

THE PROMOTION OF ACCESS TO INFORMATION ACT

Commissioned Research on the Feasibility of the Establishment of an Information Commissioner's Office

The Open Democracy Advice Centre Cape Town

Introduction

1. As a part of its review of the implementation of the Promotion of Access to Information Act (PAIA), the South African Human Rights Commission (SAHRC) has commissioned research from two organisations to help it think through the options relating to promotion and enforcement. Specifically, the Open Democracy Advice Centre (ODAC) is asked to conduct research on the following three issues:
 - Whether the SAHRC is best placed to champion the right of access to information as enshrined in PAIA.
 - If the answer to the above issue is in the negative; then examine the feasibility of the establishment of the office of the information commissioner either as part of the Chapter 9 Institutions or as an independent office.
 - Whether there would be a need for an amendment to PAIA, the SAHRC Act and/or the Constitution in this regard.

2. The South African History Archive (SAHA) has been asked by the Commission to explore the other side of the 'flow chart' – ie if the answer to issue one is in the affirmative. We have discussed the detailed issues that arise with SAHA, but understand that part of the purpose of these commissions is that each organisation put forward the alternative case and we do so to the best of our ability in the time available. Naturally, we

reserve our actual own organisational position and will express it a convenient moment later in this process.

3. PAIA has reached a crucial phase in its history. It is clear from the comparative experience, that most Freedom of Information/Access to Information Acts have to contend with intense challenges during the implementation phase – a phase which can last many years. With the wave of new laws that have been passed throughout the world in the past ten years (around 35 in fact), a new body of experience has emerged, especially from developing and middle income countries (prior to 1990, the only countries with a developed information regime were high income nations, such as the US, Sweden, Australia and Canada). Common implementation challenges are evident:

- The difficulty of adjusting “old”, secretive “mindsets” amidst the bureaucracy/holders of information;
- A lack of commitment to compliance from the bureaucracy/holders of information; and a tendency to ignore difficult requests for information and generally to breach time-limits;
- A lack of capacity in relation to record-keeping and insecurities in relation to older records;
- Insufficient funding for implementation – both in terms of human resources and procedural infrastructure;
- Inadequate staffing, in terms of training, specialisation and seniority
- The absence of “champions” within the bureaucracy/holders of information
- The lack of an enforcement mechanism providing accessible, speedy and affordable review against refusals or non-responses to requests for information under the law.¹

¹ See Calland, R. *Turning Right to Information Law in a Living Reality: Access to Information and the Imperative of Effective Implementation* in XXXXXXXXXXXX. Commonwealth Human Rights Institute (CHRI). Forthcoming (October 2003). Delhi. ODAC’s approach to this research subject draws extensively on the recent experience of its Executive Director, Richard Calland, who has consulted for the Carter Center’s Transparency Program in Latin America in the past two years, focussing in particular on implementation issues in Jamaica, Peru, Bolivia and Mexico. It also draws on the official reports of Information Commissioners in Ireland, Canada and Western Australia; specific references will be given where appropriate.

4. Many of these characteristics feature in the current South African situation. The need for stronger promotion and enforcement, in order to drive compliance by the holders of information, is now clear. Thus, we welcome the attention the SAHRC is paying to this issue and are glad of the opportunity to contribute to the debate about solutions and the way forward.
5. In this paper we draw on our own experience as users of PAIA, promoters/trainers and as attorneys acting for requesters. We also draw on the comparative experience and have compiled as an appendix a matrix setting out the powers and institutional designs of models from several different jurisdictions². In our analysis, we seek to place our commentary within the particular socio-political context of South Africa, and to take proper heed of its implications for this decision.

Issue One: Is the SAHRC best placed to champion the right to access information as enshrined in PAIA?

Champion?

