IMPLEMENTING THE FREEDOM OF INFORMATION LEGISLATION IN SOUTH AFRICA

By Mukelani Dimba[1]

1. Greeting

Before I start my talk today I wish to thank SAHA for inviting me, as a representative of the Open Democracy Advice Centre (ODAC), to take part in this dialogue.

4. Implementation challenges as a result of weaknesses and strengths in advocacy.

The Gold Standard

Speaking at the Second Open Democracy Review conference in South Africa almost ten years ago, Andrew Puddephatt (former Executive Director of Article 19) commended the impressive constitutional gains that had been made in South Africa since the fall of Apartheid. According to Puddephatt' the South African ATI law was an international gold standard.

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Indeed a number of laws that have emerged following PAIA, particularly those from developing countries, such as those in Uganda, Antigua & Barbuda (private sector application), among others, have been fashioned On PAIA which then was recognized as an international gold standard. The recent global ranking complied by the Canadian Centre for Law & Democracy ranks PAIA number 13 out of a list of 90 laws.

Puddephatt's Warning

Puddephatt's accolades for PAIA were accompanied by a warning against allowing PAIA to falter on the bedrock of implementation. Some developments or the lack there of, on the access to information regime in South Africa are showing that Puddephatt was correct in his warning.

The 7 Deadly Sins and lessons to be learned

Some of the concerns regarding implementation of the South African RTI law – which came into force in 2001- included what I call "the 7 Deadly Failures in Implementation". These are issues that will have to be addressed either through law and policy reform or through change in practice.

In addressing these major concerns we may have to draw

These major concerns are, namely:

1. Poor designation of deputy information officers

2. Failure to compile PAIA manuals
3. Failure to submit reports to the SAHRC
4. Lack of an alternative dispute resolution mechanism
5. Failure to respond to requests for information
6. Failure to provide access to disadvantaged requestors (formalistic manner of requests and access)
7. Weak sanctions and penalties for non-compliance.

a. Information officials

The PAIA is very clear on the designation of information officials in public bodies and private bodies. **Section 1** of the Act says that the information officer of a public body must be the director general, the head, the executive director, the municipal manager or the chief executive officer. According to **section 17**, each public body has to appoint sufficient deputy information officers to make its records as accessible as possible, and in terms of **section 75** of the Act an internal appeal must be made through the information officer to the 'designated authority', usually the political head of that institution.

In a survey done a year after the law came into force we found that:

> *"When asked how many deputy information officers have been appointed and their ranks or positions, 23% of the total respondents*

confirmed that deputy information officers had been appointed in their organisation (reflecting 73% of those respondents who are implementing the PAIA). However, these responses are problematic in the context of the responses to the questions regarding the ranks and positions of these officials. Almost half the respondents identified 'the deputy information officer' as the statutorily deemed information officer, as set out in section 1 of the PAIA. It is not clear whether these responses indicated a misunderstanding of the different roles of information officers and deputy information officers, or whether no deputies have been appointed in these cases.

When asked who is responsible for dealing with internal appeals, 9% of the total respondents were able to answer, which represents 30% of those implementing the act. Half the respondents correctly identified the person responsible for internal appeals, while the balance identified legal, labour or human resource department personnel as being responsible.

The appointment of a deputy information officer in a public body would indicate the first step in the implementation process, as this officer would primarily be responsible for providing the statutorily required positive assistance to requesters. The statistics in this regard indicate that implementation is lean, patchy and inconsistent. The distinct lack of clarity regarding the identity of either the information officer or the deputy information officer, and around the necessity of appointing deputy information officers, indicates that even those

bodies that are aware of the PAIA are unaware of their own obligations under the act.

Regarding the queries on internal appeals, the indication that these are handled by labour, legal or human resource staff suggests that the question may have been misunderstood as an internal grievance procedure appeal, rather than an internal appeal in terms of the PAIA. This may indicate a lack of knowledge of the procedures laid down by the law, but it also suggests there may simply not have been any internal appeals against refusals for access to records. In either event, this finding suggests that Departments having internal appeals procedures may not be appropriate."

There is no evidence that the situation has changed much since 2002 because the report on the 2007 Access to Information Index reflected on the fact that the designation of deputy information officers is still haphazard and "not structured" with a number of Deputy Information Officers who received requests for information from the Index researchers claiming that they were not aware that they were Deputy Information Officers. This remains the case in 2011.

b. ***PAIA Manuals and automatic availability of records***

In terms of **section 14 of PAIA**, public bodies are obliged to publish a manual[2] by September 2002 to provide, amongst other things, their contact details, the records they holds and how to access these records. In addition, in terms of **section 15** public bodies must report annually to the SAHRC and the Ministry of Justice regarding the categories of records that it makes automatically available, and how to access these records.

In a survey done one year after the Act came into force we found that only 9% of respondents had prepared, or even begun to prepare, the required manuals. When asked why work on the manual had not begun, most gave lack of time as the reason. Three respondents said the reason was insufficient staff and one gave the reason as lack of resources. Significantly, two respondents said they were 'unaware that it had to be done'.

