

**THE PROMOTION OF ACCESS TO INFORMATION ACT- A BLUNT
SWORD IN THE FIGHT FOR FREEDOM OF INFORMATION?**

(A dissertation submitted to the University of the Western Cape in partial
fulfilment of the requirements for the degree Magister Legum)

BY



Ms. Fatima Ebrahim

UNIVERSITY of the

(Student Number: 2762633)

Prepared under the supervision of Professor Nico Steytler, Community Law
Centre, University of the Western Cape

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All praise belongs to my Creator alone who has blessed me abundantly and who has not forsaken me in my times of need.

DECLARATION

I, Fatima Ebrahim, hereby declare that this dissertation titled, *The Promotion of Access to Information Act- A Blunt Sword in the fight for Freedom of Information?*, is my own work and has not been submitted to any other university for the award of a degree and that all sources I have used or quoted have been indicated and acknowledged as complete references.

Fatima Ebrahim

Date



KEYWORDS

Access to/Freedom of Information

Apartheid

Democracy

Promotion of Access to Information Act No.2 of 2000

Socio-economic rights

South African Human Rights Commission

South African Constitution Act 108 of 1996



ABBREVIATIONS

ATI	Access to Information
ANC	African National Congress
FOI	Freedom of Information
ODAC	Open Democracy Advice Centre
PAIA	Promotion of Access to Information Act No.2 of 2000
PGWC	Provincial Government of the Western Cape
SAHRC	South African Human Rights Commission



TABLE OF CONTENTS

Acknowledgements	ii
Declaration	iii
Key Words	iv
Abbreviations	v
CHAPTER 1: INTRODUCTION	
1.1 Background to the Study	6
1.2 Problem Statement	7
1.3 Scope and Objective	8
1.4 Methodology	9
1.4.1 Literature	9
1.4.2 Questionnaires	9
1.5 Chapter Delineation	9
CHAPTER 2: BACKGROUND TO THE ACT	
2.1 Introduction	11
2.2 Access to Information during the Apartheid Era	11
(a) The Media and Access to Information	12
(b) The Control of Information	12
2.3 A New Dawn in the Quest for Access to Information	14
2.4 The Birth of the Promotion of Access to Information Act	15



2.5 Conclusion	17
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CHAPTER 3: ANALYSIS OF THE LEGISLATIVE FRAMEWORK OF THE ACT

3.1 Introduction	19
3.2 Guiding Principles of Access Legislation	20
(a) Principle 1- Maximum Disclosure	20
(b) Principle 2- Obligation to Publish	21
(c) Principle 3- Promotion of Open Government	22
(d) Principle 4- Limited Scope of Exceptions	23
(e) Principle 5- Processes to Facilitate Access	24
(f) Principle 6- Costs	25
(g) Principle 7- Openness	25
(h) Principle 8- Disclosure takes Precedence	25
(i) Principle 9- Protection for Whistleblowers	26
3.3 Domestic Criticisms	26
3.3.1 Form and Type of Information	27
(a) Application of PAIA to Records Only	27
(b) Exemption of Cabinet Records	28
3.3.2 Procedure for Obtaining Information	29
(a) Deemed Refusals	29
(b) Generous Time Frames for Dealing with Requests	30
(c) Lack of an Effective Dispute Resolution Mechanism	31
3.4 Danger of Misguided Legislative Reforms	33



3.5 Conclusion	34
----------------	----

CHAPTER 4: IMPLEMENTATION PROBLEMS: OPERATIONALISING PAIA

4.1 Introduction	36
4.2 Technical Issues	36
4.2.1 Inadequate Human Resources	36
4.2.1.1 The Appointment of Information Officers	37
4.2.1.2 PAIA-An Added Responsibility	38
4.2.1.3 Unskilled Officials	39
4.2.1.4 Awareness of PAIA amongst the Officialdom	40
4.2.2 Inadequate Infrastructure and Internal Mechanisms	41
4.2.2.1 Records Management	41
(a) Record Making	42
(b) Record Keeping	42
(c) Electronic Records	43
4.2.2.2 Lack of Dedicated PAIA Units	44
4.2.2.3 Non Compliance with the Provisions of PAIA	45
(a) Deemed Refusals	45
(b) Production and Submission of a PAIA Manual- s 14 Compliance	46
(c) Automatically Available Records – s 15 Compliance	47
(d) Reporting Obligations – s 32 Compliance	48
4.3 Socio-Political Issues	49
4.3.1 Political Will	50



4.3.1.1 Absence of an ATI mind set	51
4.3.1.2 Resource Allocation and Commitment to Operationalising PAIA	52
4.3.2 Role of the South African Human Rights Commission	53
4.3.3 Culture of Secrecy	55
4.3.4 Failing State of Demand	56
4.3.4.1 Lack of Awareness of the Right to ATI	57
4.3.4.2 Infrastructural and Physical Barriers	58
4.3.4.3 Language, Literacy and Compromised Abilities	59
4.4 Conclusion	60

CHAPTER 5: WAY FORWARD AND CONCLUSION

5.1 Introduction	61
5.2 Identifying Champions	61
5.2.1 The SAHRC	62
5.2.2 Political Champions	63
5.2.3 Senior Administrative Officials	64
5.3 Plans and Processes	65
5.4 Resources	67
5.5 Conclusion	68



BIBLIOGRAPHY	70
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ANNEXURES

“A”: Questionnaire: Officials: PGWC	76
“B”: Questionnaire: Deputy Information Officer’s: PGWC	79
“C”: Questionnaire: Members of the Public	82

“The liberties of a people never were, nor ever will be, secure, when the transactions of their rulers may be concealed from them”.

(Patrick Henry- American Lawyer, patriot, and orator, symbol of the American struggle



CHAPTER 1- INTRODUCTION

1.1 Background to the study

The global village is an information dense society. Instantaneous communication across vast geographical areas and time zones is a lived reality for millions of people. The exchange of information, thoughts and ideas are possible at a mere touch of a button. Research and fact finding is no longer restricted to field work and the pages between books. Today access to the internet allows for a visual and textual explosion of information on every imaginable topic.

There is no doubt that the advancements in information technology are astounding and have revolutionised the way in which we do things and the way in which we see the world. Information, it would seem, is in abundance. The irony, however, is that despite these developments billions of people worldwide suffer from 'information poverty' or the lack of access to essential information.¹ Thus, despite the constant bombardment of information, in the form of entertainment, sports and one sided news reports, the reality, as French philosopher Baudrillard, explains, is that we have more information being available but with less meaning and value.²

The state is undoubtedly an important generator and custodian of essential information. In this context essential information refers to information which can be used to meet a person's basic needs of survival and development. This paper focuses on access to essential information held by the state. It is in this context that access to information (ATI) as a fundamental human right finds expression. The importance of ATI as a human right should not be underestimated, especially in a democratic state. Access to information empowers the citizenry and enables meaningful participation in public matters; it exposes corruption and mismanagement and serves to facilitate the realisation of socio-economic rights.

In South Africa, the positive spin-offs of its ATI legislation have reached as far as Ntambana, a small village in rural Kwa-Zulu Natal, where with the assistance of ODAC³, a request for information on the municipality's water access policy led to the community receiving clean water for the very first time.⁴ As Mukelani Dimba points out, "it is when freedom of information

¹ Britz, Johannes, "A Critical Analysis of Information Poverty from a Social Justice Perspective" (2006) Unpublished D Phil Thesis, University of Pretoria, available at <http://upetd.up.ac.za/thesis/available/etd07212007122555/unrestricted/00front.pdf> [accessed 12 July 2010].

² Britz 2006, 127 ff.

³ The Open Democracy Advice Centre is a non-profit organisation whose aim mission is to promote open and transparent democracy; foster a culture of corporate and government accountability; and assist people in South Africa to be able to realise their human rights.

⁴ Calland, Richard "Illuminating the Politics and the Practice of Access to Information in South Africa" (2009) in Allan, K (ed) *Paper Wars* 9.

is used as a leverage right for the protection or promotion of other socio-economic rights that it finds its real meaning in the context of a developing country.”⁵

ATI is instrumental to the concept of democracy. ATI, when properly implemented, helps to ensure good public administration and open and accountable government thereby helping in the fight against corruption.⁶ Case studies from around the globe show the usefulness of ATI as a means of holding government to account. In India a local NGO used ATI legislation to reveal that almost 90% of food intended for distribution under a state rationing system was in fact being siphoned off by corrupt ration dealers.⁷ Similarly in Uganda, the right to ATI was used to show that certain development funds earmarked for schools were instead being paid to corrupt government officials.⁸ As a result parents were able to take steps to ensure accountability at the local government level which ultimately led to a reduction in corruption from a staggering 80% to 20% over a five year period.⁹

From the above it is clear that access to essential information is a powerful tool in the protection of other rights and the achievement of true democracy. But what does access entail? Is the existence of a legal right to access information sufficient? Or does access require corresponding positive actions on the part of the state? This paper will explore South Africa’s Promotion of Access to Information Act (PAIA)¹⁰ and assess whether the state of ATI in South Africa, which has been described as ‘unhealthy’¹¹ is due to shortcomings in the legislation or the failure of the state to create and promote a society in which information poverty is the exception rather than the norm.

1.2 Problem statement

PAIA is hailed as one of the most progressive pieces of ATI legislation in the world.¹² There is, however, general consensus amongst civil society and academia, that despite PAIA being lauded as the “gold standard” of ATI legislation, the Act is not without its weaknesses and

⁵ Dimba, Mukelani “Access to Information as a Tool for Socio-Economic Justice” (February 2008) Presentation delivered at the Carter Centre International Conference on the Right to Public Information, available at www.opendemocracy.org.za/documents/section_file_detail/21 [accessed 10 June 2010].

⁶ *Ibid.*

⁷ Article 19 “Access to Information: An Instrumental Right for Empowerment” (2007) available at www.article19.org/pdfs/publications/anti-empowerment-right.pdf [accessed 10 May 2010] 98.

⁸ *Ibid* 99.

⁹ Article 19 2007, 100.

¹⁰ Act 2 of 2001.

¹¹ Kisoan, Chantel “Ten Years of Access to Information in South Africa: Some Challenges to the Effective Implementation of PAIA” (2010) available at www.opendemocracy.org.za/wp-content/uploads/2010/10/Ten-Years-of-Access-to-Information-in-South-Africa-Some-challenges-to-the-effective-implementation-of-PAIA-by-Chantal-Kisoan.pdf [accessed 14 August 2010] 3.

¹² Akro-Cobbah, Albert “The Right of Access to Information: Civil Society and Good Governance in South Africa” (2007) Paper delivered at 73rd IFLA General Conference and Council, available at <http://www.ifla.org/iv/ifla73/index.htm> [accessed 11 May 2010].

requires a number of legislative amendments.¹³ Proposed amendments include inter alia, the development of speedier and more cost effective enforcement mechanisms, the redefining of exemption clauses and the extension of the scope of PAIA to include information not contained in a record.

It is off course envisaged that the proposed amendments to PAIA will improve the state of ATI in South Africa, which has currently been described as “unhealthy”.¹⁴ The year 2010 marks a decade since the inception of PAIA yet despite the passage of time both legislative compliance as well as levels of demand for information remains low.

Whilst there can be no doubt that the regulatory framework has impacted on the effectiveness and efficiency of PAIA there is the concern that remedying the so-called design flaws of PAIA will be a wasted exercise in the absence of a determined effort by the state to address the technical and socio-political implementation challenges that have thwarted the success of the legislation to date.

The problem question is thus framed as follows: Will the amendment of PAIA translate into a more effective information regime or is the key critical barrier impeding the success of PAIA the host of implementation challenges?

1.3 Scope and objective

This study focuses on the implementation of PAIA. The impediments facing the successful implementation of PAIA are as complex as they are multidimensional. As such this paper will focus on access to information of public bodies, to the complete exclusion of private bodies, and shall draw particularly on the status quo of the Provincial Government of the Western Cape (PGWC).

The objective of this study is to show that the unsatisfactory state of ATI in South Africa is due to the fact that the state has failed to properly implement the Act. This study should not be seen as an assessment of all PAIA’s impediments or all of the implementation problems associated with operationalising the Act. The state of implementation across various public bodies and the unique institutional design of each public body differ vastly even within the same sphere of government. Nonetheless, many of the challenges discussed are experienced to some degree or the other by a large part of government and the recommendations, where necessary, can be tweaked to suit the operational needs and organisational structure of a particular public body.

¹³ McKinley, D.T “The State of Access to Information in South Africa- Research Report for Centre for the Study of Violence and Reconciliation” (2003) available at <http://www.csvr.org.za/wits/papers/papmckin.htm> [accessed 10 May 2010] 5.

¹⁴ Kisoona 2010, 2.

1.4 Methodology

A mixed research approach has been adopted consisting of the following two research methods, a desktop review of applicable ATI literature and a structured questionnaire on PAIA usage and implementation.

1.4.1 Literature

A wide range of academic texts, qualitative and quantitative reports published by civil society and government institutions and a host of internet sources has been used.

1.4.2 Questionnaires

Three distinct groups of persons were requested, via e-mail, to complete a structured questionnaire. Each group received a different questionnaire and the questions were based on a qualitative rather than a quantitative approach. The overall response rate was relatively low.¹⁵

Group 1 consisted of officials within the Provincial Government of the Western Cape who were not information officers and were not responsible for the implementation of PAIA. A total of 5 officials completed the questionnaire. A copy of the questionnaire is attached marked "Appendix A".

Group 2 consisted of 4 deputy information officers (DIO's). A copy of the questionnaire is attached marked "Appendix B".

Group 3 consisted of 10 members of the public. The minimum requirement for inclusion in group 3 was a post matric qualification and fluency in English. A copy of the questionnaire is attached marked "Appendix C".

The anonymity of all participants was guaranteed.

1.5 Chapter delineation

The study is divided into six chapters.

Chapter 1 is an introduction, which sets out the background of the study, the focus and objectives of the study, the problem statement and the methodology of the research.

Chapter 2 provides a background to the adoption of PAIA and contextualises the importance of ATI in the new democratic order.