6. ODAC regards the notion of “champion” in the context of implementation of a law, as a term of art meaning “promoter”, but more specifically “promoter from within”. The idea that lies behind this is that for a law such as this to succeed, it needs individuals within the bureaucracy to personally “believe” in the law and to actively promote the objectives of the law to less enthusiastic colleagues - in other words, help spread the word about the *spirit* as well as the *letter* of the law. Clearly, this coheres with the general duty to promote the rights contained in the constitution and the specific responsibilities with which the SAHRC is charged in relation to PAIA³. However, the distinction between the ‘internal’ champion and the ‘external’ champion is, we submit, important.

² In this we have been greatly helped by the Carter Center, Atlanta, US, and specifically by its Senior Program Associate: Transparency, Laura Neuman, and her interns, who did much of the basic research and whose analytical ideas fed into our own analysis.

³ Section 184 of the Constitution; section 7 of the Human Rights Commission Act 1994; section 83 of PAIA.

7. Given this, we understand the SAHRC to be using the term “champion” in the following way: to “fight and argue”⁴ (promote and advocate) for the realisation of the right of access to information. This begs, however, a further question: does the usage of the notion of champion extend to include “enforcement” in the legal sense? This is crucial to our recommendations below.

SAHRC’s Multi-functionality

8. Collating the duties and responsibilities of the SAHRC pursuant to PAIA, as well as to the Constitution and to its foundational Act, it is clear that the SAHRC has been tasked with an extensive, multi-functional set of responsibilities:

- Promotion
- Monitoring
- Education
- Review (re performance and compliance)
- Advisory (re policy or legal reform)
- Mediation/Conciliation
- Advisory (re citizen inquiry or complaint)
- Citizen support/litigation.

9. Much of this constitutes “championing”, as the SAHRC interprets it. So, to that extent, there is no issue: the SAHRC *has to* champion PAIA as part of its general set of statutory and constitutional duties.

10. As can be seen from the comparative review of promotion/enforcement mechanisms contained in the appendix, there are different models, some of which encompass some or most of the above functions, some which have a far narrower brief, and some that go beyond into the realm of legal enforcement.

⁴ See Oxford English Dictionary meaning.

Promotion and Enforcement

11. Like SAHA in its paper, we also distinguish between a *promotion* function and an *enforcement* function. Within the enforcement function, we distinguish further between an adjudicatory body with *order powers* and one with *recommendation powers*. Having stated that the SAHRC has clear promotion functions, and that because the right to access to information is contained within the bill of rights, the SAHRC **must** properly retain a promotional function. Thus, the main question is whether SAHRC should also be responsible for the enforcement function.

Starting Principles

12. In answering this question we must state our starting principles. We believe that such a body should offer an enforcement remedy that is:

- accessible
- affordable
- specialist, and
- speedy.

13. PAIA's greatest weakness, in our submission, is the absence of such an enforcement remedy. In this regard, and with relevance for the current inquiry, it is worth recalling the original intentions of the Task Team appointed by Deputy President Thabo Mbeki in 1994, and chaired by his legal advisor, Advocate Mojanku Gumbi. Their white paper recommended specialist enforcement body – an Open Democracy Court – supported by a specialist promotion body, the Open Democracy Commission. These recommendations attracted controversy, and were contested by the then Chief Justice⁵. Advocate Gumbi complained about Chief Justice Corbett's intervention and stated in the following months that she regarded the information courts as essential: "Expedition is critical in our view, the normal system does not function well. I know those courts."⁶ Then Justice Minister Dullah Omar was quoted as saying "We could adopt procedures

⁵ *Parliamentary Whip*, 30 August 1996.

which give magistrates courts certain roles, or else have particular Supreme Court judges specialise in information matters”⁷. As a compromise, the notion of the information court was retained in name, but not as a separate specialist court or division, but as a special procedure. Another member of the Task Group, Advocate Empie Van Schoor said that the motion procedure that was included in the modified version of the bill that went to Cabinet in Spring 1996 was one of the quickest of the current normal court procedures; she had included provisions to allow the court to deviate from the normal rules in order to expedite matters⁸.

