

PROMOTION OF ACCESS TO  
INFORMATION CIVIL SOCIETY NETWORK  
**2015 SHADOW REPORT**

## TABLE OF CONTENTS

- 1. Introduction to the PAIA Civil Society Network and the Shadow Report**
- 2. Legal framework governing access to information in South Africa**
  - 2.1. Access to information as a right
  - 2.2. Why is this right important?
  - 2.3. Legislation giving effect to the information right
  - 2.4. State of access to information as a yardstick of democracy
- 3. PAIA request statistics**
  - 3.1. Requests submitted to public bodies
  - 3.2. Requests submitted to private bodies
  - 3.3. Emergent patterns of non-compliant responses
- 4. Case studies and litigation**
  - 4.1. Seeking bail protocols from the Department of Correctional Services
  - 4.2. Request for Lonmin's Atmospheric Emission Licence
  - 4.3. The 'Spy-Tape' saga: amaBhungane's PAIA requests to the Department of Justice & Constitutional Development and the State Security Agency
  - 4.4. SAHA requests Farlam Commission report
  - 4.5. The trials of moving office
  - 4.6. Landmark SCA judgment ordering ArcelorMittal South Africa to release environmental information
- 5. Auditing PAIA Manual Compliance**
- 6. Establishment of the Information Regulator**
- 7. Recommendations**

Appendix: Members of the PAIA CSN

*This report was prepared by Marianna Belalba-Barreto, Khuraisha Patel and Lisa Chamberlain from the Centre for Applied Legal Studies on behalf of the PAIA Civil Society Network.*

## **1. INTRODUCTION TO THE PAIA CIVIL SOCIETY NETWORK AND THE SHADOW REPORT**

The Promotion of Access to Information Act Civil Society Network (PAIA CSN) was established in 2009 and is an umbrella body of organisations with the common objective of advancing the realisation of access to information rights for ordinary people in South Africa. The primary objectives of the PAIA CSN are to work together to strengthen and advance the effective use and implementation of the Promotion of Access to Information Act 2 of 2000 (PAIA):

- as a mechanism to enable the constitutional right to access information;
- in order to build and promote a culture of openness, accountability and transparency; and
- as a basis to realise other rights.

In the past year, the work of the PAIA CSN has gained significant traction – this is evidenced by the number of new organisations that have joined the Network, namely: the Wits Justice Project, the Right2Know Campaign, Equal Education Law Centre and the amaBhungane Centre for Investigative Journalism.

On an annual basis, the PAIA CSN produces a report which is designed to complement the work done by the South African Human Rights Commission on the administration of PAIA. The intention behind the Shadow Report is to provide a clear picture of civil society’s experience in using PAIA. This Report reflects the experiences of the Network’s member organisations in using PAIA during the 12-month period from 1 August 2014 – 31 July 2015.

## **2. LEGAL FRAMEWORK GOVERNING ACCESS TO INFORMATION IN SOUTH AFRICA**

### **2.1. Access to information as a right**

In South Africa, information is a right not a privilege. Section 32 of the Constitution enshrines this right and provides that:

‘Everyone has the right of access to

(a) any information held by the state; and

(b) any information that is held by another person and that is required for the exercise or protection of any rights.’

The South African right of access to information is noteworthy both because it includes a right to information held by the private sector and because it is available to ‘everyone’ (i.e. not just South African citizens). There is nevertheless a difference between the right enforceable against a

public body and that which can be exercised against the private sector. If the information you seek is in private hands, then you must establish which other right (other than the right of access to information) you seek to exercise or protect. However, no such requirement exists when requesting information from the state.

## 2.2. Why is this right important?

The right of access to information is important for several reasons. A simple reason is to satisfy the need to know what is happening both internally in the public sector as well as in the private sector in order to hold those in power to account. More often, however, information is sought to further another action. For example, a community might use their right of access to information to obtain information from their local municipality about the municipality's plans for water service provision in the area, and what budget the municipality has set aside to make water supply a lived reality. The community can then use that information to further the realisation of rights such as their right to participate in decision-making,<sup>1</sup> their right of access to adequate water,<sup>2</sup> their right to dignity,<sup>3</sup> and their right to an environment that is not harmful to their health and well-being.<sup>4</sup> The right of access to information can therefore be understood as an 'enabling' right in the sense that it enables the realisation of other rights.

Of course, the existence of an enabling right like access to information does not guarantee that the end sought (for example the provision of water) will materialise, but it does change the relationship between the parties by empowering the rights holder to demand certain things from the duty bearer.<sup>5</sup> This use of the right of access to information to disrupt asymmetries of power is evident in the fact that many of the requests and much of the litigation discussed in this report play out in the mining sector – a sector notorious for imbalances in power. Understood in this way, access to information is also a prerequisite for democracy, open debate and accountability.

---

<sup>1</sup> Section 33 of the Constitution of the Republic of South Africa, 1996.

<sup>2</sup> Section 27(1)(b) of the Constitution.

<sup>3</sup> Section 10 of the Constitution.

<sup>4</sup> Section 24 of the Constitution.

<sup>5</sup> K Bentley & R Calland 'Access to information and socio-economic rights: A theory of change in practice' in M Langford, B Cousins, J Dugard & T Madlingozi (eds) *Socio-Economic rights in South Africa: Symbols or substance?* (2014) 347.