¹⁵ Approximately 40% of those requested to participate in the study responded.

Chapter 3 examines and assesses the legal framework of PAIA in relation to the purpose and objective of the Act. It is argued that legislative reform will not improve the state of ATI in South Africa.

Chapter 4 deals with the implementation of PAIA in relation to the ability of the state apparatus to fully deliver on PAIA and the impact of the social, economic and political landscape on the realisation of the right to ATI.

Chapter 5 concludes the study by providing a list of recommendations that will lead to improving the state of access in South Africa without necessitating legislative reform.



CHAPTER 2 - BACKGROUND TO THE ACT

2.1. Introduction

The quest for ATI is premised on the notion that public bodies hold information not for themselves but as custodians of the public good.¹⁶ The right to ATI, however, is not absolute. It would off course be practically impossible for the state to release all information in its custody and in many instances the right to ATI may be justifiably limited when necessary for, inter-alia, the protection of personal privacy, state security or commercial confidentiality.¹⁷ However, notwithstanding that the right to ATI is not exclusive, the fact remains that in order for government to be open and accountable it must respect and promote ATI as a right and not limit it unnecessarily.

In order to fully appreciate the special importance and value of ATI in the South African context it is necessary to frame the right against the backdrop of Apartheid and trace the adoption of PAIA as a tool in promoting and protecting the new founded democracy.

2.2. Access to information during the Apartheid era

Apartheid can crudely be described as a system based on the institutionalised and systematic oppression by the white minority against the black majority with the purpose of establishing and maintaining white domination. Whilst this definition constitutes a formal description of the system it does little to convey the dehumanising effects of Apartheid – the economic hardship, the lack of basic facilities, unequal education, unemployment and the violation of basic human rights. The state relied on various tools to promote its goal of segregation including geographical division, unequal access to resources and the control of and access to information.

The use of information as a means of perpetuating Apartheid ideology was achieved in two ways- through media censorship and propaganda on the one hand and the stringent control of information on the other.¹⁸

¹⁶ Mendel, Toby *Freedom of Information: A Comparative Legal Study* (2008) 4.

¹⁷ O' Regan, Kate "Democracy and Access to Information in the South African Constitution" (2000). Paper presented at the Konrad Adeneauer Foundation conference on the Constitutional Right of Access to Information , available at www.kas.de/suedafrika/en/publications/4936/ [accessed 24 July 2010] 13.

¹⁸ Bird, Edward & Garda, Zureida "The Role of the Print Media during the Apartheid Era" (1996), available at www.mediamonitoringafrika.org/images/uploads/trc.pdf [Accessed 12 May 2010] 1 ff.

(a) The media and access to information

The ability of the media to report in an open, factual and truthful manner was severely restricted during Apartheid as was the flow of information between ordinary citizens. An intricate web of laws served to censor media reports and thereby exercise control on the nature and extent of information disseminated to the public.¹⁹ Thus information ranging from sanctions, capital punishment, corruption and fraud and liberation movements, to military action, police involvement in repression, prisons and the territorial consolidation of homelands was, in varying degrees, circumscribed.²⁰

The control of information by the state influenced the manner in which the media reported and presented information. The state's aim in controlling and censoring the media was essentially to starve the public of news and ideas which undermined and threatened the Apartheid system. A study undertaken by the NGO, Media Monitoring Africa, into the role of the print media during Apartheid reveals that

“the Afrikaans press... was supportive of the state, faithfully reporting news in a manner and discourse which overtly supported apartheid. Seldom in the Afrikaans media was the government criticised, and there was never any indication that apartheid racism was wrong and an abuse of millions of people's human rights was taking place. The strategies of criminalisation and demonisation of political activity, restrictions on information and the faithful regurgitation of government propaganda resulted in the Afrikaans press' support for the apartheid system.”²¹

The study is evidence of the fact that where access to essential information is curtailed, the actions and opinions of people may well be based on falsities rather than genuine beliefs.

(b) The control of information

Parallel to the Apartheid state's grip on the media was its obsession with official secrecy.²² The withholding of information and its resultant ignorance was a central tenet of the apartheid regime's strategy of oppression.²³ In the words of the Truth and Reconciliation Commission, “all governments are, to a greater or lesser extent, uncomfortable with the notion of transparency, preferring to operate beyond the glare of public scrutiny” but in Apartheid

¹⁹ Currie, Iain & Klaaren, Jonathan *The Promotion of Access to Information Act Commentary* (2002) 3.

²⁰ Truth and Reconciliation Commission of South Africa Final Report (1998) vol 1, chapter 8, para 1.

²¹ Bird & Garda 1996, 8.

²² Currie & Klaaren 2002, 2.

²³ Calland 2009, 4.

South Africa, “government secrecy was a way of life.”²⁴ This was not to say, however, that the state released no information. On the contrary it has been noted that the “publication of government information and disinformation in the Apartheid era was reasonably well systemised, with printed gazettes and other documents produced by the Government Printer and available for sale to the public.”²⁵ Nonetheless information imparted by the state was little more than Apartheid propaganda, intended not to inform but rather to reinforce policy.²⁶ Thus in the context of Apartheid South Africa, the limitation to ATI must not be viewed as a blanket withholding of information but rather as a withholding of essential information and the spreading of misinformation, both of which are critical considerations in the analysis and framing of ATI as a right.

Whilst the state was continuously engaged in the activity of suppressing information, the liberation forces and their allies identified the importance of information as a tool in their efforts to expose the brutality of the apartheid regime and hasten its demise.²⁷ The example of the sophisticated communication networks created by political prisoners on Robben Island serves to re-enforce the power of information as a tool in the quest for the realisation of socio-economic and political rights. In his poignant autobiography, “*Long Walk to Freedom*”, Nelson Mandela describes communication as one of the “vital tasks” of political prisoners.²⁸ Despite bans on all forms of political communication among prisoners and between prisoners and the outside world, detainees created inventive methods to communicate with each other and circulate information necessary for keeping the struggle alive. These included the use of code language and discarded match boxes as vehicles of communication and the storing of notes beneath food drums and inside toilet rims.²⁹ Mandela’s recollection of using milk as a writing tool perhaps best reflects the importance of information and the desperate measures taken by the liberation forces to disseminate information.

“In order not to have our notes read or understood by the authorities if they were found, we devised ways of writing that could not easily be seen or deciphered. One way was to write messages with milk. The milk would dry almost immediately, and the paper would look blank. But the disinfectant we were given to clean our cells, when sprayed on the dried milk, made the writing reappear. Unfortunately, we did not regularly receive milk. After one of us was diagnosed with an ulcer, we used his.”³⁰

²⁴ Truth and Reconciliation Commission (1998) para 24.

²⁵ Darch, Colin & Underwood, Peter *Freedom of Information and the Developing World* (2009) 234.

²⁶ *Ibid.*

²⁷ Akro-Cobbah 2007, 1.

²⁸ Mandela, Nelson *Long Walk to Freedom* (1995) 66.

²⁹ *Ibid.*

³⁰ Mandela 1995, 66.

Our brief analysis of the state of ATI during the Apartheid era reveals three important themes that are of significance to our analysis of the implementation of PAIA. Firstly, the Apartheid state followed a course of purposefully limiting ATI and of packaging information in a manner that best served the interests of segregation. As such the deliberate control of information did little to create a real platform for public scrutiny of the regime or to stimulate dialogue on government actions. Secondly, it highlights the fact that without freedom of information there can never be freedom of the press and lastly even where ATI is limited, citizens can and must be pro-active in their efforts to counter restrictions and use information as a tool to promote good governance.

2.3. A new dawn in the quest for access to information

The Apartheid state monopolised the flow of information in its efforts to create an uninformed, ill-informed and unenlightened society that would support its radical principles of discrimination, segregation and separate development.³¹ However, despite the best efforts of the state, the system was, in one way or another, challenged from its very inception and gradually broke down. The final demise of apartheid was formally announced by then President de Klerk in his opening-of-Parliament address of February 2, 1990.³²

In the political negotiations that followed, it became clear that in order for the new post-Apartheid state to be legitimate and gain popular support it had to be built on the principles of open, transparent, participatory and accountable government. Central to this new political morality was the recognition of ATI as a right. In the Interim Constitution, the chapter containing the Bill of Rights provided that, “Every person shall have the right of access to all information held by the state or any of its organs at any level of government in so far as such information is required for the exercise of protection of any of his or her rights”.³³ Constitutional Principle IX in Schedule 4 required that “Provision shall be made (in the final constitution) for freedom of information so that there can be open and accountable administration at all levels of government”.³⁴ The implication of this proviso was that the text of the final Constitution had to provide for freedom of information, otherwise the text would not be certified by the Constitutional Court.³⁵ As such Justice Kate O’ Reagen notes that, “the right of ATI should not be seen as an afterthought or optional extra in our constitutional dispensation. It is integral to our conception of democracy.”³⁶

³¹ Nyalunga, Dumisani “ The State of Access to Information in South Africa” (2008) available at <http://iolsresearch.ukzn.ac.za/wonder16213.aspx> [accessed 7 May 2010] 1.

³² Address by the State President, Mr FW De Klerk at the opening of the Second Session of the Ninth Parliament of the Republic of South Africa, Cape Town, 2 February 1990.

³³ Section 23 of Interim Constitution of South Africa, Act 200 of 1993.

³⁴ *Ibid*, Schedule 4.

³⁵ O’ Reagen 2000, 12.

³⁶ *Ibid* 15.

The final Constitution strongly re-enforces the theme of accountability and transparency that was laid down in the Interim Constitution. In fact, the scope of the right to ATI was extended in the Constitution to provide for a right to information from private bodies if same was necessary for the exercise or protection of any other right. Furthermore, s 32 dispensed with the requirement that requesters had to justify their request for state held information in relation to the exercise or protection of a right. In other words the public was at liberty to request ATI without any reference to a reason for or justification of why such information was being sought.

Despite the massive global trend towards legal recognition of the right to ATI, the inclusion of the right in the South African Bill of Rights is unique in so far as no other constitution world – wide, makes express provision for it.³⁷ The special status granted to the right speaks volumes about its importance as a tool of democracy and as a testament of the post-apartheid state's commitment to open, accountable and transparent government.

2.4. The birth of PAIA

Section 32 (2) obliged the state to enact national legislation within three years to 'give effect' to the right of access to information. The section makes provision for such legislation to include 'reasonable measures to alleviate the administrative and financial burden on the state'. The right to ATI was suspended for the duration of the three-year period and the Constitutional Court concurred that the period was necessary, as the envisaged legislation would have to supply 'detailed and complex provisions defining the nature and limits of the right and the requisite conditions for its enforcement.'³⁸ In the event that legislation was not enacted within the three-year period, section 32 (1) of the Constitution would have come into direct operation.³⁹

The process of drafting in fact began as early as 1994 when then Deputy-President Mbeki appointed a task team on open democracy.⁴⁰ After a protracted process that included public input and wide government consultation, and a number of revised versions, PAIA was approved by Parliament in February 2000 and promulgated in March 2001.⁴¹ Whilst the first draft of the proposed legislation was far reaching in scope, PAIA in its final form reduced the

³⁷ Devenish, GE *A Commentary on the South African Constitution* (1998) 79.

³⁸ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Republic of South Africa*, 1996 (4) SA 744 (CC) para 83.

³⁹ *Ibid* para 86.

⁴⁰ Currie & Klaaren 2002, 7.

⁴¹ *Ibid* 7ff.

ambit of the draft to exclude chapters on open meetings (“Sunshine Law”), access to cabinet records and the establishment of an Open Democracy Commission and Information Courts.⁴²

Section 9 of PAIA sets out the broad objectives of the Act which can be summarised as follows:

- to give effect to the Constitutional Right to Access Information as set out in s 32 of the Constitution;
- to generally promote transparency, accountability and effective governance of public and private institutions;
- to put in place voluntary and mandatory mechanisms or procedures aimed at enabling information requesters to obtain access to records held by both the State and private bodies as swiftly, inexpensively and effortlessly as reasonably possible;
- to regularise the need for certain justifiable limitations, such as privacy, commercial confidentiality and effective, efficient and good governance; and
- to empower and educate the public to understand their right to access information, so as to exercise such rights in relation to public and private bodies, to understand the functions and operation of public institutions and to effectively scrutinise and participate in the decision-making process in the country.⁴³

The broad objectives of PAIA clearly illustrate that the Act was never intended to limit the constitutional right of ATI but rather to facilitate the realisation of the right. As such PAIA must be viewed as an enabling rather than as a limiting mechanism. Currie and Klaaren describe the dominant objective of the Act as disclosure and not secrecy and argue that it must therefore be interpreted in the manner which best promotes this objective.⁴⁴ Similarly, the Act must be seen as promoting the principle of maximum disclosure with the result that its exemptions and grounds of refusal must be read narrowly “to avoid further and unnecessarily limiting the right.”⁴⁵ As then Minister of Justice and Constitutional Development, Penuell Maduna, remarked to Parliament on the occasion of the adoption of the legislation, “we are turning on the light to bring to an end the secrecy and silence that characterised decades of apartheid rule and administration”.⁴⁶

⁴² Currie & Klaaren 2002, 9.

⁴³ Akro-Cobbah 2007, 7.

⁴⁴ Currie & Klaaren 2002, 23.

⁴⁵ *Ibid.*

⁴⁶ McKinley 2003, 2.

The adoption of PAIA was met with wide-spread support and approval both within South Africa and beyond its borders. It has been described, by international legislative standards, as a fairly radical law and is commonly referred to as the 'golden standard' for freedom of information law.⁴⁷ Some of the most notably progressive features of PAIA are the following:

- The application of PAIA covers both public and private bodies. The inclusion of private bodies is radical in so far as ATI is traditionally deeply rooted in the concept of democracy and has been viewed primarily as a means of increasing government accountability, citizen participation and the realisation of socio-economic rights.⁴⁸
- The breadth of categorical exemption to public bodies is narrow and the Act excludes in this regard only cabinet records, records of the judiciary and records of members of parliament.⁴⁹
- The meaning of the term 'record' is extremely broad and covers any recorded information regardless of its form or medium or when it came into existence. This is of special significance in the electronic age where records are frequently taking on new forms and where communication is becoming increasingly paperless. In the public realm it is significant that records need not be formal in nature and can in fact take the form of scribbled notes, tape recordings, e-mail messages, etc.