14. Although after a long process of consultation and deliberation the Cabinet apparently decided against the original ideas of the Task Group, or the proposed compromise, parliament was mindful of the potentially negative implications of creating a system without an intermediary enforcement mechanism. Hence, the ad hoc committee on the Open Democracy Bill resolved when finalising the bill, to recommend that the Executive conduct an appropriate enquiry into the feasibility of creating an alternative adjudicatory body:

“The Department of Justice and Constitutional Development is requested to investigate the feasibility of establishing an enforcement mechanism like the Information Commissioner and to report back to the Committee within 12 months after the Bill has been put into operation.”⁹

15. At present, requesters whose request for information is denied or ignored must go the High Court. The creation of a designated Magistrates’ Courts to hear PAIA cases may improve the accessibility of the remedy, but it is unlikely to make a substantial difference in terms of cost, speed and specialism. The Magistrates Court remains a lawyer and law-centric forum, a far cry from the administrative tribunal systems that operate in other jurisdictions. We believe that it is important to be realistic about the operation of the

⁶ *Parliamentary Whip*, 21 February 1997.

⁷ *Parliamentary Whip*, 13 September 1996.

⁸ *Parliamentary Whip*, 21 February 1997.

⁹ Announcements, Tablings and Committee Reports, No. 4 – 2000, 24 January 2000, paragraph 7, page 19.

Magistrates Court and not think that the delegated courts will offer the sort of remedy that a right of this importance deserves. According to the recent “Justice Footprint”,¹⁰ an analysis of the functioning of the South African court system, some courts spend three hours a day on criminal cases. District courts in the Witwatersrand local division sit for at the most four hours and thirty-five minutes per day. The rest of the time is spent on legal research, signing domestic violence interdicts, and civil cases. This does not represent an affordable, accessible, specialist, and speedy legal remedy.

16. PAIA is unusual in requiring disappointed requesters to have to go to court without first having the opportunity to resolve their complaint at some intermediary mid-point. All of the best comparators¹¹ with South Africa have created in their new access to information regimes, some sort of mechanism between the executive and judiciary to enforce the right and provide a legal remedy to citizen requesters. In addition to the developing/middle income countries that have an intermediary body, the more established/higher income countries have one either at federal level (Canada, Japan, UK, Sweden) or at State level (USA, Australia). Japan¹², Thailand¹³ and Jamaica¹⁴ have information tribunals rather than Information Commissioners or Commissions.
17. Hence, our major point of departure is that part of the overall “championing” need (as more widely defined in the context of this research), is the need for an effective enforcement mechanism that offers a speedy, specialist, affordable and accessible remedy.

Arguments against SAHRC

¹⁰ Sunday Times 8 June 2003

¹¹ By “best comparators” we mean those countries that meet the following criteria: (a) the law was passed in recent years; (b) the law meets most international standards, such as the ARTICLE 19 best practice list; (c) the law was advocated by some sort of civil society campaign (and not merely imposed by government without consultation); (d) the country is either a developing economy or middle income. This list thus includes: Thailand, Mexico, Peru, Jamaica, Hungary.

¹² Information Disclosure Review Board, created by its 1999 Information Disclosure Act.

¹³ Information Disclosure Board, created by its 1997 Access to Information Act.

¹⁴ Information Tribunal, created by its 2002 Access to Information Act.

18. There are three main arguments against the SAHRC playing such a role. First, the danger of over-stretch, and related questions of resources. Second, an issue of potential confusion or conflict of roles. Third, strategic and political factors that arise.
19. On the question of over-stretch, even with the best will in the world, is it reasonable to believe that the Commission will be provided with sufficient resources to extend its functions so significantly? As can be seen from the comparative study, the cost of dealing with cases from an enforcement/remedy point of view represents significant though not excessive state expense. Can one be confident that the SAHRC will receive the necessary extra funding to permit it to fulfil this extra role?
20. The Commission has thus far been directed in terms of sec 85 of PAIA that ‘any expenditure in connection with the performance of the Human Right’s Commission’s functions in terms of this Act [PAIA] must be defrayed from moneys appropriated by Parliament to that Commission for that purpose.’ The Commission has thus far not been able to operationalise this section and no additional money has been specifically allocated by Parliament to the Commission to carry out its mandate. Some funds have been allocated by the Department of Justice, but the SAHRC have consistently argued this as inadequate for the carrying out of their present mandate.
21. The specific brief of the Commission to train the information officers is contained in section 83 (e), one of many of the tasks it is required to perform in terms of the Act. A measure of the reach of the Commission may be seen in the survey conducted by ODAC in 2001 on the awareness of public officials of the Act – nearly 50% of all officials in the three spheres of government did not know of the Act’s existence.
22. The Commission is also tasked with promoting timely and effective dissemination of accurate information by public bodies about their activities – in a recent snap survey conducted by ODAC, 60% of public officials failed to respond to requests for information in terms of the Act.