### 2.3. Legislation giving effect to the information right

In South Africa, the right of access to information is detailed in the Promotion of Access to Information Act 2 of 2000 (PAIA). PAIA is the result of the directive in section 32(2) of the Constitution that requires national legislation to be enacted to give effect to the right of access to information. PAIA does not replace the constitutional right, but because it 'gives effect to' it, parties must now assert the right via PAIA.<sup>6</sup>

To assert this right and access required information, PAIA enunciates the mechanisms and processes to be followed in order to access information. Amongst other provisions, PAIA provides for a request process,<sup>7</sup> assigns responsibility for the handling of PAIA requests through the appointment of Information Officers,<sup>8</sup> sets time limits for requesting access to information and responding to requests<sup>9</sup> and mandates the development of a manual by public and in which they must explain the functions of and index of records held by it.<sup>10</sup>

### 2.4. State of access to information as a yardstick of democracy

If realising enabling rights like access to information is a precondition to the realisation of other rights and to democracy more generally, then an assessment of the state of access to information also serves as a yardstick by which to measure our progress 21 years into the democratic project. Unfortunately, the assessment contained in this report indicates that South Africa is far from realising the vision of transparency as a default position. Instead, the very legal mechanisms designed to give effect to the right of access to information are often administered in a way which undermines the right. The statistical analysis in section three of this report more comprehensively describes the challenges surrounding the administration of PAIA.

## 3. PAIA REQUEST STATISTICS

Information relating to PAIA requests made during the period 1 August 2014 – 31 July 2015 was collected by the Centre for Applied Legal Studies (CALS), the Centre for Environmental Rights (CER), Corruption Watch, the South African History Archive (SAHA), the Right2Know Campaign

---

<sup>6</sup> Cora Hoexter, *The New Constitutional & Administrative Law vol II* (2001) 57.

<sup>7</sup> PAIA secs 11, 18, 50 & 53.

<sup>8</sup> PAIA, sec 17.

<sup>9</sup> PAIA, chapter 3.

<sup>10</sup> PAIA, sec 14. See also sec 51 in respect of private bodies.

(R2K), amaBhungane and the Public Service Accountability Monitor (PSAM). During that period, these organisations submitted a total of 169 requests under PAIA.<sup>11</sup>

### **3.1. Requests submitted to public bodies**

Of the 169 requests submitted, 157 were submitted to a total of 57 public bodies. In comparison to the 2013 – 2014 reporting period, these figures have decreased both in terms of the number of requests submitted as well as the number of public bodies to whom requests were made. Much like the previous reporting period, national departments attracted the greatest number of PAIA requests from the Network while limited requests were submitted to provincial and local government departments.

#### **3.1.1. Compliance with time frames**

Concerningly, only 26% of public bodies responded to PAIA requests within the statutory time frame. Keeping with the trends identified in the 2013 – 2014 report, it can be seen that public bodies are still increasingly relying on the extension of time provisions in PAIA for response to a PAIA request – 32% of PAIA requests submitted were met with an extension notification. Under-resourcing, lack of adequate training on PAIA processes and poor communication within public bodies remain obstacles to the timeous disclosure of information under PAIA.

#### **3.1.2. Outcomes of initial PAIA requests**

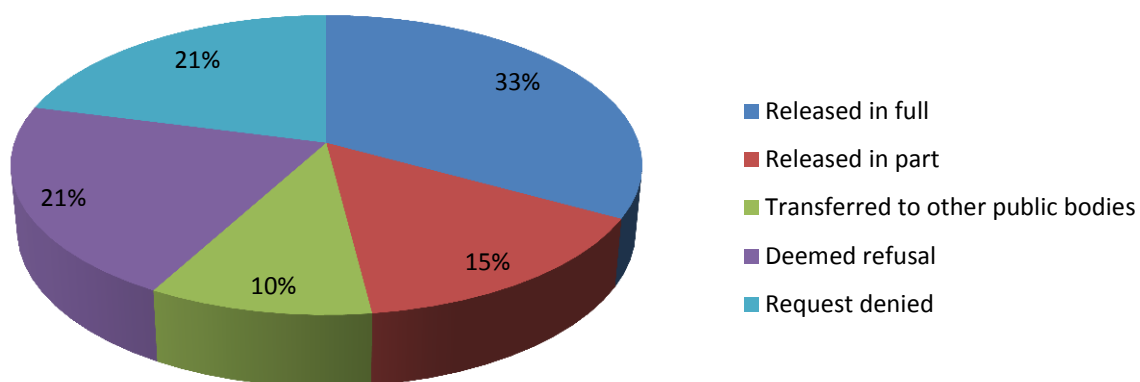
Of those requests to which a response was received or deemed to have been received by the requesting organisations,<sup>12</sup> 52 (33%) were decisions to release requested records in full, 23 (15%) were decisions to release in part and 15 (10%) were decisions to transfer the request to other public bodies. Again depicting lack of will to timeously engage with and address PAIA requests, 33 (21%) of the 157 requests were deemed to have been refused as the body failed to respond within the required statutory period. A further 33 (21%) of PAIA requests were expressly denied. These statistics illustrate that South Africa has not yet achieved a prevalent culture of transparency amongst public bodies, as large numbers of requests are ignored or denied.

---

<sup>11</sup> Of the 169 requests, 147 (87%) requests were submitted through the PAIA Tracker by CALS, CER and SAHA and can be viewed at [http://foip.saha.org.za/request\\_tracker/search](http://foip.saha.org.za/request_tracker/search). The remaining 22 (13%) requests were submitted manually by Corruption Watch, R2K and amaBhungane.

<sup>12</sup> Requests 'deemed to have been received' refer to instances where requestees have failed to respond to the PAIA request within the prescribed time frame. Their failure to respond constitutes a decision in terms of PAIA, i.e. a deemed refusal; see further section 27 of PAIA.