2.5. Conclusion

Notwithstanding the global movement towards the recognition of ATI as a right, the South African story is unique in that it is no doubt a direct response to the state sanctioned secrecy and spread of misinformation that was key to the success of the Apartheid regime. The inclusion of ATI as a constitutional right must therefore be interpreted as a concerted and determined effort to prevent in the new democratic order "the perpetuation of the old system of administration, a system in which it was possible for a government to escape accountability by refusing to disclose information even if it had a bearing upon the exercise or protection of the rights of the individual."⁵⁰

It is against the backdrop of the struggle that the special status of PAIA as a tool in the promotion of democracy becomes most apparent. The liberation movement's use of information, although obtained and disseminated illegally, was a means of securing civil, political and socio-economic rights for the masses. The affirmation of a right to ATI is

⁴⁷ *Ibid* 4 ff.

⁴⁸ Currie, Iain, Klaaren, Jonathan and Smith, Andrew "Analysing Foreign Access to Information Legislation from a South African Viewpoint" (2000) Paper presented at the Konrad Adenauer Foundation conference on the Constitutional Right of Access to Information, available at http://www.kas.de/proj/home/pub/32/2/year-2001/dokument_id-4936/index.html [accessed 24 July 2010] 30

⁴⁹ *Ibid*.

⁵⁰ Phato v Attorney-General, Eastern Cape, 1995 (1) SA 799 (E) at 815 D-F.

therefore a radical departure from the past and one in which the new government not only affirms the value of the right but which it has committed, in the form of PAIA, to promoting and protecting.



CHAPTER 3- ANALYSIS OF THE LEGISLATIVE FRAMEWORK OF PAIA

3.1 Introduction

Chapter Two traced the development of ATI in South Africa and concluded that the birth of PAIA signalled a step in the realisation of the right to ATI as opposed to a mere constitutional affirmation of the right. In adopting PAIA, South Africa joined a plethora of other countries worldwide who have also adopted access legislation. According to the World Resources Institute the latest figures show that more than 80 countries have enacted some form of access legislation, indicating that 'transparency is becoming the norm'.⁵¹

The adoption of legislation alone is not concrete evidence of a true commitment to the principles of transparency and an access law in the statute book is not necessarily good law. PAIA has been flagged as inadequate in so far as it has failed to achieve the "appropriate gain in transparency and efficiency in the public administration."⁵² Based on studies conducted by ODAC approximately two-thirds of all requests for information are met without response.⁵³ The number of requests itself remain low and it is becoming increasingly obvious that the lacklustre supply side is met by an equally uninspiring demand side.

The question then is what makes an access law good law? It is submitted that access laws must be subjected to a dual evaluation. Firstly it must be assessed in terms of international best standards. Does the law meet these standards and if not to what degree does it fall short? Secondly, the law must be assessed, post-implementation to determine whether any criticisms of the access regime can be cured by means of legislative reform or whether the fault lies in the implementation itself.

This chapter will examine the legislative framework of PAIA against international standards on the one hand and in terms of the most popular criticisms of the Act on the other. It will then seek to show that the calls for legislative reform are premature and misguided.

⁵¹ World Resources Institute, "Freedom of Information Laws Spreading Around the World" (2010) available at <http://www.wri.org/stories/2010/09/freedom-information-laws-spreading-around-world> [accessed 3 November 2010].

⁵² Open Democracy Advice Centre "African Peer Review Mechanism Submission on Whistleblowing and Access to Information" (2005) available at www.aprm.org.za/docs/submissions/ODAC_APRM.doc [accessed 10 May 2010] 211.

⁵³ Open Democracy Advice Centre 2005, 11.

3.2 Guiding principles of access to information legislation

As indicated earlier, there has been an explosion in the adoption of ATI legislation across the globe. The impetus for establishing a transparency regime is nonetheless not attributable to a single factor but varies from country to country. In some instances it may be a response to an inherent need or civil society demand, in others it may have been due to a desire for government efficacy or as a means of building trust and creating new political spaces, in yet others it may simply be the result of the need to satisfy a condition for international debt relief.⁵⁴ As such the various access laws and policies around the world vary considerably as to their content and approach.⁵⁵ Nonetheless, there are certain principles that are globally accepted as necessary for any freedom of information legislation. The most salient principles have been captured by the human rights organisation.⁵⁶ These Article 19 Principles are used herein as a measure of determining whether PAIA meets the international standard for transparency legislation. Each principle is dealt with separately.

(a) Principle One- maximum disclosure

The principle of maximum disclosure “establishes a presumption that all information held by public bodies should be subject to disclosure and that this presumption may be overcome only in very limited circumstances.”⁵⁷ The principle is encapsulated in s 32 of the Constitution, which bestows on anyone the right to *any* information held by the state.⁵⁸ The right may, however, be limited by law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society.⁵⁹

PAIA gives expression to the principle of maximum disclosure in several respects. Firstly, the primary aim of the Act is to give effect to s 32 and to promote and fulfill the right to ATI.⁶⁰ As such although the Act lists several specific grounds upon which access may be refused, these grounds are an exception to the general rule, which dictates that information that is requested must be granted. Furthermore the grounds for refusal are subject to a public interest clause which trumps all exemptions.⁶¹

⁵⁴ Neuman, Laura and Calland, Richard “Making the Access to Information Law Work-the Challenges of Implementation” (2007) A florin (ed) *The Right to Know-Transparency for an Open World*, 2.

⁵⁵ Mendel 2008, 23.

⁵⁶ ARTICLE 19 is a global organisation that champions the right to freedom of information. It has produced this set of international principles to set a standard against which anyone can measure whether domestic laws genuinely permit access to official information. Detailed information on the organisation is available at www.article19.org.

⁵⁷ Article 19 “The Public’s Right to Know -Principles of Freedom of Information Legislation” (1999) available at www.article19.org/pdfs/standards/righttoknow.pdf [accessed 10 October 2010].

⁵⁸ Own emphasis.

⁵⁹ Currie & Klaaren 2002, 6.

⁶⁰ Preamble; section 9 PAIA.

⁶¹ Section 46 PAIA.

Secondly, the scope of the Act is broad and access to records is not limited to citizens but is a right that is enjoyed by all. Thirdly, requesters are not under an obligation to reveal the reasons for a request and do not need to justify the reasons they require a record or what they intend to use the record for.⁶² Fourthly, the term ‘record’ is defined broadly so as to include any record, regardless of form or medium, thus ensuring that PAIA is responsive to any new and changing technologies or means of capturing data.⁶³ Lastly, PAIA is applicable to both public and private bodies, therefore protecting the right to access information from all legal entities.

From the above it is clear that in interpreting PAIA, the principle of maximum disclosure must be invoked and the starting point should be, unless otherwise explicitly provided for, disclosure. In other words the “dominant objective of the Act is disclosure and not secrecy.”⁶⁴

(b) Principle 2- obligation to publish

In recognition of the importance of the supply side of ATI, this principle requires public bodies to actively publish and disseminate information in the absence of a formal request.⁶⁵ PAIA does not specify which records of a public body must be listed but s 15 does obligate information officers to submit to the Minister of Justice, at least once a year, a description of the categories of records that are automatically available. The Minister must in turn ensure that the list is published in the government gazette.

It is submitted that s 15 in fact increases the scope of Principle 2 in so far as it does not provide a numerous clauses of records that must be published but instead “rewards information officers who voluntarily disclose records by exempting those records from the usual request and response procedures.”⁶⁶ Section 15, must be interpreted in line with the duty of public bodies to promote the disclosure of information and as a means of fulfilling the objective of enabling persons “to obtain access to records...as swiftly, inexpensively and effortlessly as reasonably possible” as captured in section of the Act. As such the requirement to publish a list of categories of records obligates public bodies to ensure that effect is given to the purpose of PAIA whilst at the same time appreciating that public bodies may face resource constraints which legitimately restrict them from publishing vast amounts of information.

⁶² Currie & Klaaren 2002, 64.

⁶³ Section 1 PAIA.

⁶⁴ Currie & Klaaren 2003, 23.

⁶⁵ Mendel 2008, 26.

⁶⁶ Currie & Klaaren 2003, 214.

(c) Principle 3- promotion of open government

Most governments the world over are accustomed to doing things in a secretive fashion and “the notion of transparency is invariably far beyond the range of experience and mindset of most public bureaucrats.”⁶⁷ As such Principle 3 demands that access legislation lay down obligations aimed at creating and facilitating a culture of openness.

Mendel identifies the training of public officials, the provision of criminal penalties for those who wilfully obstruct access, public education campaigns, good records management and incentives for good performers as tools to promote open government.⁶⁸ With reference to this list, PAIA promotes open government in the following ways-:

- Sections 89 - 90 makes it a criminal offense to destroy damage, alter, conceal or falsify a record with the intent to deny a right of access, punishable by up to two years imprisonment.
- Section 14 compels public bodies to publish a manual containing information on its structure, services available, guidelines on how to make a request and any consultative or facilitator processes.
- Section 32 requires public bodies to report annual to the SAHRC on inter alia, the number of requests received, whether or not they were granted and the provisions of the Act relied upon to deny access.
- The SAHRC is tasked, in terms of s 10, with publishing a user guide in all 11 official languages.
- The SAHRC may further, subject to resource availability, undertake educational and training programmes for both the public and officials monitor the implementation of the Act, assist individuals to make requests, make recommendations to public bodies to improve the administration of the Act and make recommendations on the development and modernisation of the Act.⁶⁹

⁶⁷ Calland Richard “Turning Right to Information Law into a Living Reality- Access to Information and the Imperative of Effective Implementation”, (2003) available at http://www.humanrightsinitiative.org/programs/ai/rti/international/laws_papers/southafrica/Calland%20-%20Turning%20FOI%20law%20into%20living%20reality%20-%20Jan-03.pdf [accessed 4 June 2010] 1.

⁶⁸ Mendel 2003, 27 ff.

⁶⁹ Section 83 (2) PAIA.

It is clear that PAIA goes some distance in promoting open government. Nonetheless the Act can be criticised for making certain key measures subject to the availability of resources. However, it is important to take into consideration the fact that resource and capacity constraints are a lived reality in South Africa and s 32 of the Constitution states explicitly that legislation “may provide for reasonable measures to alleviate the administrative and financial burden of the state.”⁷⁰ In any event what is most important is that the Act creates the mechanisms necessary to enhance open government. The utilisation of these mechanisms can and must be achieved through concerted pressure on the SAHRC to secure and commit adequate financial resources and to exercise creative means of fully exercising its mandates and powers.⁷¹

(d) Principle 4- limited scope of exceptions

As previously explained, the right to ATI is not absolute and legitimate reasons may exist to limit access. Nonetheless, an ATI law will lose effectiveness if its scope of exceptions is excessively broad.⁷² As such Principle 4 dictates that exceptions should be clearly and narrowly drawn and subject to strict ‘harm’ and public interest tests.

The majority of exceptions in terms of PAIA, “contain a form of harm test and all are subject to a form of public interest override.”⁷³ The exceptions are not arbitrary and seek to protect identifiable rights and interests such as rights to privacy and property, commercial interests, public safety, the administration of justice, defence and international relations.⁷⁴ However, PAIA does not apply to certain institutions at all and of particular concern has been the fact that it does not apply to records relating to the judicial functions of Courts and Special Tribunals and its judicial officers, individual members of parliament or the provincial legislature and Cabinet records. In the case of records relating to judicial functions it is submitted that same is justified in light of the protection of the efficient functioning of the courts, the fairness of litigation and the finality of judicial decisions.⁷⁵ Similarly Currie and Klaaren argue that the exemption of records in the possession of members of Parliament is justified in light of the protection of freedom of speech and political activity of members in the legislatures.⁷⁶ The exemption must further be considered with due regard to the fact that in any case records that emanate from the legislative process like bills, statutes, regulations

⁷⁰ Section 32 Constitution

⁷¹ McKinley 2003, 39.

⁷² Mendel 2003, 28.

⁷³ *Ibid* 73.

⁷⁴ Currie & Klaaren 2002, 99.

⁷⁵ O'Brien, David M 'Privacy and the Right of Access: Purposes and Paradoxes of Information Control' (1978)

30 *Administrative Law* 45 at 52.

⁷⁶ Currie & Klaaren 2002, 58.

and so on are fully accessible as they are not in the exclusive control or custody of a member of the legislature.⁷⁷

The public interest override in PAIA has been criticised for being narrow in so far as it can only be invoked where disclosure would reveal a “substantial contravention of or failure to comply with the law” or where there is an “imminent and serious public safety or environmental risk” and as a result of either “disclosure of the record clearly outweighs the harm contemplated in the provision in question.”⁷⁸ However, it is submitted that in light of the fact that discretionary grounds of refusal requires public bodies to exercise their discretion in favour of disclosure there should technically hardly ever be the need to resort to the public interest override where records are subject to be made available.⁷⁹ It is submitted further that in the case of mandatory refusal, the override in fact acts as a ‘second chance’ where legitimate and justifiable reasons already exist for refusing access.

(e) Principle 5- processes to facilitate access

Principle 5 is premised on the basis that in order for an access regime to be effective, “requests for information should be processed rapidly and fairly and an independent review of any refusals should be available.”⁸⁰ As such ATI legislation should according to Mendel, provide for the appointment of information officers, clear time guidelines, written responses to requests, scope for inspection of records available, and clearly defined appeal mechanisms.⁸¹

PAIA contains detailed information in respect of access procedures. Provision is made for the appointment of information officers, there are clear time frames governing requests as well as transfer of requests, the form and cost of access and the provisions of written reasons where a request is denied.⁸² PAIA further provides for an internal appeal process and Mendel notes that such appeals to a higher authority within the same public body is “a useful approach, which can help address mistakes and ensure internal consistency.”⁸³ However, PAIA does not provide for a higher appeal to an independent administrative body and this criticism is dealt with in greater detail below.