23. Given the need for a ‘champion’ of this legislation, we believe that the SAHRC should focus on securing sufficient resources so that it can undertake its legislated promotional and educational functions to an acceptable level is a first priority.

24. Second, in any case, would it not present a confusion or contradiction of roles? Can the Commission be expected to, for example, advise and represent a disgruntled citizen, as it is required to, yet also act in an adjudicatory fashion to determine appeals brought before it. At the moment, the SAHRC is required to assist a citizen who claims that his or her rights have been denied or denuded. This may involve taking the matter up with the relevant agency. If the agency then decides against the requester, citing an exemption, and the requester appeals to the SAHRC as the enforcement adjudicatory body, how awkward would this be for the commission? Is it being asked to be player and referee in the same match?

25. The SAHRC’s role is to assist people who wish to exercise their rights in terms of the Act, and we see this role as one in which they actively seek to use their good offices to achieve the desired outcome of the Act – an open and transparent government. This is not, we submit, a neutral mediatory role, involving a weighing of the claim against the exemption, but actively seeking to achieve the disclosure of the information. This role, once undertaken, places the SAHRC as working in the interests of one of the two parties in the matter, and ‘*nemo iudex in sua causa*’ would dictate against the Commission then acting as judge in the matter. This conflict might be avoided with the establishment of a separate division in the Commission, separately staffed with experts in the field, but the perception of bias would be difficult to avoid. The costs of such an option would probably equal the establishment of a separate review structure, without the benefits of independence from the Commission’s champion role. A parallel would be the case around social economic rights – the Commissions position is to champion their implementation, not act as a neutral party.

26. In addition, a third issue arises, which derives from the socio-political context of South Africa. The democratic institutions of the country are less than a decade old. They are still in process of establishing themselves, in terms of credibility, efficacy and

independence. Each of the Chapter Nine institutions faces significant challenges in relation to their resources and role. It is unrealistic to deny or ignore the political character of this process. The institutions have to balance competing demands; political judgments have to be made and political relationships maintained or forged. Adding adjudicatory responsibilities in the realm of what is inevitably going to be a politically sensitive Right, may have the effect of limiting or constraining the strategic choices for the SAHRC. Will the SAHRC be able to delicately position itself with the same strategic opportunities if it is compelled to deliver strong, independent orders against government? A hard question must be asked: does the socio-political milieu permit us to say, with confidence, that the advisory body model will be effective, especially given the record and experience so far of the Public Protector and the SAHRC? At present, the SAHRC has room to maneuver in relation to cases that arise. Any adjudicatory responsibility, whether with order or recommendation power, will compel the SAHRC to not only enter the ring, but offer a clear opinion. Is that in the best interests of the SAHRC? Is it in the best interests of the Constitution?

27. The Commission would have to accept political responsibility for the difficult decisions that it would have to make. Err in favour of the executive, and the overturning on appeal would bring the Commission into disrepute – find in favour of the applicant and the Commission’s political role might well become more charged. There is no guarantee that a separate review body could avoid this, but if its competence is framed as technical, the charge of bias would be more difficult to level. In Canada, the experienced federal Information Commissioner, John Reid, has reported on the “backlash” against his attempts to improve compliance and that the Treasury was “starving” his office or the resources needed to their work. He further claimed that his staff had received threats that their career prospects would be jeopardized if the Office of the Information Commissioner did not change its course¹⁵. This experience supports the argument that it may well be better for all major stakeholders to separate the promotion and enforcement functions.