## Outcome of initial PAIA requests to public bodies



### 3.1.3. Grounds of refusal

Chapter four of PAIA details various grounds on which access to a requested record may be refused. Such grounds include refusal on the basis of protecting commercial or confidential information of a third party, the safety of individuals or property and the operations of public bodies.<sup>13</sup> PAIA mandates that when a request for access to a record is refused, such refusal must be accompanied by reference to a ground for refusal in Chapter four as well as reasons for the refusal. In respect of the 58 instances in which access to the requested record was expressly denied in part or in full, only 32 (55%) of such refusals were accompanied by grounds for refusal codified in PAIA. In 15 of these refusals, grounds for refusing access were provided but did not constitute legitimate grounds for refusal as detailed in PAIA. For example, in response to a PAIA request submitted by CER to the Western Cape Department of Mineral Resources for a copy of Bongani Minerals (Pty) Ltd's application for the renewal of a prospecting right and related documents, an official at the regional office initially informed CER that such information may only be released on obtaining a court order to that effect. While some of the documents were later released (without the need for a court order), this anecdote highlights the inadequate PAIA-related training of some officers and the poor implementation of PAIA. Additionally, in 11 cases out of 58 (19%), no ground for refusing access to the record was cited at all. Furthermore, of the 58 express refusals, only 32 refusals were accompanied by notification of the requester's right to appeal the decision, notwithstanding the fact that this information is required to form part of a PAIA refusal in terms of sections 25(3)(c) and 56(3)(c) of PAIA.

<sup>13</sup> PAIA secs 33 – 45.

With respect to instances where grounds were provided for refusals of access, as consistently documented in previous reports, access to records was most often denied on the basis that the record cannot be found or does not exist.<sup>14</sup> This fact points to the poor record-keeping of public bodies. Other leading grounds on which refusals were based included: the mandatory protection of the privacy of a third party that is a natural person,<sup>15</sup> protection of certain confidential information of a third party<sup>16</sup> and that records requested related to the operations of public bodies.<sup>17</sup> It is interesting to note that section 46 of PAIA makes provision for a public interest override. This provision allows requesters to access documents to which they would have otherwise been denied on grounds of refusal in PAIA on the basis that such records contain information that should be disclosed in the public interest. Despite the presence of this valuable exception in section 46, it was not applied in respect of any of the above requests that were refused.

Failure to cite any or adequate reasons for refusing access to records frustrates the objectives of PAIA and indeed the Constitution. As detailed, access to information is necessary for the realisation of the rights to freedom of expression and the right to access to information as codified in the Constitution and often contributes to the realisation of a number of other constitutional rights.

#### ***3.1.4. Levels of compliance by different public bodies***

The five public bodies receiving the greatest number of requests from the PAIA CSN during the reporting period were:

- South African Police Service (SAPS)
- National Archives of South Africa
- Department of Water and Sanitation
- Department of Environmental Affairs
- Department of Mineral Resources

Of these bodies, the efficiency with which the Department of Water and Sanitation responds to requests for access to information submitted to them is laudable: 10 out of the 14 requests (71%) made to them were responded to with decisions to release the records in full. The Department of Mineral Resources fully released 60% of the records requested of them as well. Contrastingly,

---

<sup>14</sup> PAIA sec 23.

<sup>15</sup> PAIA sec 34.

<sup>16</sup> PAIA sec 37.

<sup>17</sup> PAIA sec 44.



SAPS only granted full access in 6 of the 16 requests (37.5%), the National Archives of South Africa granted full access in terms of only 3 of 15 requests made to them (20%)<sup>18</sup> while the Department of Environmental Affairs granted full access only 31% of the time i.e. in terms of 4 requests submitted to them.

Some of the public bodies who failed to provide a decision to any of the requests submitted by the PAIA CSN, within the legislative timeframes, include:

- Department of Agriculture, Forestry and Fisheries
- Department of Co-operative Government and Traditional Affairs
- Department of Defence
- Department of Labour
- Department of Public Works
- State Security Agency
- Department of Rural Development and Land Reform
- Department of Traditional Affairs
- Gauteng Department of Agriculture and Rural Development
- Gauteng Department of Education
- Gauteng Department of Human Settlements
- Gauteng Department of Social Development
- City of Johannesburg
- City of Tshwane
- Johannesburg Property Company
- Emfuleni Local Municipality
- Fezile Dabi District Municipality
- Makana Municipality

### **3.1.5. Internal Appeals**

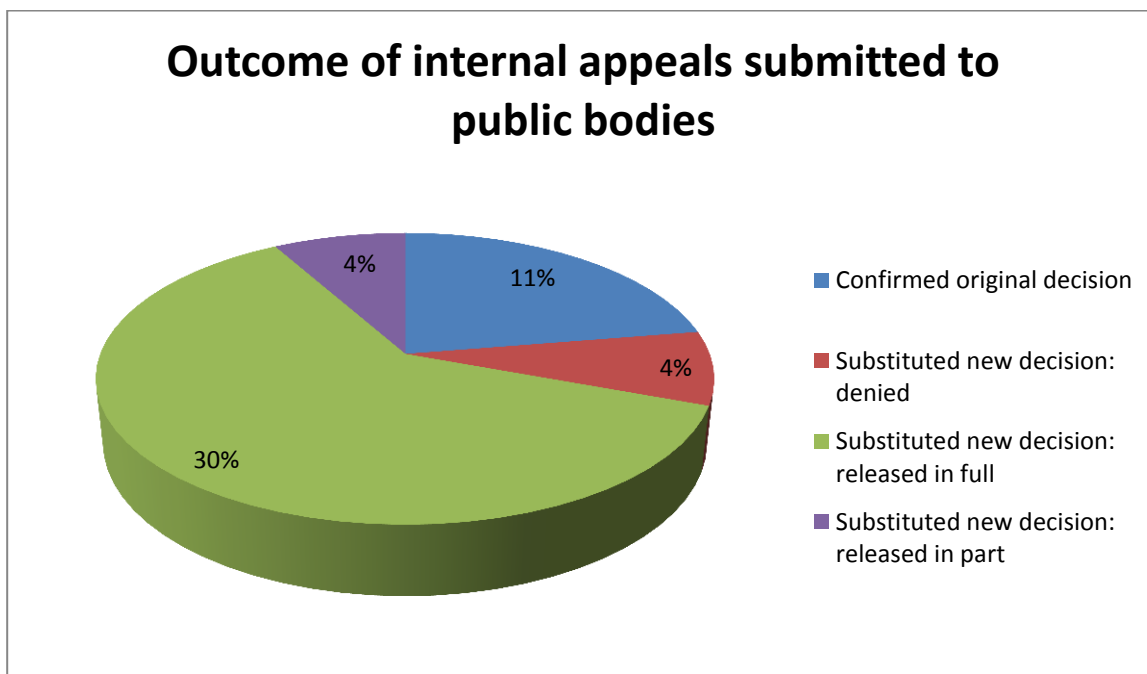
In response to the express and deemed refusals received, 27 internal appeals were submitted to public bodies. Of this total, 14 requests (52%) of the internal appeals submitted were deemed to be dismissed by virtue of the public body failing to respond to the appeal.<sup>19</sup> The results of 3 (11%) appeals confirmed the original decision made by the body appealed to. There was 1 (4%) initial response to either partially or fully grant the record which was substituted with the decision to