⁷⁷ *Ibid.*

⁷⁸ Section 46 PAIA.

⁷⁹ Currie & Klaaren 2002, 108.

⁸⁰ Mendel 2008, 31.

⁸¹ *Ibid* 31 ff.

⁸² Currie & Klaaren 2002, 72 ff.

⁸³ Mendel 2008, 32.

(f) Principle 6- Costs

In terms of principle six, individuals should not be deterred from making requests for information by excessive costs.⁸⁴ Whilst the ideal situation would be free requests, practically every law does allow for some charges be it for searching for records, preparing and reviewing them or copying them.⁸⁵ The charging of fees should ideally create a balance between the right to access on one hand and the financial constraints faced by public bodies on the other. It is submitted that PAIA achieves this because despite setting down an access fee of R35 and a reproduction fee per page of a record it also provides requesters, within a certain financial band, with the option of applying for an exemption from fees.⁸⁶

(g) Principle 7- open meetings

In terms of Principle 7, meetings of public bodies should be open to the public as access of information should not be limited to information in documentary form only. However, Mendel notes that in practice it is extremely rare for this to be dealt with in an information law. This is certainly true in the South African context. Whilst the first draft of PAIA did contain this so called “sunshine provision” allowing access to public meetings, the provision was ultimately removed from the final Act.⁸⁷ This was despite vigorous opposition from civil society and the promise of the Task Team on Open Democracy, responsible for drafting the legislation, that the provision would be a feature of the access legislation.⁸⁸ To date South Africa does not have legislation on access to open meetings.

(h) Principle 8- disclosure takes precedence

Principle 8 demands that laws, which are inconsistent with the principle of maximum disclosure, should be amended or repealed.⁸⁹ This provision is of special significance in the South African context where, due to the Apartheid regime, the new democratic order inherited an “abnormal load of security legislation.”⁹⁰ Whilst PAIA does not make provision for the amendment or repeal of any legislation it does tackle this issue head on in s 5 which provides that PAIA applies to the exclusion of any provision of other legislation that restricts or prohibits the disclosure of a record of a public body and is materially inconsistent with an object or provision of PAIA. Most importantly however is the fact that the right to ATI is

⁸⁴ *Ibid* 33.

⁸⁵ Mendel 2008, 33.

⁸⁶ Open Democracy Advice Centre 2005, 7.

⁸⁷ Freedom of Expression Institute “Representations on the draft Open Democracy Bill published for comment on 24 October 1997 in GG No. 18381” (1997) available at www.fx.org.za/PDFs/ATIP/representationsODB%2024%2010%201997.pdf [accessed 10 June 2010].

⁸⁸ *Ibid*.

⁸⁹ Mendel 2008, 34.

⁹⁰ Akro-Cobbah 2007, 4.

protected by the Constitution and as such an assessment of any legislation past or future must pass constitutional muster.

To date the constitutional principle of disclosure has not been tested in respect of new legislation. However, the state is currently in the process of adopting the Protection of Information Bill⁹¹ and this will certainly provide a platform for the Constitutional Court to flesh out this principle. The Bill has been severely criticized for being at odds with s 32 of the Constitution and with PAIA. Whilst an analysis of the Bill in relation to PAIA is beyond the scope of this paper, chapter 4 does assess the impact of the bill in relation to the notion of political will in favour of openness.

(i) Principle 9- protection for whistleblowers

According to Principle 9, a freedom of information law should protect individuals against any legal, administrative or employment related sanctions for releasing information on wrongdoing.⁹² PAIA does not contain a whistle-blowing provision but legislation in the form of the Protected Disclosures Act 26 of 2000 seeks to protect employees who alert their employers or the public to corruption or danger in the workplace from “detriment” resulting from their actions.⁹³ The Protected Disclosures Act is not without its critics and leading civil society organisations such as ODAC have described it as inadequate and in need of reform.⁹⁴ Principle 9 further requires that civil servants, who have released information mistakenly, but in good faith, should not have to fear sanctions for disclosing information or they will tend to err in favour of secrecy. This element is captured in s 89 of PAIA, which provides that no person is criminally or civilly liable for anything done in good faith in the exercise of any power or duty in terms of the Act.

From our brief assessment of PAIA in relation to the Article 19 Principles it is clear that PAIA is overall sound in structure, content and scope. There are of course areas in which improvement in the law is possible such as the introduction of independent appeal mechanisms, sunshine laws and better protection for whistleblowers. However, it is submitted in the section below, that the legislative amendment of PAIA has a number of drawbacks and the time for review is therefore not ripe.

3.3 Domestic criticisms of PAIA

Notwithstanding the fact that PAIA “closely mirrors freedom of information regimes globally”⁹⁵ and is widely regarded as the ‘gold standard’⁹⁶ for access legislation, the Act has drawn

⁹¹ Protection of Information Bill 6 of 2010.

⁹² Mendel 2008, 34.

⁹³ Open Democracy Advice Centre 2005, 12.

⁹⁴ *Ibid* 13.

⁹⁵ Kisoona 2010, 9.

criticism within South Africa from both civil society and academia. The criticisms fall into two broad categories, namely the form of information and the procedure for obtaining information. This section will explore and examine the most popular of these criticisms.

3.3.1 Form and type of information made available

As far as form and type of information made available is concerned there are two main criticisms. Firstly, the fact that the Act applies to 'records' as opposed to 'information' in a general sense and secondly that certain records are entirely exempt. The exemption of records relating to judicial functions and members of parliament have been dealt with above. The exemption of Cabinet records is dealt with specifically below as it has attracted the greatest criticism.

(a) Application of the Act to "records" only

Despite the constitutional guarantee of the right of access to "any information", PAIA only provides for a right of access to a "record".⁹⁷ The Act defines record as "recorded information" and as such the only information that qualifies is information that already exists in a recorded form. Despite the fact that the definition of "record" is broad enough to cover any type of record regardless of its medium or form (e.g. it can take the form of a handwritten note, e-mail, video) the section arguably reduces the ambit of information to records only and is therefore in contravention of s 32 which guarantees a general right to information without limiting the form of such information. The concern is essentially that it would be possible for the state to deliberately refrain from recording certain sensitive information such as the minutes of meetings or opinions/advice or even instructions on a particular matter.

It is submitted that the limitation is justifiable. By its very nature, public bodies are extremely reliant on record making and record keeping and most information is recorded in some form or the other. It would in any event be almost impossible to trace information that is not recorded or to place any value on such information. In other words there is little control over non-recorded information especially as far as accuracy is concerned. In the event that a public body purposely refrains from recording sensitive information it would in any event be under an obligation in terms of s 23 of PAIA to give requesters an account of the steps taken to determine that no record exists and this in itself will highlight and draw attention to the fact that information is being purposely withheld. It is therefore submitted that a widening of the scope of records to cover information in the general sense is not necessary. Furthermore the benefit of the widening of the definition will be limited in so far as the value of the information, its currency and its reliability will be questionable.

⁹⁶ Mckinley 2003,

⁹⁷ Section 32 Constitution; Sub-sections 3-8 PAIA.

(b) The exemption of Cabinet records

Due to the power it wields, the documents of Cabinet have been referred to as the “most important, the most controversial, the most sensitive, and the most sought after type of records in any freedom of information system.”⁹⁸ However, section 12 (a) of PAIA explicitly states that, “this Act does not apply to a record of the Cabinet and its Committees.” It is no surprise then that this provision has come under fire and is regarded as being in direct conflict with s 32 which guarantees the right to “any information” held by a public body. McKinley argues that the exclusion “effectively renders the right of access to major policy decisions and processes of government inaccessible to the public” and argues that “human rights in general cannot be exercised fully when access to the key decisions and processes that provide the foundation for both legislation and administrative action by government is denied.”⁹⁹

It is, however, submitted that the exemption must be understood with due regard to the role and responsibilities of Cabinet. Firstly, the Constitution endorses the doctrine of “individual ministerial” and ‘collective responsibility of Cabinet’.¹⁰⁰ It is argued therefore that disclosure of cabinet records will undermine the fiction of cabinet unanimity in so far as records may disclose dissent with a cabinet decision.¹⁰¹ Secondly, it is the function of the Executive to make decisions that they deem in the best interests of the public. These decisions may not necessarily always be popular and the scrutiny of cabinet records may impede this function because Cabinet is fearful and pressurized to make a decision contrary to what it believes is best. The non-disclosure does not, in any event, retract from the ultimate accountability of Cabinet. Lastly, the exemption is narrow in scope. Nothing prevents a requester from making an application for records not in the sole possession of Cabinet, example to a public body that prepared those records and submitted it to Cabinet. Furthermore, in terms of s 59 (1) of the Constitution, the Public, the National Assembly must facilitate public involvement in its legislative activities and those of its committees.

The narrow interpretation of the exemption has found support in the Courts. In June 2010 the North Gauteng High Court ordered the Presidency to release a controversial 2002 report to the Mail and Guardian newspaper on the elections in Zimbabwe.¹⁰² The report was compiled by Judges Dikgang Moseneke and Sisi Khampepe, acting as special envoys to Zimbabwe for then-President Thabo Mbeki. The Presidency argued unsuccessfully that the report

⁹⁸ Tromp, Stanley “Fallen Behind-Canada’s Access to Information Act in the World Context” (2008) available at www3.telus.net/index100/report [accessed 10 June 2010] 159.

⁹⁹ McKinley 2003, 6.

¹⁰⁰ Section 92 (2) of the Constitution states that ‘members of the Cabinet are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions’.

¹⁰¹ Currie & Klaaren 2002, 54.

¹⁰² M&G Media Limited versus the President of the Republic of South Africa (4 June 2010) , North Gauteng High Court Pretoria (unreported).

constituted a cabinet record and was therefore exempt from the provisions of PAIA. According to Judge Sapire, "the Judges made their report directly to the President and it remains in the office of the President until this day without it ever being incorporated in the Records of Cabinet".¹⁰³ Judge Spiers rightly refused to accept that "the President on his own ... is the Cabinet".¹⁰⁴

It must be noted that the fact that Cabinet records are beyond the scope of PAIA does not mean that there is a blanket exemption on access to such records. On the contrary they remain "subject to the direct application of the constitutional right" and thus Cabinet is not absolved of the "constitutional responsibility to conduct its affairs transparently and provide ATI about its proceedings and decisions."¹⁰⁵ As such it is submitted that the view of Currie and Klaaren that the exemption of Cabinet Records is not an unjustifiable limitation on the right to access means that there is no real necessity in amending PAIA to include it.¹⁰⁶ The harm of its inclusion may in fact outweigh the benefit of allowing Cabinet to function in a manner that best serves the constitutional principle of collective responsibility.

3.3.2 Procedure for obtaining information

PAIA provides detailed procedures and processes governing a request for access to information. The provisions relating to deemed refusals, time frames and dispute resolution mechanisms have repeatedly been cited as problem areas.

(a) Deemed refusals

According to s 27 of PAIA, 'if an information officer fails to give the decision on a request for access' within the prescribed 30 day period, then such a request is deemed a refusal. This effectively means that government can choose to ignore requests without the attraction of a penalty of any sort. The onus would then rest on the requester to appeal the matter, which makes the procedure unnecessarily burdensome on the requester. McKinley argues this "gives lie to one of the main objects of PAIA which is 'to promote transparency, accountability and effective governance of all public and private bodies ...'¹⁰⁷ As such he suggests that the 'deemed refusal' clause in sections 27 and 58 (which allows for failure to respond to a request to be deemed a refusal of access) should be changed to a 'deemed approval' rule.¹⁰⁸ The effect of this would be that where a request is met with silence it will be deemed to have in fact been approved thus dispensing with the need to appeal the refusal.

¹⁰³ *Ibid.*

¹⁰⁴ *Opp Cit.*

¹⁰⁵ Currie & Klaaren 2002, 57.

¹⁰⁶ *Ibid* 56.

¹⁰⁷ McKinley 2003, 35.

¹⁰⁸ *Ibid.*

Whilst the suggestion appears to create a favourable situation for requesters it is submitted that this is in fact not the case. In the first respect, a deemed approval would be outside the scope of PAIA as a whole as it would mean that a request would not be subject to the limitations imposed by the Act. The consequences of this could be disastrous especially with reference to security of individuals and the state and may open public bodies to a litany of litigation from third parties. Secondly, the suggestion does little to counteract the fact that deemed refusals may merely be an indication of a public bodies inaptitude to process requests and not due to the fact that it is purposely attempting to restrict ATI. It follows that where proper systems are not in place to process a request, a deemed approval would in reality have little effect, as it would be extremely difficult to enforce. Lastly, deemed approvals would simply create enormous backlogs for public bodies and stifle a system that is already not functioning optimally. The result for the requester will therefore be no different. As such it is contended that a 'deemed approval' is neither necessary nor beneficial.

(b) Generous time-frames for dealing with requests

It is trite fact that time influences the value of information. Whilst requests for information stemming out of curiosity or perhaps during the course of purely academic pursuits may not be time-sensitive as such, it is safe to argue that in most instances only timely ATI is effective ATI. ATI law which fails to provide a fixed time frame for responses have thus been described as "toothless".¹⁰⁹ Providing a fixed time frame is, however, only one aspect and what is in fact more important is the reasonableness of the time periods set down.

There is off course no specific value for what is reasonable and this would largely depend on the context in which an ATI law is operating. It is submitted that a reasonable time frame is one that balances the right to receive information as rapidly as possible with the everyday demands on public bodies.¹¹⁰ Section 25 (1) of PAIA provides that a decision to disclose or refuse disclosure must be made within 30 days of receipt of the request. The period may be extended for a further 30 days under limited circumstances.¹¹¹ Worldwide response times vary from a mere 24 hours in some countries to three calendar months in others, the global average is however under 15 working days.¹¹²

Notwithstanding the fact that PAIA defines 'working days' section 25 (1) refers to 'days' only and must therefore be interpreted as meaning calendar days. On average thirty days would equate to 20 working days and this amount of time is according to Mendel, "in line with a

¹⁰⁹ Ackermann, JM & Sandoval-Ballesteros, IE , 'The Global Explosion of Freedom of Information Laws' (2006) *Administrative Law Review* 118.