Regulations pertaining to the compilation of manuals were promulgated in February 2002 the manuals became due in September 2002. The SAHRC ran information sessions in nine provinces on PAIA and the reporting requirements to the SAHRC. In August of 2002 regulations were passed delaying the deadline for manuals to be published in terms of the Act.

In 2003 the February deadline for the publication of manuals was again extended. The National Intelligence Agency (NIA) and the South African Secret Service (SASS) were exempted from producing such manuals for five

[2] In other jurisdictions manuals are referred to as publication schemes. Manual is a document that contains background information of the institution, the records it holds, the contact details for information officials as well as description of the process of submitting a request.

(5) years. (In the meantime, the NIA embarked on a review of the Act, in relation to the Protection of Information Act.)

By 2005 it had become quite apparent that the issue of submission of manuals was becoming a thing of controversy as the more than 800 public institutions and over a million institutions scrambled to comply with the requirement to submit manuals to the SAHRC. The SAHRC's own information technology infrastructure soon bulked under the pressure of the thousands of manuals that were flooding in. Next in line to have their systems tested by the compliance requirements of PAIA was the Government Printers Office that had to publish these manuals in the Government Gazette, this enterprise was soon to be a financial burden on the limited resources of the Government Printers as some of these manuals ran into hundreds of pages depending on the nature and size of the institution. For example it cost the Government Printers USD 40,000.00 to publish the manual of the South African Police Service.

It was inevitable that in 2005 the Minister of Justice would promulgate regulations exempting small and medium private bodies from having to compile manuals and from having to submit them to the SAHRC. The exemption is in place until August 2011.

POPIA: Removes the onerous publication requirements for manual. No longer need to have them published in the government Gazzette or submitted to the IR.

c. Reporting on the usage of PAIA

The South African Human Rights Commission (SAHRC) assumes primary responsibility for oversight of PAIA, particularly reporting on implementation and usage of the Act.

In terms **section 84** of PAIA the SAHRC is required to publish an annual report to the National Assembly on PAIA and the implementation of the Act. This report is based on reports from public institutions that SAHRC is also responsible for collecting as required by **Section 32** of the Act. These reports are then used to compile and publish statistics on the use of the Act annually.

SAHRC has expressed concern over the manner in which public bodies have treated their obligations to submit reports detailing their implementation of PAIA in each annual reporting period. In one of its annual reports the Commission noted that:

> *"During the previous reporting period (2002 – 2003), the (PAIA) Unit experienced difficulties in obtaining the section 32 reports from information officers. The Commission placed reminders on the Commission's website but there was no significant response. At a cost of R80,000.00 the Commission placed advertisements in four leading newspapers reminding information officers to submit the reports. As a last resort, the Commission wrote to the Office of the President, the Speaker of Parliament and the Minister of Justice. The Minister of*

Justice acknowledged receipt of the letter and subsequently wrote to Director Generals of various government departments requesting them to submit their reports. Following the Minister's letter, the Commission received reports from some public bodies, but not all responded."[3]

These difficulties have persisted. In the 2007 reporting period, SAHRC received about 20 reports by the original due date, from more than 800 public bodies. Following an email to all information officers, 13 additional reports were received. Further intervention by the Minister of Justice, the Office of the President and other prominent public offices succeeded in bringing the number of reports received up to 46, 16 fewer reports than from the previous reporting period.

a. Dispute Resolution Mechanism

In the absence of the necessary rules, applicants for information held by public bodies are restricted in their right of appeal to the same body that refused access, followed by appeal to the High Court. Requestors who are aggrieved about the decision on an Information Officer in the private sector do not have an option to appeal internally within the private body but have to directly approach the High Court for relief.

In both these instances this is an extremely expensive and lengthy process that is out of the reach of the vast majority of South Africans. In addition,

[3] SAHRC Annual Report, April 2003 – March 2004, p 101

ODAC's monitoring exercise, described in greater detail below, suggests that the internal appeal process currently mandated by the Act very seldom results in a changed outcome, indicating the value of an independent appeals mechanism.

The South African History Archive (SAHA), an NGO engaged in access to information work, has commented on this obstacle:

> *"The single most cited complaint about the implementation of PAIA is the lack of a cheap, accessible, quick, effective and authoritative mechanism for resolving dispute under the Act. What is sought is a forum which can be accessed after refusal of a request by a public or private body or rejection of internal appeal against refusal of a request by a public body, but before resort to court action."*[4]

The creation of easily accessible dispute resolutions mechanisms such as Ombuds, Tribunals or Information Commissioners in matters involving public & corporate governance, human rights and socio-economic justice brings dispute resolution within easier reach of the ordinary citizen. These mechanisms are less expensive than the normal justice system, flexible and have quick processes to ensure that those in positions of authority perform their administrative functions in accordance with accepted and fair rules and procedures.

[4] Esarbica Journal, Vol. 22 (2003), p 51.