---

<sup>18</sup> SAHA notes that this refusal rate can be attributed more to poor record management than unwillingness to release records.

<sup>19</sup> Sec 27 of PAIA provides that where an Information Officer (IO) fails to provide a decision on a request for access to information within the 30 days stipulated in section 25 of PAIA, the IO is deemed to have refused the request.

deny access to the record on appeal. On the other hand, 8 (30%) decisions to refuse access to the record at the initial request stage were substituted with decisions to release the record in full on appeal and 1 decision was substituted with the decision to release it in part. However, it must be noted that while 8 appeal decisions were decisions to grant full access, the records requested were only actually received, at the time of reporting, in 2 instances. Read with the above-mentioned rate of 21% deemed refusals at the initial request stage, these figures indicate the difficulties that requesters face from public bodies: there is little to no consideration of a substantial number of PAIA requests submitted as well as a lack of communication with requesters. This state of affairs places a heavy onus on requesters to follow-up on requests (even where access has been granted), resulting in time and financial implications for the requester.



### 3.2. Requests submitted to private bodies

12 of the 169 total PAIA requests made by members of the PAIA CSN during the reporting period were submitted to 11 different private bodies, consisting mostly of banks such as ABSA, Standard Bank and Capitec as well as mining companies such as Samancor Chrome Limited and Columbus Stainless (Pty) Ltd. Those private bodies to whom requests were made displayed relatively good compliance with the requirements of PAIA. All 11 bodies responded to the initial PAIA request within the required statutory time frame with three bodies seeking an extension of the time period. 6 requests (50%) were granted in full, with the requested record actually being provided, at the time of reporting, in 5 cases. A further 6 (50%) requests were granted in part,

however, only in respect of 2 of these were records received by the requester at the time of reporting. In instances where full access was actively denied, only 3 out of 11 private bodies provided reasons in line with the provisions of PAIA for the refusal of access.

The PAIA CSN welcomes the gradual improvement of PAIA compliance by private bodies, however, the limited nature of the sample-size does not allow one to draw conclusive finding as to the improvement of private bodies with PAIA compliance. As past reports have documented, compliance levels have been consistently poor although this has been improving of late.<sup>20</sup>

### **3.3. Emergent patterns of non-compliant responses**

Apart from the conclusions indicated from the above-detailed statistics, the following concerning interpretations of PAIA, and practices relating to the use and application of PAIA by public and private bodies, have been observed by the PAIA CSN members:

#### ***3.3.1 Rise in the number of notifications of extension of time period to deal with request and full or partial transfers***

An increasing number of bodies, particularly private bodies, are issuing notices of extension of time period to deal with a request.<sup>21</sup> This secures the requested body an extended period of time (30 days) within which to respond to PAIA requests. Such extensions of time periods further delay the requester access to information. This, in turn, can affect the requester's ability to partake in related participatory democracy features that are usually time bound, for example, commenting on Bills and engaging in public consultation. Worryingly as well, these time period extensions are not always translating into an increased number of decisions that granted full or partial access. Further, many bodies are frequently transferring requests either in part or full to other bodies. For this reporting period, a total of 10% of the requests submitted to public bodies were transferred.

#### ***3.3.2 Failure to consider applicability of the public interest override***

In keeping with the objectives of transparency, section 46 of PAIA makes provisions for the mandatory disclosure of requested records in the public interest. The section provides that despite any other provisions of the Act, the Information Officer of a public body *must* grant a request for access to records if the record would reveal evidence of-

- (i) a substantial contravention of, or failure to comply with, the law; or
- (ii) an imminent and serious public safety or environmental risk; and

---

<sup>20</sup> PAIA Civil Society Network Shadow Report (2014), 9.

<sup>21</sup> PAIA, secs 26 & 57.

- (iii) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question.

Similarly to the findings in previous years' reports, neither public nor private bodies took cognisance of or applied the provision on public interest override during the consideration of the initial request or the appeal process. The application of this provision could prove invaluable to requesters and communities seeking access to information as a gateway to the protection and promotion of other rights.

#### **4. CASE STUDIES AND LITIGATION**

Members of the Network are actively submitting PAIA requests to a range of different entities, both public and private. To complement the quantitative data provided in the section above, below we outline a few anecdotes regarding these requests in order to convey more tangible insight into the experiences and challenges surrounding the use of PAIA.

