PAIA Civil Society Network Shadow Report: 2010

The Promotion of Access to Information Act (PAIA) was passed in 2000. The National PAIA Civil Society Network was established in February 2009 in order to bring civil society together in an effort to improve the implementation and usage of PAIA in South Africa. This report offers a summary of civil society's experience of using the Act during the 12 months commencing August 2009. The report also discusses the role of civil society in campaigning against the Protection of Information Bill which, in its current form, threatens the principles of open governance on which PAIA is founded and which is protected by the Constitution.

Membership

Since its inception in February 2009 the PAIA CSN has grown substantially to encompass a broad membership that reflects the diverse range of persons in the community who are using PAIA to promote human rights in South Africa. The expanding membership also reflects the increasingly high profile nature of the work done by the Network and the growing success of the Network.

In 2009, the membership of the network was expanded to include Khulumani Support Group which had partnered South African History Archive in piloting the training of community human rights groups in the use of PAIA. Tshwaranang Legal Advocacy Centre became the second organisation to serve as a partner in developing training methodologies for community-based groups. Both organisations became formal members of the network towards the end of 2009. The Network's membership has now expanded further to include Black Sash, the Centre for Environmental Rights, Media Monitoring Africa, the South African Economic Rights Institute, the South African Litigation Centre and the Vaal Environmental Justice Alliance.

Civil Society's PAIA experience

The experience of civil society in using PAIA during the past 12 months is discussed in further detail in the statistics and case studies section of the report below. It is clear that there is still a considerable journey ahead before PAIA is used to its fullest extent. Only 35 per cent of the requests analysed resulted in a full release of information to the applicant and of those cases where a full release was achieved, a significant portion of releases were achieved only as a result of an internal appeal.

Responsiveness also remains a problem as only one fifth of the requests analysed received a response in the 30 day timeframe provided under the Act. Despite the lack of timely responses, there was only one instance in which the requestee sought a formal extension of time in accordance with section 26 of the Act.

Of those requests which were denied, almost three quarters were denied on the basis that the documents could not be found or did not exist. This is indicative of a number of problems, including the likely inability of information and deputy information officers to conduct a thorough and diligent search as is their duty in terms of PAIA. It also points toward the already known problem of effective records management. There seems to be a general problem regarding the keeping of full and accurate records by public bodies and their appropriate management of these records by these bodies.

Of the requests that proceeded to internal appeal, access to the requested documentation was granted in almost half (5 out of 12) of the cases. This also indicates that information and deputy information officers seem not to be able to correctly apply the exemptions under the Act. This raises the question of whether these officers have been empowered to make appropriate decisions regarding the release of information under the Act.

The Network is not implying that the process of providing information is being deliberately obstructed by the information and deputy information officers. It does seem, however, that the training and resourcing of information officers may be inadequate and that this impacts on the effectiveness of records management, with consequent difficulties in achieving the access goals set out in PAIA.

Finally, the Network notes that PAIA is being used more often to obtain personal information the government holds concerning the individual applicant or a relative thereof, rather than for the purposes of enabling citizens to advocate for their rights. It is the goal of the Network to broaden the use of PAIA to serve as a means of practising the claiming of rights, especially socioeconomic rights. To that end, several Network partners have been involved in training community groups in the use of PAIA as a human rights advocacy tool. This is a thrust that will be supported by the use of the training DVD that has been produced by SAHA as a tool to assist communities to implement PAIA for human rights advocacy purposes.

For many communities, the implementation of PAIA is thwarted by a lack of access to faxes and other communication tools. Despite these major obstacles, many communities are using their right to access information towards making local government more accountable.

Statistics and Case Studies

Information concerning PAIA requests made in the period from 1 August 2009 to 30 August 2010 was collected by the Centre for Environmental Rights, the Open Democracy Advice Centre, the Public Service Accountability Monitor and the South African History Archives. During that period those bodies submitted a total of 111 requests under PAIA.

Private Bodies

Of the 87 requests submitted, only 2 requests were submitted to private bodies; Business Connexions Services (BSC) and Oceana Pty Ltd. To date responses to both requests are pending.

The request by SAHA to BSC demonstrates the limited understanding and awareness of PAIA within the private sector. The request was sent to BSC on 12 May 2010. On 20 May a legal advisor from the company indicated that they intended to transfer the request to another company, a client of their organisation. However, no details of the transferee company were provided. Once transferred, the legal officer who had been assigned to be in charge of the request in fact called SAHA directly to ask what PAIA was and what it obliged her to do. Subsequent correspondence indicated that BSC had privacy concerns in relation to the transfer, in response to which SAHA directed BSC to its obligations under the Act, including reference to the relevant sections. Despite subsequent emails seeking BSC's response to the request, it remains outstanding.