¹¹⁰ Open Society Institute 'Transparency & Silence: A Survey of Access to Information Laws and Practices in Fourteen Countries' (2006), available at <http://www.justiceinitiative.org> [accessed 24 August 2010] 175.

¹¹¹ Section 26 PAIA.

¹¹² Open Society Institute 2006, 174.

model freedom of information law.”¹¹³ Having due regard to the implementation problems currently facing public bodies it is contended that the 30 day time frame is reasonable and a shortening of the period is overly ambitious and will inevitably result in a loss of respect for the law when public bodies are not able to comply. In any event a revisit of the time frame is unnecessary in so far as PAIA lays down the period as a maximum and envisages instead that access decisions be taken “ as soon as reasonably possible.”¹¹⁴ Thus on a purposive application of the Act, a public body that has the capacity to process requests quicker than within 30 days is in fact under an obligation to do so. It is therefore contended that a more generous time frame is not necessary and may very well not be beneficial.

(c) Lack of an effective dispute resolution mechanism

According to the South African History Archive, “the single most cited complaint about the implementation of PAIA is the lack of a cheap, accessible, quick, effective and authoritative mechanism for resolving disputes under the Act.”¹¹⁵ PAIA, until recently, provided for appeals to the same body that refused access, followed by appeal to the High Court.¹¹⁶ The scheme is criticised for three main reasons. In the first instance the internal appeal procedure involves exactly the same officials and politicians that made the decision to refuse a request in the first place. This has been described by critics as “akin to a priest confessing to him/herself.”¹¹⁷ A study conducted by ODAC supports this contention in so far as the findings suggest that the internal appeal process very seldom results in a changed outcome.¹¹⁸

Secondly, access to the formal court system is an extremely expensive process “that is out of the reach of the vast majority of South Africans.”¹¹⁹ It is therefore argued that

“the inability of ordinary South African to have easy and quick access means that only blue- chip or well funded civil society organisations are capable of realising this right. There are therefore huge institutional and practical difficulties for the poor in accessing information.”¹²⁰

¹¹³ Mendel 2008, 31.

¹¹⁴ Section 25 (1) PAIA.

¹¹⁵ Sorensen, Rolf “Impact of South Africa's Promotion of Access to Information Act after Three and a Half Years: A Perspective” (2003) *Esarbica Journal* Vol. 22, 51.

¹¹⁶ Sections 74 and 78 PAIA; On 9 October 2009, rules of procedure were promulgated in terms of which PAIA requests could be enforced in the Magistrates Courts. See “Rules of Procedure for Application to Court in terms of the Promotion of Access to Information Act 2 of 2000, Government Notice No.R 965, GG No. 32622.

¹¹⁷ McKinley 2003, 15.

¹¹⁸ Open Democracy Advice Centre 2005, 2.

¹¹⁹ *Ibid* 3.

¹²⁰ Memeza, Mzi “ An Analysis of Weaknesses in Access to Information Laws in SADC and Developing Countries”, (2006), available at www.fx.org.za/PDF's/ATIP/AT1%20weaknesses%20analysis%20sadc1.pdf [accessed 3 July 2010] 12.

Lastly, the dispute resolution mechanism in PAIA does not take into consideration the fact that litigation is by its nature lengthy in time and this may impact on the value of the information. As such even requesters that are able to afford to litigate may be persuaded not to by the mere fact that the litigation process will be a protracted one.

In light of the above shortcomings critics have recommended that a forum be created which will process appeals against a decision not to disclose or alternatively that an information commission be set up within the SAHRC to hear appeals.¹²¹ The notion of an independent ombudsman/commissioner seems to generally enjoy international favour and is widely accepted as a key tool in promoting and protecting the right to ATI, its value as a means of improving access in the current information climate in South Africa is questionable.

Firstly, the establishment of such a commission would require a considerable amount of resources to process appeals -this is especially so due to the high levels of deemed refusals and the fact that PAIA is wide in its application- covering both the public and private sphere.¹²² The likelihood of the state being able to provide sufficient funding to ensure the optimal functioning of such a commission is slim considering that to date it has failed to provide the SAHRC with sufficient funding to fulfil its mandate in terms of PAIA. In its 2008/9 Annual Report the SAHRC noted that “urgent attention to the budgetary allocations made for the execution of the PAIA mandate by the Commission is crucial. If adequate resources are not timeously allocated, there is a real danger that the legislation will atrophy very quickly.”¹²³

Secondly, there is no evidence that a commission would be able to deliver decisions in a manner that facilitates timeous access. In the case of the New Zealand Ombudsman, it has been found that complaints to the Ombudsman about time delays in responding to requests often take longer to deal with than the delay itself and appeals often take months to be reviewed and processed.¹²⁴

Thirdly, there is the risk that public officials who are not adequately trained in the proper application of PAIA or who face political and internal pressure not to disclose records will simply continue to ignore requests and rely on the commission to take decisions. The commission will then serve as a processing body rather than an appeal body. This is too burdensome a task for a single body and may mean that a culture of openness will not be promoted within public bodies themselves.

Fourthly, a commission can only be successful if it is independent. However, a commission by its very nature will be reliant on state funding and in the absence of powerful institutional and legal powers it may be nothing more than a toothless bulldog. In the current political

¹²¹ Open Democracy Advice Centre 2005, 2.

¹²² Mckinley 2003, 31.

¹²³ South African Human Rights Commission Annual Report 2008/9, 179.

¹²⁴ Mckinley 2003, 31.

climate where indications are that the ruling party is becoming increasingly nervous about access issues and appears to be taking steps to reduce the ambit of the right, it is highly likely that such a commission may be set up in a manner that is designed to favour the state over requesters.

Fifthly, the cost argument relating to the High Court as enforcement body has to some extent lost a degree of merit with the adoption of PAIA Rules providing that enforcement can take place via the magistrate court, which is cheaper and more accessible for litigants from a procedural point of view.¹²⁵

Lastly, PAIA is designed to promote access and the principle of maximum disclosure should be used in interpreting the Act. As such a proper application of the Act should lead to very low refusal levels and such refusals should be clearly justifiable. It is submitted that in the event that access is denied and there is grounds to believe that such denial is unjustifiable and will harm or compromise a requester's right in the Bill of Rights, the SAHRC should offer requesters assistance through its existing powers of mediation, negotiation and conciliation. Requests that do not relate to the protection of human rights can similarly be dealt with by the Public Protector on the same basis.

Whilst the value of an independent commission is not doubted it is clear that such a commission, to be effective and efficient, requires the correct measure of resources and powers. It should furthermore not be a body that is forced to deal with trivial requests simply due to the failure of public bodies to respond to and process requests. In other words the commission should not have to do the work of public bodies as this would simply lead to an overburdened and ill-functioning institution. At present such a commission is unwarranted and resources should first be directed towards strengthening existing institutions. As McKinley points out, if the SAHRC and the Public Protector "cannot be transformed to play an effective role in enforcement/dispute resolution how will the creation of yet another institution deal with the challenge?"¹²⁶

3.4 The danger of misguided legislative reforms

The law is not static and from time to time it becomes necessary to modernise legislation and bring it in line with social, economic and technological changes. When Canada adopted its ATI law in 1982 it was hailed as "a progressive piece of legislation which could claim to be competitive with the other access laws which existed at the time."¹²⁷ Today, more than two

¹²⁵ Klaaren, Jonathan "PAIA Through the Courts: Case Law and Important Developments in PAIA Litigation" (2010), available at <http://www.opendemocracy.org.za/images/docs/jklaarenpaper.pdf> [accessed 3 August 2010].

¹²⁶ McKinley 2003, 31.

¹²⁷ Tromp 2008, 7.

decades later there are strong calls for the urgent reform of Canada's ATI law which has been described as being in "drastic need of updating".¹²⁸

There can thus be no doubt that legitimate and necessary reasons may exist for amending a law, but on the same account it must be understood that no amendment process can be successful if the result does not improve the overall functioning of the law. The point of departure should therefore be an assessment of the law itself in relation to what it is meant to achieve. If the law as it is currently crafted is a means to the desired end than it would follow that reform is in all probability unnecessary.

It has been argued that the proposed legislative reforms are not strictly necessary. However, cognisance is taken of the fact that such reforms may be valuable and enhance the right to access if properly and carefully formulated. Nonetheless, it is submitted that the emphasis on legislative reform is misguided in so far as the proposed changes do not directly tackle the main issues causing the worrying state of access in South Africa. On the contrary some of the proposed reforms such as the establishment of an information commissioner, reducing time frames and substituting the deemed refusal provision with a deemed acceptance one will only result in the further burdening of the state. To date the state has largely been unable to comply with its obligations in terms of PAIA and it therefore follows that the imposition of further obligations will only cause the state of access to deteriorate even more.

Furthermore, there is the danger that a focus on legislative reform will detract from the real issues at hand- the failure of the state to commit itself to properly operationalising PAIA. The proposed amendments are unlikely to tackle the issues of non-compliance with the Act, limited resources, the lack of political will and the failure of the state to comply with its obligations should be foremost on the access agenda and energies should be directed at remedying the situation by means of government reform rather than legislative reform. In other words it is essential to deal not with the consequence but with the root cause of the problem.

3.5 Conclusion

It has been shown that PAIA is indeed of a high standard and incorporates principles fundamental to ensuring that the right to ATI is protected and promoted. If the processes in PAIA are correctly implemented through concerted efforts coupled with adequate resources and the application of the Act through the lens of maximum disclosure, there is no doubt that it will result in a clear improvement in the state of access. In short, the time for legislative reform is not ripe and it is only once the Act is properly applied that an assessment can be

¹²⁸ *Ibid.*

made on its adequateness. In the absence of same the call for legislative change is premature and unwarranted.



CHAPTER 4- THE IMPLEMENTATION PROBLEMS ASSOCIATED WITH OPERATIONALISING PAIA

4.1 Introduction

The enactment of access to information legislation is only the first of many steps necessary to create, promote and entrench a culture of access and openness. In order for an access law to be effective it must be properly implemented. The operationalising of an access law requires both human and financial resources, a strong political commitment and the creation of proper systems to ensure that the law is effective and efficient.

This Chapter outlines the main barriers impeding the effective implementation of PAIA. It must be noted, from the onset however, that the implementation problems are as wide as they are varied and range from practical based issues to broader social impediments. This chapter differentiates the implementation issues on two levels: - a technical level and a socio-political level. The two levels are however interrelated and should not be viewed as independent of each other.

4.2 Technical issues

A number of the problems that are impeding the proper and effective implementation of PAIA are related to the “orientation of the state apparatus” to fully deliver on PAIA.¹²⁹ These issues range from lacsadaisal record keeping and unskilled officials to the availability of resources and the failure of the state to comply with certain provisions of PAIA.

4.2.1 Inadequate human resources

The public administration is the lifeblood of government. It consists of “innumerable officials in a labyrinth of departments and statutory bodies at national, provincial and municipal levels of government.”¹³⁰ Whereas the political order may change from time to time, the majority of public servants will despite such change continue to oil the machinery of government across different administrations. In the Provincial Government of the Western Cape (PGWC), by way of example, officials who have been in office during the last decade have worked under eight different Premiers. Thus despite public servants being an extrapolation of the executive, their key functions in terms of the Constitution focus on their relationship with the public and in particular the delivery of services. To this end the Constitution explicitly provides that public

¹²⁹ Kisoona 2010, 2.

¹³⁰ Devenish 1998, 263.

servants foster transparency 'by providing the public with timely, accessible and accurate information.'¹³¹

From the above it is clear that the role of the public servant in the pursuit of good governance is not to be underestimated. The Constitution bestows on every official the responsibility to perform his functions in accordance with the democratic values of the Constitution and to be guided in his duty by the principles of transparency and efficiency.¹³² It is against this backdrop that we will more closely examine the role of public servants in administering the provisions of PAIA.

4.2.1.1 The appointment of information officers

PAIA provides for the appointment of an information officer and deputy information officer's (DIO's) within public bodies who are tasked with carrying out the majority of the duties of public bodies, including the consideration of requests.¹³³ By reference to the definition of 'information officer' as contained in s 1 of the Act, the information officer is, in fact the most senior employee of a public body- the director-general, a municipal manager or the chief executive officer of a parastatal.¹³⁴ The information officer may in turn delegate his duties to as many DIO's as is "necessary to render the public body as accessible as reasonably possible for requesters of its records."¹³⁵

The rationale in making PAIA the primary responsibility of the most senior officials in the administration was to ensure that the "Act would be taken seriously by the public administration and that it would be treated as a mainstream responsibility of government departments."¹³⁶ Whilst this is a laudable intention, the fact remains that the pressures on such senior officials simply do not allow them the time to process each and every request personally and as such the majority of the work involved falls to other officials. In some instances the information officer will still sign off on each request but the actual processing of the request will have been dealt with elsewhere whereas in yet other cases the processing and consideration of the matter is the responsibility of the designated deputy information officer.¹³⁷

¹³¹ Section 195 (1) Constitution.

¹³² Devenish 1998, 264.

¹³³ Currie & Klaaren 2002, 72.

¹³⁴ *Ibid* 73.

¹³⁵ Section 17 (1) PAIA.

¹³⁶ Currie & Klaaren 2002, 73.

¹³⁷ By way of example in the case of the PGWC, the Head of Department of the Premier, who is also the Director- General of the Administration, has not delegated his duties to a deputy information officer in the Department. However, all PAIA requests are processed by Legal Services and sent to the DG for sign-off. The negative consequence is the time and duplication of efforts involved.