##### **4.1 Seeking bail protocols from the Department of Correctional Services**

In May 2015 the Centre for Applied Legal Studies (CALS) submitted a PAIA request to the Department of Correctional Services for information concerning '[a]ny and all Bail Protocols applicable to Judges and/or Magistrates and/or Prosecutors in the Department of Correctional Services which may be used for or applied in bail proceedings and/or any election to hold a bail inquiry'. The request was made in the context of a practice in Magistrates Courts where proof of residential address must be provided in order to proceed with the bail hearing or to grant bail. Since there is no legislation in terms of which the verification of address is a requirement in bail proceedings and due to the negative consequences that this requirement is having on people living in poverty, CALS made the above request to verify if there is a document or protocol that contains such a requirement.

The initial request was transferred from the Department of Correctional Services to the Department of Justice and Constitutional Development (DoJ&CD). Interestingly, DoJ&CD requested a 30 day extension period since '[t]he request is for a large number of records or requires a search through a large number of records and compliance with the original period would unreasonably interfere with the activities of the public body concern'.<sup>22</sup> A bail protocol, however, is a document that should be commonly used in the Department and should therefore

---

<sup>22</sup> The receiver of an information request is entitled to such an extension in terms of section 26 of PAIA.

be readily available. When we pointed this out to the Department and indicated that their reliance on section 26 was perhaps misplaced, the protocol materialised and CALS' request was granted 4 days later.

#### **4.2 Request for Lonmin's Atmospheric Emission Licence**

In May 2015, the Centre for Environmental Rights (CER), acting on behalf of the Ekurhuleni Environment Organisation, requested a copy of Lonmin's Atmospheric Emission Licence for Western Platinum Limited and copies of their annual emission reports. The request was granted but Lonmin charged CER an access fee of R 761.30. CER requested an itemisation of these costs, which was provided by Lonmin over a month later. Lonmin's justification for this fee was that they had spent 5 hours collating the information. Throughout the period of engagement, Lonmin's attitude was characterised by comments such as 'what a torturous process' the PAIA request was and 'I hope you understand we are dealing with the implications of the Farlam report at present'. Interestingly, CER requested the same information from the Ekurhuleni Municipality, which laudably managed to provide it within the 30 day period and only charged an R80.00 access fee.

#### **4.3 The 'Spy-Tape' saga: amaBhungane's PAIA requests to the Department of Justice & Constitutional Development and the State Security Agency**

In early July 2015, amaBhungane submitted a PAIA request to two state Departments to confirm and uncover the full extent of the interceptions of certain communications of amaBhungane Managing Partner, Sam Sole, which formed part of the so-called 'Spy Tapes'. These intercepted communications were available to the then acting National Director of Public Prosecutions Mokotedi Mpshe, prior to his decision on 6 April 2009 to terminate criminal proceedings against Jacob Zuma. Later that year, Sole and Stefaans Brummer submitted a complaint to the then Inspector General with little result.

Interceptions of communications are regulated under the Regulation of Interception of Communications and Provision of Communication-related Information Act (RICA). Under Rica, a designated judge is responsible for giving interception directives under section 16(4), or may verify the decision of a law enforcement officer to intercept the communications. Under Rica, a network operator or internet service provider must give *'real-time access to communication – allow the state to 'listen in' on what a user is saying over the phone or in an SMS or email, as well as 'communication-related information', such as the user's location, who they are calling, and the*

*time and duration of the call*<sup>23</sup>. Although intended for crime-fighting and anti-corruption activities, the secretive Rica system has been subject to concrete evidences of abuse.

The first PAIA request was submitted via the DOJ&CD to the designated Rica judge. amaBhungane further submitted a PAIA request to the State Security Agency (SSA). The DOJ&CD responded to amaBhungane's PAIA request confirming a record relating to the interception order existed. However, citing discussions between themselves and the National Intelligence Agency (NIA) the Department transferred the request to SSA, as the NIA 'were *the authors of the document*' and '*the requested document is a classified document and subject to MISS*'. The SSA has now provided a response well past the thirty-day period provided under PAIA. In refusing to disclose the records, SSA regurgitated wording from PAIA, without substantiating as required by PAIA, basing their non-disclosure on the intelligence related purposes of the records, which include '*detection, prosecution, suppression or curtailment of subversive or hostile activities*'. AmaBhungane will be submitting an internal appeal against this decision.

#### **4.4. SAHA requests Farlam Commission report**

In May 2015, SAHA, in consultation with the Marikana Support Campaign and R2K, submitted a PAIA request to the Presidency for the release of the Farlam Commission Report. In terms of PAIA, the Presidency must respond to the request within 30 days. The report was sent to the President on 31 March 2015 and at the time of the request had not been made public.

The report was eventually publically released by the President, after the lapse of the 30 day period from date of submission of the request. Also outside of the 30 day period, the Presidency phoned SAHA to determine whether a decision was still required considering that the report was released publicly. SAHA advised that it took the view that a decision was still required under section 25 of PAIA but that it was open to the Presidency providing a decision granting access to the document by means of furnishing a web link that granted access to the documents. This was duly done by the Presidency.

---

<sup>23</sup> Murray Hunter (2014) 'Rica in South Africa: How big is Big Brother?' GroundUp available at [http://groundup.org.za/article/rica-south-africa-how-big-big-brother\\_1882](http://groundup.org.za/article/rica-south-africa-how-big-big-brother_1882)

#### 4.5 The trials of moving office

The Centre for Environmental Rights requested information from the Department of Mineral Resources related to the granting of a mining right in a declared protected environment. While access to certain portions of the requested records was 'granted' on 29 May 2015, the CER has yet to receive any information. The reason given by the Mpumalanga regional office of the Department of Mineral Resources for the delay was that the regional office was moving premises. Apparently the movers had packed all of the files into sealed boxes and moved the boxes to the new premises. The staff, on the other hand, were still at the old premises and were waiting for an 'internal memo' advising them of the move date. This had apparently been the situation for more than three months.

