the SAHRC for mediation. This could be along the lines of the power of an equality court to refer disputes to an alternative forum in terms of s 20(5) of the Promotion of Equality and Prevention of Unfair Discrimination Act. It is worth noting that, like the PAIA, the Equality Act also calls for magistrates courts to operate as enforcement structures. There may therefore be ‘enforcement synergies’ resulting from the fact that magistrates courts will be deciding both Equality Act and PAIA disputes. It is also possible that the mediation expertise of the SAHRC will increase, given the flow of mediation referrals from the Equality Courts.
43. Our view is that while such a mechanism offers certain benefits, it does not address the fundamental problem of the current system – the absence of an intermediate dispute-resolution mechanism with binding order powers.

*Comparative analysis of Public Protector and SAHRC in relation to PAIA enforcement powers*

44. Assuming that it is desired to (1) add a binding order enforcement power and (2) to do this within the framework of the existing Chapter 9 institutions, then the question is whether the SAHRC or the Public Protector is best suited to undertake that role. In order to answer that question, this section engages in a general discussion and comparison of the SAHRC and the Public Protector on four dimensions: present PAIA statutory role, scope of application, general institutional role with respect to enforcement, and potential participation in strategies of targeted enforcement.
45. While the Public Protector is relatively clear on its statutory role under PAIA, there are differences of opinion within the SAHRC on its statutory role. The Public Protector is clear that its jurisdiction under s 6(4)(d) of its Act is merely confirming what in any case it could otherwise do. Thus the enforcement role of the Public Protector is limited to instances of maladministration. These would include matters such as failing to respond to a PAIA request within the appropriate time limits, failing to give a section of the Act or reasons for a refusal of a request, or failure to refer a request as arguably required by section 20 of the PAIA. In each of these instances, the Public Protector would most likely deal with these matters in terms of informal action. The Public Protector does not regard itself as competent to pronounce upon the substantive interpretation of the PAIA. It deals only with maladministration of the PAIA, not its implementation.
46. Some within the SAHRC read the PAIA to preclude a PAIA enforcement role for the SAHRC. This is based upon two features of the PAIA as well as a general constitutional principle. The first factor is the identification in PAIA in s 91 of a role for the Public Protector. The implication of this role is said to oust any enforcement role that the SAHRC might have. The second factor is the permissive language regarding the SAHRC in the PAIA. The PAIA identifies many functions for the SAHRC but couches those roles with caveats in terms of



available resources and the like. Thus, departing from a position of scarce resources within the SAHRC, the PAIA enforcement role is downplayed. A third factor is that of constitutional comity. This reinforces the first factor. The notion here is that, while there is no reason that the SAHRC could not take an enforcement role, if such a role is taken by a sister Chapter Nine institution, the Public Protector, then the right course of action is to defer to the Public Protector.

47. There are counterarguments to the above interpretation. First, the jurisdiction granted to the SAHRC by the s 83 "requests for assistance" can be seen as broad enough to include treatment within the usual Legal department procedures of casework. Indeed, this is the position of the Legal department. Second, it is not clear that PAIA has affected the pre-PAIA SAHRC complaint jurisdiction over violations of the right of access to information as a Chapter Two right. Third, of course, it is apparent from this research that the role of the Public Protector in PAIA enforcement is extremely limited.
48. In terms of scope of application of the SAHRC and the Public Protector, it is clear that the role of the Public Protector lies in relation to the public sector primarily and perhaps exclusively. The PAIA of course applies to the private sector as well as to the public sector. Thus, the present statutory role of the Public Protector would not be consistent with an increased PAIA enforcement role. By contrast the role of the SAHRC extends over the private and the public sector. Indeed, this has been the matter of controversy. In any case, the present ambit of the SAHRC fits more consistently with the PAIA than does the ambit of the Public Protector.
49. In addition, there is an underlying point about the conception of the right of access to information. In the South African Constitution, the right of access to information has been conceived as interrelated to other chapter 2 rights. Its enforcement and promotion by the SAHRC would continue that tradition of seeing the right of access to information as interlinked.
50. In terms of the current enforcement powers, the SAHRC is closer to an enforcement body than is the Public Protector. In terms of its present Act, the SAHRC has litigation powers (HRCA s 7(e)) as well as powers for mediation, conciliation, and negotiation (s 8). The recommendations that the SAHRC makes are part of the s 8 process of mediation, conciliation, and negotiation. These recommendations call for specific action in specific circumstances. According to the SAHRC, they have been generally obeyed, even though they have the status of recommendations only. The Public Protector has the power to make a report to Parliament but has no powers of enforcement. The PAIA enforcement model of the Public Protector is one of an ombudsman rather than a binding adjudicator of disputes. This is carried through in section 6(4)(d) of Public Protector Act (as amended by PAIA).
51. Finally, it is appropriate to look at the SAHRC role with respect to monitoring within the enforcement paradigm. An alternative method of enforcement to complaints resolution is that of informational regulation. This has been argued to be successful for the second generation of freedom of information regimes, such

as those in the Canadian provincial as opposed to federal structures.<sup>25</sup> The theory of this method of enforcement is that data and statistics of access to information should be required to be produced and published. Public and private bodies can then use this information to push for compliance of bodies revealed to be systematically non-compliant with the access to information regime. This strategy works particularly well with the copious data generated by, for instance, the Canadian enforcement regime. However, it may also be adaptable to the context of a country with scarce resources since it allows for a more targeted and narrow approach to access to information violators. The SAHRC is arguably already engaged in this strategy of informational regulation. However, there is a real problem with the capacity of government departments to generate this data. The SAHRC would appear to be better-suited than the Public Protector to participate in such targeted enforcement. Its Research and Documentation department would be able to investigate evidence of a pattern of non-compliance with PAIA. The SAHRC also has civil society linkages to pursue such research and such an investigation might be conducted in conjunction with outside research institutions. Specific legal avenues for such targeted enforcement could be either a formal inquiry of the Public Protector or the potential order power of the SAHRC. The report of the SAHRC to Parliament may also be a tool to fight systemic non-compliance.

## Conclusion

52. This report has made a case for assigning a binding PAIA enforcement function to the SAHRC. We have also argued that the SAHRC is better suited to this function than is the Public Protector. We have deliberately not addressed the question of whether an independent Information Commissioner would be a better option.
53. The case we have made involves the combining of promotional and enforcement functions within the SAHRC. This is not without difficulty. Besides statutory changes, the SAHRC would have to take organisational measures to ensure the separation and independent operation of these two functions and to avoid being seen to be both a player and a referee in specific cases.
54. The case we have made would require amendments to PAIA and to the Human Rights Commission Act. No changes to the Constitution would be necessary. The Constitution caters for the Commission to be given any additional powers and functions 'prescribed by national legislation' (s 184(4)). The case we have made would also require substantial restructuring and additional resourcing of the SAHRC. Political will to effect the necessary changes must be forthcoming.

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<sup>25</sup> This discussion draws on A Roberts 'New Strategies for Enforcement of the Access to Information Act' (2002) 27 *Queen's LJ* 647.