The limited understanding and unwillingness to engage with PAIA in the private sector is also demonstrated by the experiences of the Centre for Environmental Rights (CER). CER has engaged in a long battle with a private body who insists that a 'strong link' between the right that a person is seeking to protect by accessing requested information and the information itself is established before information will be released, despite PAIA not including any such requirement. The Endangered Wildlife Trust indicated to CER that they encountered the same problem when requesting information from a private mining company. Furthermore, the mining company demanded that the Endangered Wildlife Trust pay the request fee in respect of each document requested, rather than in relation to each request for information.

That the use of PAIA in relation to private bodies remains extremely low supports the proposition that the use of PAIA as an advocacy tool is relatively rare. In an attempt to address this issue, members of the PAIA CSN have recently begun training community-based organisations in the environmental sector in the use of PAIA. As the problems generated from irresponsible environmental behaviour will generally result from private sector industry, it is envisaged that the use of PAIA by this sector will significantly increase the use of PAIA in relation to private bodies. In fact, several private requests have already been initiated by Groundwork, the Vaal Environmental Justice Alliance and the South Durban Community Environmental Alliance. These applications will be covered in the 2011 Civil Society Report.

It appears that the lack of an internal appeal mechanism for private requests is truly crippling. The requestees lack any knowledge of the Act and will fail to abide by time periods, yet there is no recourse outside of court. This highlights the recurring need for an independent Information Commissioner or tribunal.

Public Bodies

The remaining 109 requests were submitted to public bodies. Specifically, 25 per cent were submitted to the National Archive, 11 per cent were submitted to the Department of Justice and Constitutional Development and the remaining 64 per cent were spread across 48 different public bodies.

The large number of requests submitted to the National Archive indicates that, in large part, people are using PAIA to access personal information or information of deceased relatives, indicating that the use of PAIA as an advocacy tool is infrequent, because the majority of requests made to the National Archives are to obtain the personal Security Legislation Directorate files of individuals.

Of the significant number of requests submitted to the Department of Justice and Constitutional Development most related to the Truth and Reconciliation Commission. This indicates that a more generalised release policy regarding the Truth and Reconciliation Commission would be appropriate to avoid the need for such requests to be dealt with through the formal PAIA process.

Timing

Only 21 per cent of the requests submitted were responded to within the 30 day time line specified in the Act. While this is a significant increase from the 12.7 per cent responded to

within 30 days from January 2009 to July 2009, it is clear that under-resourcing, poor communication and poor records management remains an issue within public and private bodies.

Under-resourcing is particularly demonstrated in requests made to the National Archive. Despite the large number of requests submitted to that body almost all requests resulted in a full release of documents, demonstrating a sound understanding of the Act and a fair and just application of the exemptions. However, very few of these requests were responded to within the 30 day time period, indicating a possible under-resourcing of the institution and possibly also problems inherent in the current MISS standards that empower only the original classifier to declassify documents.

The under-utilisation by public and private bodies of the right to request an extension of time to respond to a request in the circumstances specified in section 26 of the Act indicates a lack of training and understanding of the operation of the Act within those bodies. Indeed, despite the relevant body failing to respond to the request within the 30 day time period in 88 of the 111 requests submitted, an extension was requested by a body on only one occasion.

Release of documents

Of the 111 requests submitted, 32 per cent remain outstanding, 34 per cent of requests were met by a full release and the remaining 34 per cent were refused (including by virtue of non-response; a 'deemed refusal').

Unfortunately the percentage of requests resulting in a full release of documents has remained stagnant since the January 2009 to July 2009 period (in which 34.5 per cent of requests resulted in a full release of documents). This indicates that implementation of the Act has not improved amongst information and deputy information officers generally and highlights a possible lack of training.

The small percentage of documents released in the time period specified under the Act, the need to submit an internal appeal to achieve the full release in 13 per cent of the cases in which the documents were released, and the large number of requests that remain outstanding demonstrate that issues of resourcing and records management remain an obstacle to fully achieving the constitutional objectives of open governance.

The issue of inadequate records management is demonstrated in the number of requests which were declined on the basis that the documents could not be found or do not exist in terms of section 23 of the Act. Of those instances in which access to documents was refused by a public body, section 23 of the Act was provided as the basis for that refusal in 69 per cent of cases. This is despite there being evidence in many cases that the documents are, or have previously been, in existence and that the documents should sit with the relevant body in accordance with the allocation of government responsibility. For example, on 3 August 2009 SAHA submitted a request to the Department of Justice and Constitutional Development for 'copies of all documentation that the Truth and Reconciliation Commission provided to the Department of Justice and Constitutional Development in relation to the sabotage of an aircraft in which former United Nations Secretary General, Dag Hammarskjold, was travelling. On 23 September 2009 the Department responded stating that the Department had taken reasonable steps to find the requested records but they could

not be found. However, in notes from a media briefing by Archbishop Desmond Tutu produced 19 August 1998 and available on the South African Government Information website, Archbishop Tutu acknowledged the existence of the documents and that the Truth and Reconciliation Commission had reported the issue to Mr Dullah Omar, the then Minister of Justice, for further investigation. Therefore, despite the inability of the Department of Justice to locate the requested documentation, it is evident that at some point in time documents of that nature had in fact existed and were likely to be in the possession of the Department of Justice. However, some eleven years later the documents could not be located.