In a 2009 survey, compiled by the Department of Justice and Constitutional Development (2009 Justice Survey) on the state of PAIA compliance of public bodies, it was found that the majority of departments in the PGWC had no formal record of appointing DIO's although the duties of implementing the Act fell to such persons who were given the additional title of 'deputy information officer'.¹³⁸ In terms of the Act, the information officer of the PGWC is the Director-General (DG) of the Administration and as such the delegation of work to a deputy information officer should have emanated from the DG's office in writing. None of the Departments, despite being requested to, provided a written delegation from the DG authorising any official to exercise the powers or perform the duties of a DIO. Whilst this in itself is not proof that such delegation did not in fact take place it does raise the concern that the so called DIO's that have been processing requests have not been properly authorised and that the exercise by such persons of any power in relation to the Act is in fact not valid.

4.2.1.2 PAIA- an added responsibility

In its 2008/9 Annual Report, the SAHRC notes that, "most PAIA personnel have other primary portfolios to which PAIA has been added without necessarily being reflected in their key performance agreements."¹³⁹ The result is that officials deal with PAIA on an 'ad-hoc' basis and this raises its nuisance value as it is not viewed as a core function or central to their dedicated portfolios but rather as a "burdensome" task.¹⁴⁰

The effect of the above is two-fold. In the first instance there is the danger that if PAIA is indeed burdensome, officials may not process requests as speedily and efficiently as envisaged by the Act. Officials may not, in light of their workload, feel compelled to respond within the statutory time frames or to apply their minds completely to the task at hand. This is of importance especially when one considers that whilst PAIA requests are made by unknown members of the public, the other matters that officials are dealing with will primarily stem from instructions within the administration. As such there is more benefit to be seen to be doing work emanating from a superior than to be doing work for an arbitrary member of the public.

Secondly, where PAIA is an added responsibility which does not form part of an officials performance agreement it means that there is little or no incentive for an official to perform the task efficiently and effectively and accountability will be difficult to monitor. The failure to recognise the duties associated with PAIA as official, legitimate and necessary no doubt negatively influences an official's stance on the importance of ATI as a right.

¹³⁸ The results of the survey are unpublished. The writer has on record the responses received from departments in the PGWC.

¹³⁹ South African Human Rights Commission Annual Report 2008/9, 156.

¹⁴⁰ Kisoona 2010, 3.

It is interesting to note that the experience of dealing with ATI legislation as an additional duty is not unique to South Africa. In a 2002 study of the state of ATI in Canada, the Review Task Team noted that, “access work has to be juggled with other operational priorities. It is often not perceived as ‘valued’ work or part of [an official’s] ‘real job’.”¹⁴¹

4.2.1.3 Unskilled officials

PAIA is considered to be one of the more technical and complex pieces of legislation to have come into effect since the advent of democracy in South Africa.¹⁴² This can be attributed to the fact that the Act is process driven and without sufficient knowledge and training, especially on matters relating to access procedures and grounds for refusal may be difficult to understand and apply. This issue was confirmed and raised several times during the course of this study. The DIO’s noted that they had difficulty calculating periods in the Act, interpreting the meaning of certain provisions (especially those related to disclosure) and were at times simply unsure of the course of action to follow. Their experience is by no means unique. Kisoona notes that officials are often confused by PAIA and as a result of its complexity “they often defer decisions to grant access to their legally qualified peers or senior management” or “refuse access in the knowledge that a resulting appeal will safely escalate the decision to grant access to the head of the public body in question.”¹⁴³

Of the seven departments in the PGWC that responded to the Justice Survey, only three noted that their DIO’s had undergone training of any sort. Of these, only one official received formal training in the form of two short courses presented by the SAHR, one received informal training from the Legal Services Directorate and the other was trained by the information officer who had undergone the SAHRC training. In this study one DIO noted that he was unaware of any training offered by the Department of Justice and Constitutional Development since the inception of PAIA and as such has never undergone training of any sort. Another DIO felt that more training would be of value but “this being a new act that was implemented not so long ago I think I’m doing pretty well.” In light of the fact that PAIA has been in existence for more than ten years, this response is extremely alarming as it seems to suggest that the DIO’s familiarity with the Act is slim.

To date the PGWC has not undertaken a co-ordinated training initiative to up-skill its information officers. The low levels of PAIA training are, however, not unique to the PGWC and are in fact replicated in most public bodies.¹⁴⁴ The effect of same on the state of access is not to be undermined as ‘without knowledgeable and well-trained personnel throughout

¹⁴¹ Access to Information Review Task Force, “Report: Access to Information- Making it Work for Canadians” (2002), available at <http://www.atirtf-geai.gc.ca/report/report38-e.html> [accessed 9 June 2010].

¹⁴² McKinley 2003, 12.

¹⁴³ Kisoona 2010, 3.

¹⁴⁴ The survey results of the Open Democracy Advice Centre’s Golden Key Awards for 2010 show that most government institutions fared badly in the category for “Human Resources” of which training is a component.

government departments, who understand the content and processes of PAIA, the promise of realising the right of ATI for ordinary South Africans will be stillborn’.

4.2.1.4 Awareness of PAIA amongst the officialdom

The public service is, by its nature, a large and diverse beast. However, notwithstanding the fact that the administration of PAIA is the responsibility of only a small handful of officials, the proper implementation of the Act requires at least some level of awareness of the Act by all officials.

Officials are the generators of records. Each and every day public officials literally churn out millions of records whether it be reports, minutes of meetings, notes, e-mails or correspondence. Each and every one of these records may become the subject of a PAIA request and as such officials must be aware of the fact that proper record keeping is a fundamental part of their role as a civil servant. They must further be acutely aware of the fact that the public have a constitutional right to access information and as such transparency and openness must inform the manner in which they perform their functions.

The complex organisational structure of government coupled with low levels of awareness amongst the public of procedures for accessing information no doubt result in the situation where the public is not always aware of how or where to direct a query regarding access too. None of the members of the public that completed the questionnaire knew who was responsible for handling queries related to ATI. The majority of the surveyed group indicated that they would merely contact the relevant government department. This clearly raises the importance of front-line staff as well as all other officials being aware of the Act and being able to direct members of the public to the designated information officers for further conduct of the matter. Nonetheless, studies have shown that levels of awareness amongst “officialdom” are shockingly low. In 2002, an ODAC survey revealed that almost fifty percent of all public officials had not even heard of PAIA.¹⁴⁵ Now, eight years after that study it would seem that the situation has little improved. The SAHRC notes in its 2008/9 Annual Report that at best officials only appear to have a “perfunctory knowledge and awareness of the legislation.”¹⁴⁶ This was confirmed by the questionnaire which revealed that although all five officials questioned were aware of PAIA, only two were aware of the process to be followed in terms of PAIA. The remaining three responded as follows:

- Where the information is under the direct ambit of my core functions I will divulge the information, alternately I will provide the person with a more suitable contact.

¹⁴⁵ McKinley 2003, 10 ff.

¹⁴⁶ South African Human Rights Commission Annual Report 2008/9, 156.

- First of all I have a basic discussion with the individual and try to assist as much as possible, that includes trying to source and send them the information personally. If that fails I then refer them to where they could find the required information. However always ensure that they have my details, so that they can come back to me if they come across any difficulties. If all else fails then I will be honest and say that I am unable to assist, this is the absolute last resort. I feel it is important that we are totally honest and open with the public, and not send them from pillar to post. Hence I try and assist the individual personally.
- Depends on the type of information requested, I will refer them to the correct person.

The above responses are a clear indication that there is a lack of awareness amongst certain officials in the PGWC of the way in which PAIA operates. It is pleasing however that all the responses indicate that the officials have a willingness to assist. However, notwithstanding same, it is clear that a lack of knowledge may severely frustrate and hamper the process of requesting information which in turn may result in lower request levels or in the public abandoning requests. It further exposes the public body to the risk that information protected by the Act will be disclosed without due process thereby possibly resulting in the public body suffering harm of some sort.

4.2.2 Inadequate infrastructure and internal mechanisms

It is widely accepted that in addition to a legal framework protecting the right to ATI, “it is necessary to apply procedural and organisational mechanisms to promote openness of the administration and to avoid an excess of bureaucratic obstacles to the provision of information.”¹⁴⁷ As such it is crucial that public bodies put into place systems that facilitate and promote compliance with the Act.

4.2.2.1 Records management

As outlined in Chapter 3 above, PAIA reduces the scope of ATI to access to “records” only. As such the exercise of the right to ATI is dependent on whether a record does indeed exist and whether it can be found. As Laura Newman and Richard Calland point out, “if there are no records to be found, or they are so unorganised that locating them becomes an insurmountable obstacle, the best ATI law is meaningless.”¹⁴⁸ Records Management therefore entails both record making as well as record keeping.

¹⁴⁷ Danish Institute of Human Rights “An Introduction to Openness and Access to Information” (2005) available at <http://www.humanrights.dk/files/pdf/Publikationer/An%20Introduction%20to%20Openness%20and%20Access%20to%20Information.pdf> [accessed 9 June 2010] 40.

¹⁴⁸ Neuman and Calland 2007, 14.

(a) Record making

The improvement and development of record making standards is necessary for the true realisation of the right to ATI. As expounded earlier in this paper, non-essential information holds little value as a tool for the realisation of rights or the promotion of democracy. As a Bolivian public administrator commented, “that which is certain is that public entities generate and accumulate incalculable volumes of information that for the most part have no utility from the perspective of efficacy, efficiency and economy of its operations.”¹⁴⁹ PAIA does not contain any provisions on recording making and therein lies the risk that officials may purposely choose not to record certain information so as to protect it from the reach of PAIA. Furthermore, an increase in electronic modes of communication means that often no record will exist at all e.g. where matters are conducted via the telephone. Nonetheless, in the South African context the public is offered some measure of recourse in the provisions of the Promotion of Administrative Justice Act 3 of 2002 (PAJA) which grants persons the right to reasons for administrative action that affects them negatively.¹⁵⁰ PAJA in and of itself is not sufficient however in so far as it is limited to instances where an administrative action has already been taken and only extends the right to request reasons to those persons who have actually been effected by the administrative action.¹⁵¹

(b) Records keeping

The National Archives and Records Service of South Africa, defines record management as “the process of ensuring the proper creation, maintenance, use and disposal of records to achieve efficient, transparent and accountable governance.”¹⁵² Effective records management is inextricably linked to a public body’s ability to fulfil its obligations in terms of PAIA. Records that are correctly classified and stored promote the objectives of PAIA in so far as they facilitate the easy retrieval and dissemination of requested information. Despite the obvious importance (and legal obligation) of good record management practices, the state of records management in South Africa, post 1994, has been described as being “poor” and “in a general state of chaos.”¹⁵³

A 2009 survey conducted by ODAC (GKA Survey) on PAIA compliance amongst public bodies revealed that the Department of the Premier in the PGWC, which houses the office of the Premier as well as the most senior provincial official, the Director-General, did not have a records manager in place and was not able to provide file plans in respect of all of its

¹⁴⁹ *Ibid*, 16.

¹⁵⁰ Section 5 Promotion of Administrative Justice Act.

¹⁵¹ *Ibid*.

¹⁵² National Archives and Record Service of South Africa “Managing Public Records and the Law-What Governmental Bodies Need to Know” (2007), available at http://www.national.archives.gov.za/rms/ad_pamphlet1.PDF [accessed 3 August 2010].

¹⁵³ Allan, Kate “ Applying PAIA: Legal, Political and Contextual Issues” (2009) in Allan, K (ed) *Paper Wars* 144.

directorates.¹⁵⁴ Whilst this in itself is not proof that records are not properly kept it does indicate that even where records may exist they may be out of reach simply because they cannot easily be located. More than half of the responses by officials to the Research Study question “Are you easily able to trace documents within your department?” were met with negative responses. This non-familiarity amongst officials with the system of record management within their departments is a red flag in the pursuit of properly implementing PAIA. At the heart of records management is the fact that , “the extent or the time and energy spent on finding pieces of information requested, is in exact correlation to the adequateness, the efficiency and the efficacy of your filing system.”¹⁵⁵

(c) The challenge of managing electronic records

A new challenge that is facing the democratically elected government is the issue of electronic record-making and electronic record-keeping. Government is making increased use of electronic systems to conduct its business.¹⁵⁶ Despite the move away from a purely based paper system “there nevertheless appears to be resistance to the implementation of electronic record keeping and dissemination practices within government.”¹⁵⁷ The effect of this is detrimental not just in the context of the right to ATI, which is reliant upon proper record keeping, but also for purposes of operational continuity, disaster recovery and institutional and social memory of a public body.¹⁵⁸

It has been noted that, “the South African ATI regime makes almost no use of or response to the opportunities and challenges posed by [information] technology. Electronic technology seems to be seen more as a different speed of medium rather than as a different type.”¹⁵⁹ The seriousness of the situation is particularly evident with reference to the PGWC’s “IT End-User Policy” which provides that ‘individual online mailboxes will be cleaned up on the server on a regular basis. The mailbox clean-up happens on a weekly basis and items older than 260 days or larger than 8 MB are automatically deleted.’¹⁶⁰ The effect of the policy is that vast amounts of essential information may simply be deleted at the touch of a button without any prior warning. Thus the right to ATI is severely compromised by officials who do not diligently archive e-mails or print copies of same. It is interesting to note that the policy , which came into effect only in 2008, does not even refer to PAIA in its section dealing with the regulatory

¹⁵⁴ Open Democracy Advice Centre 2009.

¹⁵⁵ McKinley 2003, 14.

¹⁵⁶ National Archives and Record Service of South Africa “Managing Electronic Records in Governmental Bodies-Metadata Requirements” (2006) available at http://www.national.archives.gov.za/rms/NARS_DMLIB-4915-v1-NARS_DMLIB-Managing_electronic_records_metadata_requirements.PDF [accessed 9 June 2010].

¹⁵⁷ Allan 2009, 189.

¹⁵⁸ National Archives and Record Service of South Africa 1997.

¹⁵⁹ Currie & Klaaren 2002, 2.

¹⁶⁰ Provincial Government of the Western Cape “IT-End User Policy” (2008) available at <http://dws.wcape.gov.za/dmsv525/download?WEBID+51112> [accessed 10 September 2010].

framework of the policy thus clearly indicating that the right to ATI is seen as something separate from the issue of electronic information.

