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SOUTH AFRICA'S RIGHT TO KNOW?

REVIEWING THE POWER OF PAIA AS AN AGENT FOR CHANGE

26 September 2012

Thank you to the South African History Archive for the invitation to participate in this forum. I have been asked to consider legislative challenges inherent in the Promotion of Access to Information Act 2 of 2000 (PAIA). Since the Act's inception I have sought to rely on its provisions to protect various constitutional rights and to promote transparent and accountable governance primarily in the public sector while employed at PSAM and ODAC.

During my brief presentation I shall consider two interrelated aspects of the Act, namely its implementation by the State and efforts to improve access to justice via the magistrate's court.

In 2006 *Benita Robert's* emphasized the following with regard to PAIA's implementation:

> The mere existence of a legislative framework regulating aspects such as the nature of the right, administrative matters, legitimate limitations and enforcement mechanisms does not mean that the right of access to information will automatically be fulfilled in the way that the drafters of the Act envisaged. The success of the access to information regime will be determined by the manner in which the POAIA is implemented in practice.

While her observations may appear self-evident, eleven years after the Act was introduced, there have been a few highlights, but for the most part the period has been characterized by weak implementation of and adherence to the Act's provisions. To regular users of PAIA the saying that the "the law is not worth the paper it is written on" often springs to mind given the high prevalence of mute refusals in response to formal requests made in accordance with the Act. It is widely acknowledged that the levels of PAIA compliance within government are poor.[1] There are at least four reasons for this: Firstly, inadequate resourcing of the legislative mandate within line departments so that section 14 manuals are not produced and staff do not receive proper training, then there remain weaknesses in the record keeping of government departments who are often unable to respond properly to PAIA requests; thirdly

[1] See the 11 February 2011 minutes of the briefing by the Department of Justice and Constitutional Development to the Portfolio Committee on Justice and Constitutional Development available at http://www.pmg.org.za/report/20110209-department-justice-constitutional-development-revised-key-performance

there are often insufficient deputy information officers to assist with processing requests; and finally and probably most importantly, a lack of political will and leadership by senior management and political office bearers. We can certainly learn from overseas jurisdictions, and in this regard the Australian Law Reform Commission noted that:

> *The success of an access to information regime is to a large extent determined by the way in which it is regarded by the government of the day. If the government and individual ministers support the objects of the legislation through firm action and provide the necessary political leadership, there is a better chance that officials will prioritise information-related matters and actively pursue the ideal of a transparent public administration.*[2]

Unfortunately in the South African context the lead proponents with regard to access to information have tended to be members of the judiciary. Court rulings together with sustained efforts by civil society groups, alongside the work of the Human Rights Commission have sought to improve the realisation of the rights conferred upon us all by s.32 of the Constitution and PAIA.

Despite the laudable intentions of the Act, its weak implementation has resulted in a range of unintended consequences, especially following court rulings against the State which have highlighted the implementation problems. While the Act's preamble emphasizes that it seeks to 'foster a culture of transparency and accountability within public and private bodies' the relatively few PAIA cases which have been brought to court by well-resourced requesters seeking to assert their rights have at times resulted in knee-jerk and arguably undemocratic responses by government. An example of this is documented in the minutes of Parliament's Justice and Constitutional Development Portfolio Committee meeting which took place on 8 February 2011. Here it was alleged that Director-General's, had issued directives to Departments to adopt a practice that would result in mute refusals, in the hope that most requesters would not have the means to haul them before court.[3]

This kind of defensive and at times deliberately obstructive attitude towards the Act's objectives has at times been weakly defended by officials and politicians who have sought to place reliance on

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[2] Cited by B.Roberts in *Prerequisites for the successful implementation of the promotion of access to Information Act 2 of 2000* as published in the Journal of Public Administration Special Issue 1, Vol 41 dated July 2006 at pages 231 – 240.

[3] http://www.pmg.org.za/report/20110209-department-justice-constitutional-development-revised-key-performance

confidentiality clauses purportedly required by the outdated Protection of Information Act 84 of 1982. Thankfully this outdated and unconstitutional Act will be repealed given the wide-ranging proposals contained in the current draft of the Protection of State Information Bill which is before the NCOP, and regrettably contains certain provisions that the President should rightly refer to the Constitutional Court before it is enacted.

Of course the predominance of mute refusals together with the current dispute mechanism process required by PAIA, have been at forefront of calls for the introduction of an Information Regulator. As an upcoming panelist Mukelani Dimba will be discussing the role of the Information Regulator, I shall leave my comments here, pausing only to remark that if the planned Information Regulator is not adequately resourced over the long term by the Minister of Justice and the National Treasury, its office will face many of the same challenges that the Human Rights Commission and other Chapter 9 institutions have and continue to endure as a result of their constitutional obligations being constrained by the funding decisions of the Executive. At present R50 million has been set aside for the creation of the Information Regulator – in my view this is far too little and will seriously impact upon its rollout.