¹⁵ Annual Report of Canadian Information Commissioner, 2000, cited in Roberts, A. *New Strategies for Enforcement of the Access to Information Act*. 27 *Queen’s Law Journal* 647 at page 658.

28. The answer to at least some of these questions may well turn on whether the enforcement power is a recommendation or an order power. South Africa's situation is probably unique. While there are plenty of Information Commission models that combine promotion functions with adjudicatory functions – both order and recommendations powers (see below) – none have the same responsibilities to assist and support individual citizens in the way the SAHRC does (with the possible exception of Mexico, which has a brand-new law with a body – the Institute for Access to Public Information – that only came into being a month ago).
29. It is conceivable that the SAHRC could extend its powers to include formal recommendation powers (compared with its current 'informal' powers of advice and persuasive comment), the argument is far weaker and problematic in relation to order powers – for reasons of resource as well as conflicting roles. Interestingly, a recent review of the operation of the Queensland State freedom of information law in Australia conducted by its enforcement body reached as its main conclusion the need for a new monitoring/promotion function.¹⁶ The 2001 report recommends the creation of an FOI monitoring entity designed to promote public awareness of the FOI, and provide advice and assistance to applicants, and also to monitor public agencies' compliance. In other words, it is traveling towards the same destination as South Africa, but from a different direction. Having first created an enforcement body, Queensland now realises that it needs, as a separate entity, a promotion body.

Issue Two: The feasibility of the establishment of an Office of Information Commissioner in either a Chapter Nine body or as a separate independent entity

30. We have gone some way towards answering this question already:

¹⁶ Report of the Queensland Legal, Constitutional and Administrative Review Committee, December 2001. See also Hodgson D., and Snell, R. Freedom of Information in Queensland – A Preliminary analysis of the Report of the Queensland Legal, Constitutional and Review Committee.

- We submit that the SAHRC's constitutional and statutory mandate means that it is compelled to continue to fulfil the promotion function and is well placed to do so.
- We submit further that the case against the SAHRC fulfilling the enforcement function is very strong, less so if the adjudicatory function is limited to one with recommendation not order powers, which would be more consistent with its current role and modus operandi, though not without very substantial dangers and problems, especially around the conflict/duality of roles.

31. Because SAHA are putting the case for such a function being incorporated within the SAHRC we will not pursue that model. What though of the other Chapter Nine institutions? Could the Public Protector play this role? On the face of it, adding such an advisory role would be consistent with its current mandate. However, PAIA applies horizontally to the private sector, which goes well beyond the Public Protector's current constitutional remit, which is essentially to oversee maladministration in the public sector. There is no other Chapter 9 body that could incorporate the role of enforcement of PAIA.

32. What then is the best institutional design of the enforcement body? As can be seen from the Appendix, there are a number of different variations on the theme; different Information Commissioners have different powers and functions; there are a number of distinct models. The principal modalities are shaped around the following key points:

- 32.1 The power and functions of the body; from where does it obtain its legal authority?
- 32.2 The role of the body: does it have recommendation or order powers?
- 32.3 Institutional home: are they separate and independent, or attached to another institution? (And, if so, do they have responsibilities in another area, such as data protection/privacy?)

Comparative Analysis: What can we learn from the international experience?¹⁷

¹⁷ This section should be read with reference also to Appendix One, which offers a matrix of a number of international models.

“Experience with FOI legislation in Australia at both Commonwealth and State levels, as well as in overseas jurisdictions such as New Zealand and Canada, strongly indicates that an external review body is a crucial design feature”¹⁸.

33. The Western Australian model exemplifies a successful external review system, according to Australian expert and freedom of information scholar, Professor Rick Snell. The Commissioner’s office is adequately staffed and resourced and performs multiple functions, including having powers to oversee the conciliation and mediation of complaints. “This approach”, argues Snell, “particularly the preference for conciliation and mediation in the resolution of disputes, embodies a fundamental transformation in the application of FOI legislation, namely, the objective to facilitate greater and effective access to information rather than channeling a disputed request towards an adversarial contest whose outcomes are uncertain and often costly”¹⁹. It is important to note, however, that this approach is backed up by express order powers.