4.2.2.2 Lack of dedicated PAIA implementation units

The state has embarked on an extensive campaign to transform service delivery within the public service. The campaign finds expression in the principles of Batho Pele ('people first') which aims to enhance the quality and accessibility of government services by improving efficiency and accountability to the recipients of public goods and services.¹⁶¹ These injunctions which are directed at "consultancy, ATI, openness, and transparency.... are in perfect synergy with articulated service delivery priorities identified within PAIA itself."¹⁶²

One would expect that the close link between the principles articulated in PAIA coupled with government's commitment to the principles of Batho Pele would result in a situation where every public body dedicates resources and provides an internal platform within its structure for purposes of implementing the Act. However, all indications point to the fact that for the most part, PAIA is viewed as "a competing priority, thereby isolating it as a deliverable from the broader context of social delivery."¹⁶³

The regard for PAIA as a deliverable that does not warrant the allocation of proper resources does little to relieve the fact that the proper implementation of PAIA is dependent on the necessary infrastructure being in place. While there is a tendency on focussing on the aspect of responding to requests only, the legislation itself in fact goes further. As highlighted in chapter 2 the objectives of PAIA demand, inter alia, that processes be put in place which promote transparency, accountability and effective governance of the public body, enable information requesters to obtain access to records held by the state as swiftly, inexpensively and effortlessly as reasonably possible and empower and educate the public to understand their right to access information.

Whist the most appropriate PAIA model will change depending on the organisational structure and needs of a public body such a unit should in the very least have the necessary

¹⁶¹ Department of Public Service and Administration (2007), "Batho Pele-Putting People First", available at <http://www.info.gov.za/aboutgovt/publicadmin/bathopele.htm>. The 8 principles are:

- regularly consult with customers
- set service standards
- increase access to services
- ensure higher levels of courtesy
- provide more and better information about services
- increase openness and transparency about services
- remedy failures and mistakes
- give the best possible value for money.

¹⁶² Kisoona 2010, 4.

¹⁶³ *Ibid.*

staff and budget to pursue an access agenda based on the deliverables in the Act. The duty of these officials will extend far further than the mere processing of requests. They should further continuously create and adopt practices aimed at improving record making and record keeping, disseminating as much information as is possible without resort to formal procedures in terms of the Act and initiating campaigns aimed at educating the public and creating a demand for information. Of the four DIO's who participated in the Research Study, only one indicated that his department had strategically based the PAIA unit within its record management unit and had allocated specific resources for realisation of the Act. The fact that PAIA was a central part of the job description of the DIO as well as certain other officials in the record management unit, has translated in a situation where the department is taking active steps to promote awareness of PAIA, the DIO engages closely with civil society and the department is making great strides in the development and use of electronic record systems.

4.2.2.3 Non-compliance with the provisions of PAIA

Compliance with the overall obligations in terms of PAIA appears to be low. The Act places a number of positive obligations on public bodies, each of which is discussed separately.

(a) Deemed refusals

In terms of s 25 of PAIA, public bodies have 30 days in which to respond to a request for ATI. However, if an information officer fails to give the decision on a request for access to the requester concerned within the 30 day time period, the information officer shall be regarded as having refused the request.¹⁶⁴ As such a request that is simply ignored will be deemed to have been refused, in which case a requester may follow the dispute resolution process as set out in PAIA.

Studies indicate that the level of mute refusals is particularly high and reason for grave concern. In a study conducted by the Open Society, Justice Initiative in 2003, 62% of requests submitted to public bodies resulted in mute refusals.¹⁶⁵ More recent statistics do not appear to be any more promising, in the 2009 ODAC study, 69 % of the public bodies surveyed did not respond at all to ODAC's request for information on its state of compliance with PAIA.¹⁶⁶ Reasons cited for the low compliance rates by officials include a lack of capacity to deal with requests, the fear of making incorrect decisions and a lack of training on the manner in which PAIA requests are to be processed.¹⁶⁷

¹⁶⁴ Section 27 PAIA.

¹⁶⁵ Open Society Institute 2006, 47 ff.

¹⁶⁶ Open Democracy Advice Centre 2009.

¹⁶⁷ Open Society Institute 2006, 47 ff.

The prevalence of mute refusals is of particular significance in relation to the public's perceptions of the openness and transparency of government. Irrespective of the fact that a deemed refusal does not necessarily signal the end of the life of a request for information, it most certainly will have a negative impact on a requester's faith in PAIA and the system. This lack of confidence in the system may dissuade requesters from making future requests which in turn will have a ripple effect on the exercise and protection of other rights.

(b) Production and submission of a PAIA manual- Section 14 compliance

As discussed above, it is a prerequisite for the accessibility of information within a public body that officials (especially those tasked with administering PAIA) have institutional knowledge of how records are created, where they are stored and how to retrieve them. However, it is equally important that the public too is able to decipher what types of records a particular public body holds so that requesters can make complete and clear requests for information to the correct public body. This is especially important in the South African context where PAIA only provides for access to 'records' and not to information generally.

Section 14 of PAIA addresses this issue in so far as it provides that each public body must produce and submit a manual to the SAHRC that sets out, inter alia:

- a description of its functions and structure;
- sufficient detail to facilitate a request for access to a record of the body; including a description of the subjects to which records relate and the categories of records held on each subject; and
- the latest notice regarding the categories of records that are available without the need to invoke PAIA.¹⁶⁸

The purpose of the s 14 manual is therefore clearly to facilitate the process of requests and this is significant for both the requester as well as the public body. A precise request lends itself to being dealt with more quickly and efficiently thereby reducing the burden on the public body. However, compliance with the requirements in s 14 has been poor on two fronts.

Firstly, many public bodies have simply failed to publish the manual at all. A 2007 study by the Public Service Commission on the implementation of PAIA revealed that 44% of the 130 sample departments did not have manuals.¹⁶⁹ This failure to comply with a basic provision of the Act translates into the situation where, "citizens do not know what information is held by

¹⁶⁸ Section 14 (1) (d) PAIA.

¹⁶⁹ Public Service Commission "Implementation of the Promotion of Access to Information Act in the Public Service" (2007), available at http://www.info.gov.za/otherdocs/2007/implmnt_access_info_act.pdf [accessed 6 August 2010].

government departments and what information is automatically available to them. This means that citizens would be unable to participate in a meaningful manner in government decision-making processes.”¹⁷⁰

Where publication has occurred the manuals are often not available in at least three-official languages as required and are not regularly updated in line with changes in a public bodies PAIA regime.¹⁷¹ The s 14 Manual of the Department of the Premier, PGWC for example does not contain the name and details of the new Director-General as information officer nor does it correctly reflect the recent changes in the organisational structure of the department.¹⁷² Outdated information serves little value to citizens and as the Public Service Commission points out, “these manuals only become a meaningful part of the compliance structure if they are updated.”¹⁷³

Secondly, the quality of manuals and hence their value as a tool in promoting ATI is questionable. PAIA has been criticised for failing to provide any real guidance on the content of the manuals.¹⁷⁴ Whilst it is agreed that PAIA does not require a public body to release an index of records as such, the Act does stipulate that the description of records must be sufficient to facilitate the submission of a request.¹⁷⁵ In practice however, this has not been the case and manuals seldom contain an index of records and instead merely list the subjects and categories of records that are kept by the public body. In the s 14 Manual for the Department of the Premier, PGWC the list of records is exceptionally vague and merely contain subject lists such as travel, donations, supplies, departments, payments and visits.¹⁷⁶ These broad descriptions offer no insight as to the type of records that are generated in each category. For example in relation to the category ‘departments’ it is impossible to decipher whether it refers to provincial or national departments or what type of records pertaining to departments are kept.

(c) Automatically available records- Section 15 compliance

One of the key ways in which PAIA promotes the right to ATI is by obligating the information officer of a public body to periodically submit to the Minister of Justice a description of the categories of records that are automatically available without a person having to make a formal request for same.¹⁷⁷ The s 15 obligation, forms part of the ‘obligation to publish’ which has been internationally accepted as a prerequisite for enabling genuine access to

¹⁷⁰ *Ibid* 17.

¹⁷¹ Allan 2009, 190.

¹⁷² Department of the Premier, Provincial Government of the Western Cape “Section 14 PAIA Manual” (2004) available at www.capegateway.gov.za/Text/2004/2/sect14_pawc.pdf [accessed 19 June 2010].

¹⁷³ Public Service Commission 2007, 18.

¹⁷⁴ Allan 2009, 190.

¹⁷⁵ Section 14 (d) PAIA.

¹⁷⁶ Department of the Premier, Provincial Government of the Western Cape 2004, 9.

¹⁷⁷ Section 15 PAIA.

government information.¹⁷⁸ It is premised on the notion that freedom of information implies “not only that public bodies accede to requests for information but also that they publish and disseminate widely, documents of significant public interest, subject only to reasonable limits based on resources and capacity.”¹⁷⁹

PAIA does not define the nature or extent of records that must be published in terms of s 15. A study of comparative law shows that in some countries, ATI legislation is specifically provides for categories of information that must be automatically available. In Bulgaria, for example, publication of information that may prevent a threat to life, health, security or property is necessary, whilst in the United States of America and Thailand, legislation provides for the publication of certain information and for other information to be routinely available for inspection.¹⁸⁰ In contrast, PAIA leaves the door wide opened on the type of information that a public body can choose to publish voluntarily. The discretion is arguably to the advantage of public bodies as the wider the net of voluntary disclosure, the less work is required for information officers who will not be under an obligation to process requests formally in terms of PAIA, thus saving on time and resources.

In practice, public bodies appear to be falling foul of the provisions of s 15, in so far as they fail to submit to the Minister of Justice the requisite list of records that are automatically available and by not making sufficient information freely available. The 2009 Justice Survey shows that key departments in the PGWC such as the Department’s of Health, Environmental Affairs and Development Planning as well as the Departments of the Premier and Cultural Affairs and Sport did not comply with their s 15 obligation in 2009. In fact the only records that are automatically available from the Department of the Premier are its corporate information brochure and the register in terms of s 7(1) of the Executive Members of Ethics Act 1998.¹⁸¹ Thus the Department that houses the key political figure in the province and is custodian of vast amounts of essential information, especially that relating to budget and policy is doing little to set an example to other departments.

(d) Reporting obligations- Section 32 compliance

Section 32 of PAIA obligates the information officer of a public body to annually submit to the SAHRC a report detailing the number of requests received, the number granted in full, the number granted under s 46 (mandatory disclosure in the public interest), the number of partially and fully refused requests, as well as some other statistics. This data is then

¹⁷⁸ Article 19 1999, 3.

¹⁷⁹ Public Service Commission “Implementation of the Promotion of Access to Information Act in the Public Service” (2007), available at http://www.info.gov.za/otherdocs/2007/impmnt_access_info_act.pdf [accessed 6 August 2010].

¹⁸⁰ The World Bank “Legislation on Freedom of Information:Trends and Standards” *Prem Notes*, available at www.1.worldbank.org/prem/PREMNotes/premnote93.pdf, [accessed 9 June 2010].

¹⁸¹ Department of the Premier, Provincial Government of the Western Cape 2004, 9.

tabulated by the SAHRC and forms part of its annual report to Parliament. Whilst, the value of the s 32 report has been criticised because of its quantitative focus, the report does provide a useful snapshot of the level of demand for information and the corresponding level of ATI.¹⁸²

To date compliance by public bodies with their s 32 obligation has been extremely low with the result that the body of data available for analysis is seriously compromised and undermines the entire purpose of s 32.¹⁸³ In 2002 a paltry 42 public bodies submitted their s 32 reports and 7 years later the figure has risen only marginally to 88 in 2009.¹⁸⁴ As Kisoon points out these increases do not boost the overall compliance rate beyond 30% for the multiple levels of government.¹⁸⁵ The effect of the low levels of compliance with s 32 mean that the SAHRC has “shifted its focus to securing higher submission rates as opposed to dedicating resources for substantive monitoring and evaluation of report content.”¹⁸⁶ The result is that an opportunity for engagement on the issues that arise from the reports is missed.

It is difficult to attribute the low levels of compliance with s 32 to a specific reason but generally public officials have noted that, “the overwhelming depth of compliance obligations with various pieces of emerging legislation, an absence of adequate monitoring and tracking systems and consequently the inability to collate regional statistics and a lack of awareness” as the premium reasons for non compliance.¹⁸⁷ The reasons proffered strongly suggest that the implementation problems regarding lack of skilled officials implementing PAIA and the lack of PAIA units have the effect of seriously impeding legislative compliance. As such the levels of compliance will remain low in the absence of tackling these issues as will the quality and reliability of the s 32 report.

4.3 Socio-political issues

The implementation issues discussed above cannot be divorced from the socio-political issues that impede the proper implementation of PAIA. In many respects the one feeds the other – without the necessary budget, drive and commitment to achieving the objectives of PAIA, no implementation strategy can be successful.

This section visits the notion of political will in the context of ATI, the pervasiveness of a secrecy culture, the unique role of the SAHRC and the socio-economic issues facing requesters.

¹⁸² Kisoon 2010, 6.

¹⁸³ Collin and Darch 2009, 238.

¹⁸⁴ South African Human Rights Commission Annual Report 2008/9.

¹⁸⁵ Kisoon 2010, 6.

¹⁸⁶ *Ibid.*

¹⁸⁷ Kisoon 2010 6.

4.3.1 Political will

The term “political will” is frequently invoked in political and social discourse but its precise meaning is as ambiguous as it is elusive. Notwithstanding the fact that it is frequently referred to as the “slipperiest concept in the policy lexicon”¹⁸⁸, it is submitted that the concept of political will can be formulated in a particular context with reference to specific indicators. For purposes of this paper two indicators are used to measure political will in the context of ATI. These are the mindset of political role players and the resource commitment and willingness to resolve and counteract implementation problems.