Court

Four court applications were made within the 12 month period however, none of those applications or applications made in the preceding period were finally determined in court (though at least one case was settled outside of court after papers were filed). The low number of court applications is indicative of a significant problem: court, as a final arena of appeal, is too expensive and protracted to be an effective form of recourse for civil society organisations. This, when read alongside the lack of an internal appeal mechanism for private bodies mentioned earlier, highlights the need for an independent regulator (such as an Information Commissioner) that would serve as an accessible form of recourse for civil society, citizens and information officers to resolve a disputed request and also contribute to creating a more thorough body of precedent relating to access to information.

New developments in freedom of information - Right 2 Know

The Protection of Information Bill is currently before Parliament. Civil Society, including many members of the PAIA CSN, has been active in voicing concerns regarding the Bill. On August 2010 the Right to Know campaign was launched in Cape Town. This was followed by a launch in Johannesburg on 15 September 2010. A week of advocacy action followed and a campaign is presently being planned for October 2011.

The key concerns in relation to the Protection of Information Bill are that:

1. The Bill includes several broad definitions. For instance, the term ‘national interest’ includes all matters relating to the advancement of the public good and all matters relating to the protection and preservation of all things maintained for the public by the State. Clearly this clause could be used to include all information and thus to withhold information from those requesting it. Even definitions relating to intelligence and counter-intelligence activities are interpreted more broadly than is the norm in current South African law. This, when coupled with the unacceptably low thresholds for classification which may lead to documents being classified on the basis of a hypothetical and speculative harm, means that the Bill, in effect, shields most of the work of the intelligence services beyond what would normally be deemed necessary or reasonable.

2. The lack of specific narrow and clear definitions in the draft bill is very problematic because the release of protected information would be deemed a criminal offence and would incur serious penalties. The penalties for those who release a document marked as classified, or for those who hold a document marked as classified, or for those who commit other infringements in terms of this bill, are severe. The sanction for those who improperly classify a document are less severe. The bill lacks a public

interest clause that would provide for the release of information if it were in the public interest. This means that, even if a person releases or holds classified documents that would serve the greater public interest, they are still at risk of imprisonment or fine. This is a clear threat to whistleblowers who are already inadequately protected by current laws. Given the absence of any additional protection for whistelblowers, there would be little incentive for people to disclose information about corruption – or even about fraudulent classifications. Journalists will be particularly vulnerable to the penalties that relate to holding classified information and their rights could be severely restricted by the provisions of this bill.

3. Classification powers are given to a broad range of persons under the Bill. With a plethora of decision-makers being required to make broadly empowered decisions, the Bill does not require the decision-makers to justify their decisions to anyone. The question becomes: how will senior officials hold their juniors accountable on classification issues?

4. The bill fails to provide for an independent oversight body. Appeals in regard to classifications are therefore decided by persons within the Department of State Security. The Minister of State Security becomes the main arbiter of the Bill in its entirety. This counters citizens' right to access information that are enshrined in the Constitution and in PAIA which both create a presumption toward openness in all matters.

5. The Bill permits the classification of commercial material held by the State, including commercial information that belongs to private companies. Allowing the classification of such material would seem to allow possible suppression of information evidencing fraud or other improprieties which may be linked to commercial transactions. Whilst there is a clear public interest in exposing such information it is difficult to imagine how such commercial information could be of a nature that is crucial for national security and therefore justifiable in the context of the Bill.

From a strictly legal perspective the passing of the Protection of Information Bill should not affect the release of documents under PAIA because section 5 of PAIA provides that the provisions of PAIA apply to the exclusion of any other legislation which prohibits the disclosure of a record. However, in practice the criminal sanctions which attach to the incorrect release of documents are likely to cause information officers and deputy information officers to act with greater caution when releasing documents and to err on the side of secrecy, rather than openness, despite the obligation in PAIA to behave in the opposite manner. The adoption of such an approach by information and deputy information officers is likely to lead to an increase in the number of internal appeals lodged before successfully obtaining access to information. If this is the case, PAIA will become less accessible to the public at large in light of the often prohibitive complexities associated with lodging a successful internal appeal.

Conclusion

The right of citizens to hold government and private industry accountable for their actions is an essential part of any well-functioning democracy. PAIA is a vital tool in exercising that right in South Africa. While it is evident that the use and application of PAIA has improved as compared with previous years, the work of the Network and of civil society in general is critical to secure the right to information as provided for in the Constitution.