34. The Western Australia model is very similar to that which has been more recently adopted by Ireland. There the Office of Information Commissioner has established a strong reputation in a short period of existence, pursuing its promotion and monitoring tasks diligently and energetically, backed by order powers. Since the establishment of the Office, it has issued impressive annual reports and has actively engaged in public debate, as can be seen by reading the various speeches and papers prepared by the Office²⁰. The Western Australian Commissioner has a small staff of eight and a budget of (last year), AUS\$1,3m; the Office of Information Commissioner, Ireland, has a much larger staff of 22 (budget not available). The Connecticut Freedom of Information Commissioner, which is often put forward as best model from the US, and has both promotional and order-power enforcement responsibilities, has a large staff (16 staff including five executive members) and a large budget (US\$1,19m for FY 2003). In this comparison it is

¹⁸ Snell, R. and Tyson, N. *Back to the Drawing Board: Preliminary musings on redesigning Australian Freedom of Information*. Freedom of Information Review: Number 85, February 2000, page 4.

¹⁹ Snell & Tyson, *ibid*.

important to bear in mind that these costs represent the cost of a combined promotional and enforcement duty. The Connecticut Commission, for example, devotes many resources to training and public education, which in our submission would continue to be the responsibility of the SAHRC.

35. In his 2002 Annual Report, the Irish Information Commissioner spoke of the cost-benefit analysis involved:

“Freedom of Information does carry an administrative cost; this is in terms of staff resources expended in dealing with requests (including searching for and copying records), with internal reviews and in dealing with my own office. There are also the opportunity costs that arise, that is, what public bodies might have done had they not to spend time on FOI matters. In fairness, public bodies rarely complain about the costs of FOI as they have come to recognise the important role it plays in supporting democratic government. At the same time, it would be wrong to overstate the extent of the burden created by FOI.”

36. Any consideration of the issue of cost needs to compare the costs of running an enforcement body, as an intermediary entity, with the costs of having to go directly to court. In the most recent South African case of a government agency having to defend a PAIA refusal (in the ICC case), the Auditor-General has spent between R250,000-R300,000 so far²¹, even though a good deal of the preparatory legal work was conducted by the Auditor-General’s own internal legal department (not included in the costs’ estimate).

37. The Canadian Federal Information Commissioner is often put forward as the best model of the alternative model – recommendation powers only, and with some promotional responsibilities²². Driving the determination to limit the Canadian Federal Information

²⁰ See www.oic.gov.ie

²¹ Interview with the Auditor-General, Shauket Fakie, 14 July 2003.

²² Although his explicit legal responsibilities for promotion are limited, the current Commissioner, John Reid, indicates that he sees his role as a “championing” one within and without of government (interview with ODAC Executive Director, Richard Calland, October 2002, Ottawa).

Commissioner to recommendation powers only was a desire to create a body that was informal and non-adversarial. Over time, however, the nature of an enforcement body, even when vested with more limited powers, may become increasingly formalistic, contentious, and slow. This then negates the argument for withholding order powers. Moreover, in Canada it is hypothesized, and has been shown in the provinces where this is the model, that the capacity to order the agency to release information actually encourages more mediation, and discourages delay tactics. Finally, as the Information Commissioner stated in its 2000 report, without some power to order or sanction, it finds itself in the “unprecedented” position of “seeking ways to “encourage” public officials to obey mandatory legal obligations.”²³