In concluding my observations with regard to the Act's weak implementation I readily concede that its provisions are not easily understood and I can appreciate the position adopted by critiques who feel that the Act is "*extremely rigid, cumbersome and difficult to implement*".[4] Indeed given weak capacity and understanding of the Act's provisions by many public and private bodies it is not surprising that such entities are often unable to comply with section 19 of the Act which requires that they actively assist requesters to establish what exactly they are seeking before making a decision to refuse access in accordance with section 18 of the Act. This state of affairs has arguably contributed to the growing trend amongst communities to embark upon service delivery protests, rather than employ other less direct forms of engagement, which may include seeking information and explanations from say a local municipality using the Act's framework.

I shall now turn to an interrelated problem which concerns section 91A of the Act which was introduced to try and improve a requester's access to justice by allowing certain magistrate's to hear access to information applications. Presently a requester who has been refused access to information by a private body, or whose request has been declined on appeal to the relevant authority of a public body may approach a High Court or Magistrate's Court for relief. In most instances the requester does not have

[4] F. Cloete and C. Auriacombe, *Counter-productive impact of freedom of access to information-related legislation on good governance outcomes in South Africa*, Vol .3 of the 2008 TSAR at pages 449 – 463.

the resources to approach a High Court. Should he/she be in a position to have the matter heard by a magistrate, section 91A requires that the magistrate hearing the matter be designated and have received training on the Act before they are able to consider such matters.

The Act also requires the DG of Justice and Constitutional Development to compile and maintain a list of all magistrates who have received PAIA training and who are designated as such.

Section 91A(5) (introduced in February 2003) requires the Chief Justice, in consultation with the Judicial Service Commission and the Magistrates Commission, to develop the content of training courses with a view to building a dedicated and experienced pool of trained and specialized presiding officers for purposes of presiding in such court proceedings.

Section 91A(6) goes further to require that the Chief Justice must, in consultation with the JSC, Magistrates Commission and the Minister of Justice, implement the training courses envisaged by section 91A(5). Despite these pertinent provisions, members of the PAIA Civil Society Network (many of whom are active users of PAIA) have observed how there has been little or no PAIA cases emanating from magistrates courts.

According Ananda Louw of the South African Law Reform Commission, significant problems exist surrounding implementation of section 91A. When she appeared before Parliament in October 2011 she explained that the section "*was very difficult to implement, because eight different entities, in different sections of government, would have to work together to ensure that magistrates were trained, and that was one of the major problems. Some training had initially been done by Justice College, but it was later realised that this training did not comply with the PAIA provisions, and the training was then supposed to be taken over by the South African Judicial Education Institute. However, the Magistrates' Commission reported that this body was not funded and could do nothing, and Justice College had not resumed the training. Budget constraints also hindered the training. This did not appear to be treated as a priority.*[5]

In order to try and improve access to magistrates' courts and establish what progress has been made with regard to the implementation of section 91A, I, acting on behalf of ODAC, wrote to the Chief Justice. I also submitted a formal PAIA request to the Department of Justice and Constitutional Development, seeking a copy of the list of magistrates kept by the DG's office as required by section 91A(4).

[5] Drawn from: http://www.pmg.org.za/report/20111010-protection-personal-information-bill-further-deliberations

The Chief Justice's Office replied in February 2012 advising that 137 Magistrate's had received training on PAIA and that prior to the 2002 PAIA Amendment Act which came into effect on 15 January 2003, it was not a requirement that such training be approved by the Chief Justice as is currently the case. ODAC were assured by the Chief Justice's office that "there are plans to revise the curriculum during the next financial year in order to ensure compliance with the amendment of the PAIA" and that "training will be promoted as a priority once the new curriculum has been duly approved by the SAJEI Council".

The Department of Justice and Constitutional Development responded to the formal request in an unfortunate manner in that they tried to transfer the request to the Magistrate's Commission despite the DG's office being explicitly required by the statute to compile and keep a list of trained and designated magistrates. When this was pointed out to the Department, their response was to advise that the list does not exist and that they were *"in the process of addressing the issues such as the non-existence of a list of magistrates designated to deal with PAIA matters and the training of magistrates with the Chief Justice, the Judicial Service Commission and Magistrates Commission via the Minister of Justice and Constitutional Development*"

It therefore appears that since 15 January 2003 there has not been any training of magistrates in accordance with the requirements of the Act and that this may explain in part why there has not been significant uptake of such cases before these courts.

To conclude, it's critical that civil society increase and sustain the pressure upon the State to ensure more meaningful implementation of the Act. The likely creation of an Information Regulator will hopefully assist in this regard but it is by no means a solution to the many challenges that we face in advancing access to information.