

LEGISLATIVE CHALLENGES INHERENT IN PAIA

Tammy O'Connor – SAHA dialogue forum – 26 September 2012

- Formalised nature of the request process
 - Access to forms
 - Unavailability of forms in many of the official languages
 - Illiteracy levels
 - While PAIA allows for such individuals to make requests orally the lack of knowledge of PAIA within information holders mean that this is often unknown and not complied with
 - Must be submitted to relevant official – lack of compliance with s. 14 manual requirement - identifying the relevant officer is very challenging and requires significant human and tangible resources – compounded by high staff turnover and regular changes to contact details
 - High level designation of officials and failure to designate DIOs
- Application of grounds for appeal
 - Drafting of many of the grounds for refusal is not sufficiently certain and many are subject to either a narrow or broad interpretation.
 - Mandatory or discretionary
 - DIOs fear incorrectly given out information they are statutorily obliged to keep confidential
 - Strict or conditional
 - E.g. trade secrets
 - E.g. Financial, commercial, scientific or technical information - would be likely to cause harm to the commercial or financial interests of the third party'
 - Many mandatory grounds are conditional but public bodies fail to establish or turn their minds to whether the condition is present, instead denying refusal only on the basis of the existence of the type of information. Evident in cases such as:
 - Applying s. 37 - *Transnet Limited v SA Metal Machinery (SCA)* - *The parties cannot circumvent the terms of PAIA by resorting to a confidentiality clause. There must be a risk that if the third party sued for a breach of confidentiality*

the information holder would be at risk of an adverse finding as to material breach entitling cancellation of the agreement or an award of damages.

- Applying s. 37 - *SA Airlink v Mpumalanga Tourism and Parks Agency (G)* - Mere inclusion of a confidentiality clause in an agreement cannot shield the agreement from disclosure under PAIA. MTPA had failed to explain why the breach of confidentiality could result in a successful claim for damages and therefore the ground for refusal did not apply
- Applying s. 36 - *Transnet Limited and another v SA Metal Machinery (SCA)* - It was not reasonably probable that the release of rates charged by the third party in 2001 could put the third party at a disadvantage in competition for the award of a new contract in 2005
- Reasons – President v M&G – CC – bald assertion or reciting provisions of the Act is not enough. However many continue to fail to do so. But also Act expressly prohibits DIOs from referring to the exempt material in the response.
- Technical and legal nature of exemptions and often DIOs are not lawyers.
- Weighing the interests of requesters and third parties – must act as an ‘impartial steward’ (*Biowatch v Genetic Resources*). But many express difficulty in doing so.
- The public interest override:
 - Two-pronged test means that there are only limited circumstances in which it will apply
 - Would reveal a substantial contravention of, or failure to comply with, the law; or
 - Would reveal an imminent and serious public safety or environmental risk; and
 - Public interest in the disclosure clearly outweighs the harm contemplated in the ground for refusal
 - Courts have found that ‘would’ - Must show on the ‘balance of probabilities’ – *Centre for Social Accountability and The Secretary of Parliament*.

- Difficulty of requester establishing it when they haven't see the document.
- While has been applied by the court in some cases those have generally been high profile nature:
 - *AVUSA Publishing Eastern Cape v Qoboshiyane NO – Nelson Mandela Bay Municipality - Report regarding maladministration*
 - *Centre for Social Accountability v The Secretary of Parliament – travel vouchers - records revealing names of parliamentarians alleged to have abused the parliamentary travel voucher system*
- Internal appeal
 - Limited to category 1 public bodies
 - Rarely results in a reversal of decision
 - PAIA CSN stats
 - I/A lodged in respect of 25 deemed refusal in first instances – in 18 of those cases again failed to respond
 - Where refused in first instance I/A lodged in 3 instances – failed to respond in all 3 instances.
- Lack of an independent, swift mechanism for appeal with enforcement powers – an information commissioner
 - The failure by information holders to respond to requests and internal appeals highlights the desperate need for an independent regulator that would provide civil society with an independent, inexpensive and swift review process.
 - Jurisprudence is limited but most has been decided in favour of requester.
 - PAIA CSN stats – 53% of requests resulted in refusal either by way of ground of act or deemed refusal.
 - Lack of case law therefore indicates a lack of resources on the part of requesters to pursue litigation, rather than the absence of disputes regarding the right.