38. The Canadian Federal Information Commission’s work is heavily dependent on “goodwill” and on good working relationships between his office and the various agencies and their information officers. This is characteristic of recommendation-only enforcement systems. South Africa must decide whether its institutional and socio-political environment is suitable for such a system. Professor Alasdair Roberts, the leading Canadian scholar on access to information law and policy, argues in a recent article on enforcement, that “...the recent deterioration in working relationships is more accurately regarded as the consequence of an Act that makes the Commissioner too weak, rather than too strong. The Commissioner lacks the power to resolve complaints authoritatively, and is therefore obliged to rely on subpoenas and public advocacy to promote compliance with the law.”²⁴ Roberts concludes that “Better tools – such as an order power, a capacity to undertake performance monitoring or a power to require production of compliance plans – might channel conflict and allow more constructive engagement between the OIC and federal organizations”.²⁵

39. In 2002, Canada completed a major review of its twenty-year old Access to Information Act. The Access to Information Review Task Force conducted a comprehensive

²³ *Office of the Information Commissioner: Annual Reports 2000-2001*, Chapter 3, Blueprint for Reform, p. 61

²⁴ Roberts, A. *New Strategies for Enforcement of the Access to Information Act*. 27 *Queen’s Law Journal* 647 at 682.

²⁵ Roberts A. *ibid* at page 683.

assessment of the efficacy of the law. Because of problems with the recommendation-only Federal model, the Task Force considered a number of different models and had this to say:

“Giving the Commissioner power to make binding recommendations may well provide more incentive to departments to respect a negotiated undertaking to respond within a certain time-frame. His binding recommendations would be reviewable by the Federal Court...In Canada, this is already the model in place in British Columbia, Alberta, Ontario and Quebec. Internationally, it is the model in place in, New Zealand and Ireland, and it will be in the UK, when its Act comes into force. Our research indicates that in Canadian provinces where a full order-making power is in place, requesters and government officials consider it to be very successful...Under the full order-making model, the requester receives a more immediate determination. It is more rules-based and less ad hoc than the ombudsman model. Commissioners with order-making powers are tribunals. They issue public decisions, with supporting reasons. This results in a consistent body of jurisprudence that assists both institutions and requesters in determining how the Act should be interpreted and applied...The order-making model is also compatible with a high proportion of mediated solutions, as is demonstrated by the experience of the provinces.”²⁶

40. What emerges from the comparative review is certain criteria or parameters that should guide the design of an enforcement body. These include:

- The need for specialism: Access to Information is a complex area legally and in terms of policy considerations, often intersecting with difficult questions of power and its use and abuse; it is also a growing area of jurisprudence, matching the growing weight that access to information is a fundamental human right with profound importance for accountability, good governance and socio-economic justice.

²⁶ *Access to Information: Making it Work for Canadians*. Access to Information Review Task Force report, 2002, at pages 112-113.

- Political Weight and Credibility: any enforcement body needs sufficient political and institutional weight, and independence, if it is to be effective. This is important in terms of the manner of appointment and its own accountability (ideally, to parliament rather than the executive). In societies with developed institutions and relatively open political cultures and long-established records of independence and expertise, recommendation-only powers may be sufficient to work effectively, as in the case of the Federal Information Commissioner in Canada or the Parliamentary Ombud in Sweden. In other societies, with developing political culture and inexperienced institutions, the comparative experience suggests that an order power is an essential ingredient.
- Time limit responsibilities: the enforcement body must itself have strict duties in relation to the time in which it must respond and resolve cases brought before it.
- Procedural Powers: for the enforcement body to be effective, it must have sufficient ancillary powers, such as the power to see the document in question, to subpoena where necessary and to sanction non-compliance. In addition, it must have power to enforce its own orders, in the case of an order-power body.
- Cost-benefit considerations: clearly any enforcement body needs to be adequately resourced, with separate and specific general budget allocation, if it is to provide the specialist and speedy service required. But, the international evidence suggests that such capacity can be constructed at relatively modest cost, especially when compared to the costs of court litigation. This is an important potential benefit for both the holders of information and requesters.

Privacy/Data Protection Enforcement: Looking Ahead

41. In addition, we submit that it is important to look ahead to the passing of a data protection law. We do not know of any modern data protection law that does not create some of sort of enforcement mechanism or body.