#### 4.6 Landmark SCA judgment ordering ArcelorMittal South Africa (AMSA) to release environmental information<sup>24</sup>

The Vaal Environmental Justice Alliance (VEJA) has spent more than a decade trying to get hold of the results of an environmental impact study commissioned by Iscor (AMSA's predecessor) in 1999. The results of this study were documented as the Environmental Master Plan (EMP). The EMP mapped pollution levels caused by AMSA's activities as well as the company's plan to remediate this damage over a 20 year period. VEJA sought access to the EMP in order to establish the extent to which their health problems and the threats to their livelihoods were being caused by AMSA, and to assist them in playing a role in ensuring that AMSA complied with the pollution remediation measures that the company itself had outlined.

When other channels proved unsuccessful, in 2011 the Centre for Environmental Rights assisted VEJA in submitting a PAIA request for the EMP. The initial PAIA request was refused by AMSA on the basis that the EMP was technically flawed, out of date and irrelevant. Ultimately, the case also deliberated whether civil society has a role to play in assisting government in monitoring environmental harm caused by the private sector and monitoring compliance with obligations to deal with that harm. This is because, after its other arguments failed, AMSA also took the position that VEJA was not entitled to the Master Plan because they sought somehow to inappropriately usurp the compliance monitoring and enforcement role assigned to government.<sup>25</sup>

---

<sup>24</sup> This judgment was mentioned in the 2014 PAIA CSN Shadow Report as well. However, we have decided to include it again both because the judgment was handed down in November 2014 which falls within the time period considered in this Report, and because the judgment is of such seminal importance.

<sup>25</sup> For more information and discussion of this case, see <http://cer.org.za>. This case is the subject of a documentary produced by the Centre for Applied Legal Studies, the South African Human Rights

In November 2014, the SCA handed down one of the most significant access to information judgments in democratic South Africa. The court made a number of critical findings in relation to AMSA's lack of good faith in its engagement with VEJA and the discrepancies between AMSA's shareholder communications and its actual conduct. Regarding the role of civil society, the court confirmed that the regulatory framework applicable to the environmental sector envisages a form of collaborative corporate governance in relation to the environment, based on the notion that environmental degradation affects us all.<sup>26</sup> The court also emphasised the importance of corporate transparency in relation to environmental issues, stating that '[c]orporations operating within our borders, whether local or international, must be left in no doubt that, in relation to the environment ... there is no room for secrecy and that constitutional values will be enforced'.<sup>27</sup> The judgment thus sends a clear message to the private sector, including multinational corporations operating in South Africa, that as envisaged in the South African Constitution, transparency is the default position.

This case also illustrates the fact that accessing the information is the beginning rather than the end of the process. Since receiving the documents, VEJA has systematically ordered and analysed the documents. VEJA, together with CER are currently working on disseminating the document to communities and other organisations so as to enhance access to the document as well as to ensure transparency and accountability around the operations of AMSA. CER further utilises the content of the report itself to inform its further work in ensuring AMSA's compliance with environmental laws.

## 5. AUDITING PAIA MANUAL COMPLIANCE

To further the realisation of the right to access to information, section 14 of PAIA mandates the Information Officer of each public body to publish a manual containing, amongst other things, a description of the records held by that body, information on how a requester may submit a PAIA request for a record as well a list of records that the body makes automatically available in terms of section 15(2) of PAIA.

The PAIA CSN has been tracking compliance with section 14 of PAIA for some years. Despite a slow start, current compliance by national government departments is improving. Only 10 out of

---

Commission and One Way Up Productions which is available at [http://www.wits.ac.za/academic/clm/law/cals/newcalssite/16869/rule\\_of\\_law.html](http://www.wits.ac.za/academic/clm/law/cals/newcalssite/16869/rule_of_law.html).

<sup>26</sup> *Company Secretary of ArcelorMittal South Africa and Another v Vaal Environmental Justice Alliance* 2015 (1) SA 515 (SCA) para 71.

<sup>27</sup> *AMSA v VEJA* (n 24 above) para 82.



47 national departments have failed to publish the mandated PAIA manual on their respective government websites - this translates to a 79% compliance rate by national departments. The table below depicts an audit compliance with section 14 of PAIA by national government departments.

National government departments' compliance with Section 14 of PAIA

	<b>Name of national department:</b>	<b>Publication of s14 PAIA manual on website:</b>
1.	Agriculture, Forestry & Fisheries	✓
2.	Arts and Culture	X
3.	Basic Education	✓
4.	Civilian Secretariat for Police	X
5.	Communications	X
6.	Co-operative governance	✓
7.	Correctional Services	✓
8.	Defence	✓
9.	Economic Development	✓
10.	Government communication & Information Systems	X
11.	Health	✓
12.	Higher Education & Training	✓
13.	Home Affairs	✓
14.	Human Settlements	✓
15.	Independent Police Investigative Directorate	X
16.	International Relations and Co-operation	✓
17.	Justice & Constitutional Development	✓
18.	Labour	✓
19.	Military Veterans	✓
20.	Mineral Resources	✓
21.	National School of Government	X
22.	National Treasury	X
23.	Office of the Chief Justice	X
24.	Planning, Monitoring and Evaluation	✓