These institutions are easy to access, cheap to use, and offer an opportunity to settle disputes in an amicable way. In this way, parties to a dispute become joint owners of the end product.

While these institutions are not a courts of law, their procedures and processes must be simple, understandable and accessible to all.

International trends: 65 of the 90 countries have information commissioners.

Regional trends: The Liberian ATI provides for an Information Commissioner which is the final administrative arbiter on issues related to requests for information.

POPIA: Introduces the Information Regulator that has enforcement powers over PAIA. On instances of refusal or denial of access to information the IR has the power to issue Recommendation and Enforcement notices setting aside the decision to refuse or deny access to information.

b. Mute Refusals

One of the greatest obstacles in South Africa to the right of Access to Information is the problem of "mute refusals," the monitoring term for requests for information that do not receive a positive or negative response during the appropriate time frame. In a subsequent comparative study

involving fourteen (14) countries, 62% or nearly two thirds of requests submitted received no response[5], with occasional responses after the prescribed period of 30 days. The latest installment of the Access To Information Index (2009) put mute refusals at 60% of all requests submitted to public bodies. It should be noted that the period of 30 days is considerably longer than the average response period allowed by most Access to Information legislation internationally. A longer timeframe for requests is therefore not appropriate or justified.

The problem of mute refusals has been documented by ODAC in its own work and in previous studies.
The Department of Justice itself took 8 months to respond to a request for its legally-required information manual. There is also evidence that responses to requests for information are politically influenced, with requesters perceived as being capable of criticizing the government more likely to have their requests refused or ignored[6].

This non-compliance appears to be due to, in part a lack of adequate training in the Act and in part a lack of guidance on how to handle requests in terms of the Act. However, the lack of a rapid, inexpensive, authoritative and effective dispute resolution mechanism has prevented the development of a useful body of practice around interpretation of the Act. This in turn has hindered the establishment of good practice and higher standards of responsiveness.

[5] Transparency & Silence: A Survey of Access to Information Laws and Practices in Fourteen Countries, the Open Society Institute, New York, 2006 http://www.justiceinitiative.org/db/resource2/fs/?file_id=17488
[6] *Ibid*

ODAC's experience with the Act and supporting other users has been that government departments are severely under-informed about the Act and its provisions. There is insufficient leadership from prominent figures in positions of authority to encourage compliance and support for the Act. In the absence of leadership and training, most departments remain extremely reluctant to disclose information, partly out of concern for the reaction of their superiors.

a. ***Disadvantaged Requesters***

In 2003 ODAC conducted a monitoring study of implementation of PAIA, during which ODAC monitored 100 information requests submitted by a diverse group of requesters. Of these requests, only 23% resulted in disclosure of the desired information, while just over half of the requests received no response from the relevant public body. These results are analyzed in greater detail below.

The study identified major challenges to implementation both in submitting requests and in getting responses to requests for information. Under the Act, information officers are required to assist individuals who are unable to make written requests by translating an oral request into written on the

prescribed form, providing a copy to the requestor. However ODAC's study found that 70% of oral requests could not be submitted, while a further 10% were given oral refusals. In particular, blind and illiterate requesters experienced severe obstacles in making requests. Though some departments, including the Premier of the Eastern Cape and the Department of the Defence displayed some commitment to assisting disadvantaged requesters, the study concluded that "PAIA is inaccessible for the illiterate."

Regional standards:

Access to a Record - Limiting the right to information (RTI) only to recorded information draws from traditional way of drafting access to information laws. Again, newer and more progressive laws such as the Indian central Right-To-Information Act and the Nigerian Freedom of Information Act (2011) provides for requestors to be able to make requests for information in any form. A similar formulation is to be found in the draft model law for AU members states wherein information is defined as "any information regardless of form or medium."

6. The Protection of State Information Act

"The government is keen to update the Apartheid-era Protection of Information Act of 1982. We want to bring it within our democratic and constitutional legal framework".

CAN ANYONE GUESS FROM WHERE THE STATEMENT WAS MADE?

IT'S NOT SA, IT'S NAMIBIA!!!!!

The Protection of State Information Act has had a massive impact on the profile of South Africa as a leader on ATI laws regionally. While in the past SA was spoken off as an exemplar of best practice in opening up, now it's regarded as an example of how you close down.

Regional standards: The ACHPR Declaration onPrinciples of Freedom of Expression calls on governments to amend or repeal secrecy laws to brining them into compliance with FOI principles in the Declaration.

The ATI law in Ethiopia states that: (15/2) "The mere fact that a record has been administratively classified as confidential does not, of itself, override the right of access established by this Proclamation unless it falls within the scope of an exception set out in this Act.

7. CONCLUSION

In conclusion it is important to recall what international RTI experts have said about the South African RTI law, that it is an internationally recognized gold standard RTI law. However we are warned that South Africa should not be allowed to falter when it comes to implementation of this good law.

Tackling the implementation problems that I have mentioned is a way of responding to this call.

The law interventions I have mentioned above will ensure that once again South Africa becomes the exemplar of best practice in legislative development and practice on ATI.

Thank you.