42. The Minister of Justice has mandated a committee of the South African Law Commission to study and make recommendations around the issue of Privacy and Data Protection Legislation. This follows the Report of the Ad Hoc Joint Committee on the Open Democracy Bill dated the 24th January 2000. This report points out that the Open Democracy Bill deals with access to personal information in the public and private sector to the extent that it includes provisions regarding mandatory protection of the privacy of third parties. The report goes on to say “ The bill only deals with the aspect of access to private information of an individual, be it access by that individual or another person, and does not regulate other aspects of the right to privacy, such as the correction of and control over personal information and so forth”.²⁷ The committee goes on to request the Minister for Justice and Constitutional Development to introduce privacy and data protection legislation, after thorough research of the matter, as soon as reasonably possible.

43. A project committee of the Law Commission has been established and will be considering the implementation of data protection legislation. A key international instrument in data protection is the International European Union Data Protection Directive. This provides that data may only be transferred to third countries such as South Africa, if they provide an adequate level of data protection. One of the components of adequate data protection is, as far of the Directive is concerned, the creation of a right for every person to a remedy for breach of their rights prior to the referral to a judicial authority.

44. This has resulted in the creation of data protection agencies in all European Union Countries. There are three models of regulation:

- Separate legislation and enforcement of FOI and data protection, as in Sweden, France, US, EU, Canada;

²⁷ Report of the Ad Hoc Joint Committee on the Open Democracy Bill [B67-98] (national Assembly – sec 75), 24 January 2000, as published in the Announcements, Tablings and Committee Reports of Parliament 24/01/2000

- Separate legislation and combined enforcement, as in UK, many Canadian Provinces, and four German states;
- Combined legislative and enforcement agency, as in Hungary, Quebec, Switzerland.

45. All the models involve a data protection structure. If South Africa follows international best practice, we will also in all likelihood need a data protection agency to implement such legislation. Cost considerations would suggest that a practical solution would be to combine such an agency with an information commission. This would also allow development of a consistent jurisprudence on access and privacy, avoiding the inter-agency conflicts that mark Sweden.

Issue Three: Whether there would be a need for an amendment to PAIA, the SAHRC Act and/or the Constitution in this regard.

46. An independent body, whether an Office of Information Commissioner, or something similar, would require founding legislation, either through a new Act or by amendment of PAIA – which would probably be more convenient and expeditious. It would not, we submit, require amendment of the Constitution as it would not constitute a Chapter Nine institution; nor, is it a judicial body, rather an administrative body.

Conclusion

47. The SAHRC must continue to champion the right to access to information, both as a right contained in the bill of rights and as enshrined in PAIA. It must focus on excelling in its promotion role, as set out in its founding legislation and in PAIA itself. It has a crucial role to play – supporting requesters, monitoring the system, promoting the right, advocating a cultural change. The case against the SAHRC adding an enforcement function is strong. There are practical and pragmatic as well as theoretical and philosophical reasons for believing that the interests of the Commission as well as PAIA and the right to access information would best be served by establishing an independent office of the information commissioner with order powers. Such an office could devote

itself to providing a specialist, affordable, accessible and speedy remedy to requesters whose request for a record under PAIA had been refused or ignored. This approach would be in line with contemporary international best practice, where the trend and the most effective model appears to be to have a separate, independent enforcement body with order powers.

48. The question of resources is always an important issue. Our research suggests that an independent, separate information commissioner may well represent very good value for money. A cost-benefit analysis is likely to indicate that there will be financial benefits for the holders of information as well as requesters. As with the other new institutions created since 1994, the issue of how a budget is determined and allocated is likely to arise. One model that should be explored, we suggest, is that the cost of processing and deciding cases be borne by the agency against whom the appeal or complaint is brought. This will have the effect of dispersing the cost across government agencies and, second, provide an obvious incentive towards the public policy goal that PAIA embodies: greater openness.
49. We would be pleased to conduct further research or to develop the ideas contained within this paper as the debate unfolds, and look forward to putting our own position forwards to the SAHRC and to the parliamentary committee when it conducts its own review of PAIA later this year.

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