25.	Public Enterprises	✓
26.	Public Service & Administration	✓
27.	Public Service Commission	✓
28.	Public Works	✓
29.	Rural Development & Land Reform	✓
30.	Science & Technology	✓
31.	Social Development	✓
32.	South African Police Service	✓
33.	South African Revenue Service	✓
34.	Small Business Development	X
35.	State Security Agency	X
36.	Sport & Recreation	✓
37.	Statistics South Africa	X
38.	Telecommunications and Postal Services	✓
39.	Tourism	✓
40.	Trade & Industry	✓
41.	Traditional Affairs	✓
42.	Transport	✓
43.	Water & Sanitation	✓
44.	Women	✓
45.	Energy	✓
46.	Environmental Affairs	✓
47.	The Presidency	✓

## 6. ESTABLISHMENT OF THE INFORMATION REGULATOR

For several years, civil society activists in South Africa have been calling for some kind of information ombud. This is because when PAIA requests are unsuccessful, communities often face the spectre of litigation as their only remaining recourse. This situation is compounded by the fact that although PAIA provides for an internal appeal mechanism in the case of requests to a public body, no such appeal exists for requests to a private body. This means that should a private body deny your request, or simply ignore it (which is treated as a deemed refusal in terms

of section 58 of PAIA), litigation is the next step. However, litigation in South Africa is slow, expensive and intimidating.

But there may be light at the end of the tunnel. The Protection of Personal Information Act (POPIA), signed into law on 26 November 2013, provides for the establishment of the Information Regulator which will have oversight powers relating to both POPIA and PAIA. While decisions of the Information Regulator will not be final and may be appealed to court, the establishment of this new entity is critically important and, it is hoped, will have a substantial impact on the realisation of the right of access to information.

It is therefore fundamental to appoint a regulator that will act independently, be free from any political interference and also be sufficiently resourced. The Model Law on Access to Information for Africa, prepared by the African Commission on Human and Peoples' Rights, also highlights that an oversight mechanism must have 'independence and autonomy in its operation and administration.'<sup>28</sup> Currently, the final appointment of the Information Regulator is still pending, since the nomination period closed on 14 August 2015. POPIA provides for the appointment of 5 regulators into the Office of the Information Regulator.<sup>29</sup> The next step is for the National Assembly to approve nominations with a majority vote, after which the President makes the appointments on the basis of the National Assembly's recommendation. Hopefully, the Information Regulator will operate in such a way that communities are able to challenge attempts by either government or the private sector to block access to information, without the need for assistance from a lawyer.

## 7. RECOMMENDATIONS

The right of individuals, organisations and communities of access to information is a fundamental prerequisite for a functioning democracy, greater transparency, and good governance. Unfortunately, in the 2014 Shadow Report the PAIA CSN expressed concern that 'the right to information seems to be more at risk in South Africa than ever before.'<sup>30</sup> Since this last report, there has been little progress in the promotion and guarantee of access to information in the country.

---

<sup>28</sup> Model Law on Access to Information for Africa, available at [http://www.achpr.org/files/news/2013/04/d84/model\\_law.pdf](http://www.achpr.org/files/news/2013/04/d84/model_law.pdf)

<sup>29</sup> POPIA sec 41(1)(a).

<sup>30</sup> PAIA Civil Society Network Shadow Report (2014), available at: [http://foip.saha.org.za/uploads/images/PCSNShadow\\_Rep2014final20150202.pdf](http://foip.saha.org.za/uploads/images/PCSNShadow_Rep2014final20150202.pdf)

Our recommendations, therefore, are as follows:

1. Public bodies, especially in local governance, must receive effective PAIA training so that public officials better understand their obligations to facilitate the right of access to information.
2. Information holders must allocate adequate resources to the implementation of PAIA. In particular, there is a need for resources to be allocated to maintaining efficient and effective record-keeping systems and to engaging sufficient staff to manage requests.
3. All national, provincial and local government departments should ensure instant compliance with the PAIA manual requirements.
4. The Information Regulator must be appointed and must be sufficiently resourced to meet the demands of its mandate. The Information Regulator should prioritise consultation with organisations who have attempted to monitor and identify systemic challenges to PAIA compliance, such as the PAIA unit at the South African Human Rights Commission, and civil society coalitions like the PAIA CSN in order to capitalise on this opportunity to harmonise in practice efforts to balance the rights of privacy and access.
5. Public bodies must consider what records should routinely and automatically be made available, without the need for a PAIA request, so as to foster transparency through the pre-emptive provision of timely, accessible information to the public. Notably, Network members active in the environmental justice sector continue to advocate for the creation of a publicly available registry of environmental authorisations by public bodies, as access to basic regulatory information continues to hamper realisation of environmental rights. This would enable members of the public and civil society organisations to assist public bodies in monitoring compliance by licence holders.
6. Civil society organisations need to develop and maintain expertise on access to information and incorporate this into all streams of their work.

## APPENDIX: MEMBERS OF THE PAIA CSN

The PAIA CSN consists of (in alphabetical order):

### Centre for Applied Legal Studies (CALS)

The Centre for Applied Legal Studies (CALS) is a civil society organisation based at the School of Law at the University of the Witwatersrand. CALS is also a law clinic, registered with the Law Society of the Northern Provinces. As such, CALS connects the worlds of both academia and social justice. CALS' vision is a socially, economically and politically just society where repositories of power, including the state and the private sector, uphold human rights. *Contact: Lisa Chamberlain (Deputy Director) at [lisa.chamberlain@wits.ac.za](mailto:lisa.chamberlain@wits.ac.za) [www.wits.ac.za/law/cals](http://www.wits.ac.za/law/cals)*

### Centre for Environmental Rights (CER)

The Centre for Environmental Rights (CER) is a non-profit organisation of activist lawyers who help communities and civil society organisations in South Africa realise our Constitutional right to a healthy environment by advocating and litigating for environmental justice. As part of its work, the CER uses PAIA to promote transparency and accountability in environmental governance. *Contact: Christine Reddell at [creddell@cer.org.za](mailto:creddell@cer.org.za); Tracey Davies at [tdavies@cer.org.za](mailto:tdavies@cer.org.za); Melissa Fourie at [mfourie@cer.org.za](mailto:mfourie@cer.org.za) <http://cer.org.za/>*

### Corruption Watch

Corruption Watch is a non-profit organisation launched in January 2012. It aims to ensure that the custodians of public resources act responsibly to advance the interests of the public. By shining a light on corruption and those who act corruptly, Corruption Watch promotes transparency and accountability and protects the beneficiaries of public goods and services. *Contact: Kabelo Sedupane at [KabeloS@corruptionwatch.org.za](mailto:KabeloS@corruptionwatch.org.za) <http://www.corruptionwatch.org.za/>*

### Equal Education Law Centre (EELC)

The EELC provides support for campaigns led by members of our sister organisation, Equal Education (EE), around the country. Through collaboration, EE and the EELC work to address systematic inequalities in the South African education system and to coordinate strategies, advocacy and action to bring about sustained change. Access to information plays a central role in identifying, addressing systematic inequalities in the Centre's work. *Contact: Nurina Ally at [Nurina@eelawcentre.org.za](mailto:Nurina@eelawcentre.org.za)*

### **Khulumani Support Group**

The Khulumani Support Group is a non-profit membership-based organisation formed in 1995 by survivors and families of victims of the political conflict of South Africa's apartheid past. Khulumani has an extensive community outreach programme, which includes PAIA education, and has used PAIA internally to inform its work regarding issues arising from the Truth and Reconciliation Commission.

Contact: Frans Mogajana at [frans@khulumani.net](mailto:frans@khulumani.net); Tediso Ngcobo at

[tediso.ngcobo@khulumani.net](mailto:tediso.ngcobo@khulumani.net)

<http://www.khulumani.net/>

### **M&G Centre for Investigative Journalism (AMABHUNGANE)**

AMABHUNGANE is a non-profit company that develops investigative journalism to promote open, accountable and just democracy and a free media worthy of this duty. It does so by pursuing the best practice of investigative journalism, transferring investigative skills to other journalists, and helping to secure the information rights investigative journalists need to do their work.

Contact: Karabo Rajuili at [karabor@amabhungane.org](mailto:karabor@amabhungane.org)

<http://amabhungane.co.za/>

### **Open Democracy Advice Centre (ODAC)**

The Open Democracy Advice Centre is a NGO which promotes turning transparency into action in the South African context. Its primary aims are to foster a culture of accountability in the public and private sector, and to assist people in South Africa to realise their human rights through adequate and meaningful access to information. It offers support and advice on access to information, the protection of whistleblowers and the broader transparency environment.

Contact: Gabriella Razzano at [gabriella@odac.org.za](mailto:gabriella@odac.org.za)

<http://www.opendemocracy.org.za/>

### **Public Service Accountability Monitor (PSAM)**

PSAM is a monitoring and research institute based at Rhodes University in Grahamstown which aims to improve public service delivery and the progressive realisation of constitutional rights by using various social accountability monitoring tools to monitor the public resource management cycle. PSAM has utilised PAIA to access numerous documents of Government to assist in its monitoring work and to promote accountability. PSAM also assists other members of civil society to use the PAIA to support their own advocacy objectives.

<http://www.psam.org.za/>

## **R2K Campaign**

The Right2Know Campaign launched in August 2010 and is growing into South Africa's first post-Apartheid freedom of expression and access to information movement. R2K is a democratic activist driven campaign that strengthens and unites citizens to undertake research, public awareness raising, mobilisation and targeted advocacy that contributes to ensuring the free flow of information necessary to meet people's social, economic, political and ecological needs and live free from want, in equality and in dignity. Right2Know currently has five main focus areas: Information Access, Stop Secrecy, Justice for Whistleblowers, Media Freedom and Diversity and the Right to Protest.

Contact: Carina Conradie at [carina.r2k@gmail.com](mailto:carina.r2k@gmail.com)

<http://www.r2k.org.za/>

## **South African History Archive (SAHA)**

The South African History Archive (SAHA) is an independent human rights archive dedicated to documenting and providing access to archival holdings that relate to past and contemporary struggles for justice in South Africa. SAHA's Freedom of Information Programme (FOIP) is dedicated to using South Africa's Promotion of Access to Information Act, 2000 (PAIA) in order to extend the boundaries of freedom of information and to build up an archive of materials released under the Act for public use.

Contact: Catherine Kennedy at [catherine@saha.org.za](mailto:catherine@saha.org.za); or Toerien van Wyk at

[toerien@saha.org.za](mailto:toerien@saha.org.za)

<http://www.saha.org.za/>

## **Wits Justice Project (WJP)**

The Wits Justice Project (WJP) is a programme of the Journalism Department at the University of the Witwatersrand in Johannesburg South Africa. Our goal, as an independent, non-partisan organization, operating in both the academic and civil society space, is to improve the criminal justice system in South Africa. We use the results of our investigative journalism to inform and uplift our efforts in changing public discourse and the policy environment. The WJP uses journalism, law, research, education and advocacy to expose miscarriages of justice and abuse in the criminal justice system. While not abandoning the core journalistic values of objectivity, fairness and accuracy, we are pioneering 'transparent activism' to promote the foundational values enshrined in the South African Constitution and in international and human rights law.

Contact: Ruth Hopkins at [Ruth.Hopkins@wits.ac.za](mailto:Ruth.Hopkins@wits.ac.za);

<http://witsjusticeproject.com/>