4.3.1.1 The absence of an ATI “mindset”

As illustrated in Chapter 2 above, the liberation movement recognised early on that the right to ATI was a fundamental building block in the foundation on which to build a new democratic South Africa.¹⁸⁹ Thus notwithstanding the fact that there was during the demise of Apartheid a “global constitutional imperative” pushing for and driving the adoption of ATI laws worldwide”, there was a strong internal political campaign for its inclusion as a right in the Bill of Rights.¹⁹⁰ However, the commitment to a right to ATI must be framed within the context of the broader fact that stepping out from the shadow of Apartheid required political commitment to democratic ideals that reached far beyond ATI.¹⁹¹ As such by the time PAIA was being formulated the political commitment to the concept of ATI was perhaps not as robust as before and the main driver for a strong piece of legislation came in fact from a vociferous and committed civil society coalition.¹⁹² Thus while the impetus for the inclusion of ATI as a constitutional right may have been political, the driving force for legislation to give effect to the right seems to have lacked political buy- in and political leadership was “conspicuous by its absence”.¹⁹³

It would appear that the lack of political will at the stage of formulation of PAIA has carried through in the implementation of the Act. To date, a decade since the passing of PAIA, it is difficult if not impossible to identify any champions of the legislation. This is evidenced by the general lack of attention to PAIA or the right to ATI on the public platform, the general unawareness by politicians of the state of implementation and in some cases an outright

¹⁸⁸ Hamergen, Linn “ Political Will, Constituency Bilding and Public Support for Rule of Law Programes” (1998) *The US Agency for International Development*, available at www.pdf.usaid.gov/pdf_docs/PNACDO23.pdf [accessed 16 September 2010].

¹⁸⁹ Puddephatt, Andrew “Exploring the role of Civil Society in the Adoption of Access to Information Laws: The Cases of Bulgaria, Italy, Mexico, South Africa and the UK”, (2009) *World Bank Institute: Access to Information Working Paper Series*, available at <http://siteresources.worldbank.org/EXTGOVACC/Resources/atlCivSocietyFinalWeb.pdf> [accessed 10 May 2010].

¹⁹⁰ Calland 2009, 2.

¹⁹¹ Puddephatt 2009, 29.

¹⁹² Calland 2009, 4.

¹⁹³ Neuman & Calland 2007, 13.

display of contempt toward the right. In 2003, the then Justice Minister, Penuell Meduna, informed a visiting contingent from Armenia that his Department was fully complying with PAIA and had not been the subject of any appeals. On the contrary his Department had faced by that point numerous appeals against refusal and was the subject of two pieces of litigation under the Act.¹⁹⁴ This general ignorance is indicative of the value placed on PAIA by those in power. But perhaps worse than ignorance is the contempt against which some politicians appear to have for PAIA and the right to ATI. Richard Calland's encounter with a senior government source in 2009 crisply illustrates the lack of commitment towards the concept of ATI as a whole. According to the official, "when Cabinet looks out of the window what it sees is the (ATI) law being used by its political enemies to embarrass it."¹⁹⁵ Clearly there is a sense of doom associated with PAIA – a realisation that whilst access is a fundamental human right and essential for democracy it is also a means by which political accountability is thrown into the spotlight and where politicians are forced, perhaps to their detriment, to reveal what they would prefer not to.

It would seem that this 'contempt' for ATI as a means of accountability is finding expression in the push by the ANC for the adoption of the Protection of Information Bill or Secrecy Bill as it is commonly referred to.¹⁹⁶ The Bill gives any state agency, government department and even parastatals the ability to classify information as secret if it is in the 'national interest'.¹⁹⁷ It will thus in effect be possible for the State to curtail access to commercial information and information on service delivery. More harrowing is the fact that anyone involved in the 'unauthorised' handling and disclosure of classified information can be prosecuted and face a jail term. Notwithstanding a plethora of objections to the Bill from civil society, the media and ordinary South African's during public hearings, the Chief State Law Advisor has "declared the bill fully constitutional and has dismissed some of the submissions as "emotional and hysterical".¹⁹⁸

Whilst an analysis of the Secrecy Bill is beyond the scope of this paper, what is important is the fact that it is widely perceived as limiting and severely undermining the right to ATI as enshrined in the Constitution – this view of the Bill has been formally endorsed by more than 400 organisations and a host of well known South African academic, business, literature and media personalities. Yet despite this, the ANC has done little, in the way of reassuring the South African public that the Secrecy Bill is not designed to nor will it hamper the right to ATI. Instead in response to criticisms that the Secrecy Bill was reminiscent of Apartheid era

¹⁹⁴ *Ibid* 13.

¹⁹⁵ Calland 2009, 10.

¹⁹⁶ Protection of Information Bill 6 of 2010.

¹⁹⁷ Dario Milo "State Secrecy Bill Returns, Worse than Ever" (2010), available at <http://www.timeslive.co.za/sundaytimes/article543611.ece/State-secrecy-bill-returns-worse-than-ever> [accessed 2 October 2010].

¹⁹⁸ Hartley Windham "Secrecy Bill Declared Fully Constitutional" (2010) available at <http://allafrica.com/stories/201007280182.html> [accessed 3 August 2010].

secrecy legislation, President Jacob Zuma could only muster a defensive response and stated that such comparison is “preposterous, disingenuous and an unbelievable insult.” The ANC is in short missing a valuable opportunity to, within the context of the current debate on media freedom, to clearly pronounce on and commit itself to the notion of ATI as a right.

4.3.1.2 **Resource allocation and the commitment to operationalising PAIA**

In 2009, Helen Zille stated at her inauguration as Premier of the Western Cape that “we will devise ways of letting the sun shine into our administration, and of making accurate information on our activities more easily accessible to citizens, not only so that we are held more accountable, but so that we can jointly address the obstacles that stifle development and retard progress”.¹⁹⁹ This impassioned rhetoric seemed to indicate a political willingness and the correct mindset needed to ensure that the right to ATI was promoted and protected within the PGWC Administration. However, mindset alone is not sufficient and must be coupled with the provision of sufficient and committed resource allocations.²⁰⁰ Despite this, to date, no department in the PGWC has a dedicated PAIA unit or staff with a separate budgetary allocation to administer the Act.

The ‘piggy-backing’ of the implementation of PAIA within the resource constraints of other programmes and initiatives is not unique to the PGWC and instead appears to be replicated throughout the public sector. The 2009 GKA Survey revealed that 29 of the 33 respondents achieved a score of 5 or less out of a possible 11 for the category of resource allocation to PAIA - a clear indication of the lack of financial commitment to the operationalising of PAIA.²⁰¹ However, financial commitment is only one aspect of ensuring that PAIA is properly operationalised. Even with limited or no funds steps can be put in place to give better effect to the Act. In the Department of the Premier of the PGWC, all PAIA requests are processed by the Chief Directorate: Legal Services yet the directorate does not even have a dedicated filing system to track these requests. Instead PAIA matters are allocated a general LO (Legal Opinion) reference number making it an extremely difficult task to quickly uplift all PAIA files for a specific period, especially where a legal advisor did not specifically make reference to PAIA in the title of the file. The simple allocation of specific file numbers, which will cost the department nothing from an administrative point of view, for PAIA requests will go some way in ensuring that a proper record is kept of the number of requests received and will make follow-ups of these requests easier.

It is off course arguable that the lack of resource allocation to the implementation of PAIA is attributable to the fact that public bodies are facing increasing social demands and worsening

¹⁹⁹ Zille, Helen ,Acceptance Speech on Election as Premier of the Western Cape (6 May 2009) available at www.capegateway.gov.za [accessed 14 August 2010].

²⁰⁰ Neuman & Calland 2007, 13.

²⁰¹ Open Democracy Advice Centre 2009.

economies thus forcing them to service the needs of other programmes over and above the implementation of an access regime.²⁰² However, the simple sidelining of PAIA as a legitimate programme is indicative of the failure of public bodies to appreciate its cost-benefit worth. Studies from around the world point conclusively to the fact that a strong access regime can reduce corruption and increase investment in the country as well as improve the efficiency of government.²⁰³ However, in the absence of resource allocation and the commitment to developing and maintaining systems (especially where such developments are affordable or can be made without a cost impact) to enhance PAIA delivery, it must be concluded that public bodies lack the political will to promote and protect the right to ATI.

4.3.2 Role of the South African Human Rights Commission (SAHRC)

The SAHRC is one of the so called Chapter 9 Institutions, which form part of the South African constitutional framework. The Chapter 9 Institutions were established, inter alia, as a means of restoring the credibility of the state, ensuring that democracy and human rights was respected and promoted, re-establishing and building respect for the rule of law and ensuring that the state became more responsive to the needs of its citizens.²⁰⁴ The Chapter 9 Institutions are defined by the guiding principle of independence and the Constitutional Court has on several occasions made it clear that they are not part of government.²⁰⁵ However, these institutions are established by the state, derive their funding and capacity from the state and are ultimately accountable to the state. There is thus a fine balance between the independence of these institutions and their reliance on and interconnectedness to government. It is in this context that the failure of the SAHRC to ensure the proper implementation of PAIA is based and connected to the failure of the state as a whole.

The SAHRC assumes primary responsibility for the oversight of PAIA and is compelled to carry out a number of positive duties in terms of PAIA. These duties and the compliance of the SAHRC in relation to same are dealt with separately.

Firstly, the Act requires the SAHRC to play a lead role in educating and informing the public about the Act. In this regard the Commission is required to compile and regularly update a guide on how to use the Act.²⁰⁶ It must further, within the available resources, develop and conduct education programmes to help members of the public, especially those from disadvantaged communities, to understand the ways in which they can exercise their rights in terms of the Act.²⁰⁷ The Commission has duly compiled a user guide on the Act but the

²⁰² Neuman & Calland 2007, 12.

²⁰³ *Ibid* 12.

²⁰⁴ Parliament of the Republic of South Africa, "Report of the ad hoc Committee on the Review of Chapter 9 and Associated Institutions" (2007) 3.

²⁰⁵ *Ibid* 10.

²⁰⁶ Section 10 and section 83 PAIA.

²⁰⁷ Section 83 (2) (a) PAIA.

availability and usefulness of the guide is problematic. A search conducted on the website of the Commission for a copy of the guide proved fruitless. A general internet search yielded copies of the original publication only as posted on the websites of various public bodies but no updated versions. As a last resort an e-mail request was forwarded to the PAIA Unit requesting information on when last the guide was updated and how to secure an electronic copy of same but the e-mail was unanswered. Similarly, a call to the National Library of South Africa, which is identified in the Guide as a guide distribution Centre, for information on the latest version was met with the response that the request should be e-mailed for further attention. As such it is not clear whether the guide has in fact been updated and the process of securing a copy proved to be too tedious to continue.

The guide itself for the most part replicates the wording of the Act and as such may not be easily understandable to the general public. The section dealing with grounds for refusal is for the most part taken verbatim from the Act. For instance the section dealing with the mandatory protection of privileged records in legal proceedings is copied almost word for word from the Act with no indication or explanation of what is meant by 'privileged'. Without the requisite legal knowledge a requester would find it difficult to interpret the section and this defeats the purpose of the guide. The guide further fails to provide any practical examples of an actual request or of how the Act may be used as a means of enforcing other rights. In short, the guide is not easily obtainable and is in any event of little value.

As far as educational initiatives are concerned it appears that the Commission is not making a concerted effort to popularise the Act. As early as 2002, McKinley noted that the Commission's campaign was limited to "a few advertisements in the mainstream media, the holding of two workshops (mainly for those who already are familiar with PAIA) and some public training sessions at their offices in Johannesburg" and as such it failed to even partially fulfil its education mandate. The situation has subsequently improved but not significantly. In 2008 the Commission hosted a mere 24 PAIA sessions, on the specific request of certain public and private bodies, which reached a paltry 723 people. This clearly shows that the education and support of public bodies who failed to request assistance was not pursued. The report details no interventions, whether through the media or otherwise, aimed at educating the general public with the exception of the establishment of a PAIA Mailbox. The mailbox is an electronic interface whereby members of the public can access helpdesk facilities via an e-mail request. An e-mail requesting assistance was not responded to and throws into question the value of this initiative.

Secondly, the Act requires that the SAHRC monitor the Act's implementation and submit detailed reports to the National Assembly.²⁰⁸ The information contained in the Report relates specifically to those matters referred to in the s 32 reports discussed above as well as any

²⁰⁸ Section 83 (3) (b) and section 84 PAIA.

other recommendations that the Commission may have on improving PAIA. As indicated earlier the Commission has not managed to secure a high compliance rate with the s 32 obligation and this negatively impacts on the value of its report to the National Assembly.

Thirdly, whilst the Act does not compel the Commission to assist people who approach it for help in making a PAIA application, it does provide that the Commission may do so. As noted above the Commission has established a help desk but no details regarding the functioning and achievements of the help desk are noted in its Annual Report. This lack of clarity as to how the Commission has rendered assistance was also noted by the Asmal Committee which stated that it was not clear whether the Commission has assisted any individuals or groups, as envisaged in the Act.²⁰⁹ The indication therefore appears to be that the Commission does not take a pro-active role in this regard.

4.3.3 Culture of secrecy

Nearly two decades have passed since South Africa's transition to a constitutional democracy, yet the culture of secrecy which was so pervasive during the Apartheid regime is "proving extremely resilient."²¹⁰ According to Kate Allan the effect of this ingrained culture of secrecy can be seen across two primary areas - firstly the extremely high levels of mute refusals and secondly the tendency to interpret PAIA in a manner which does not favour access.²¹¹ It would appear that the state and public officials often regard PAIA as a threat, which must be resisted or managed. During this study, an information officer responded to the question "Do you think the administrative work, time and effort involved in processing PAIA requests is justified? In other words is it important and necessary for people to have access to the type of information they seek or is it somewhat of a waste of otherwise valuable time?" as follows:

"The information that they request at times are not valuable to us. But it can be for them. Scrutinising and double checking it the trick. The time spent doing that is sometimes not justified. It's not always wise to give out information as you never know how or against whom it's going to be used."²¹²

The response of the DIO is disturbing in that it reveals that officials treat requesters as adversaries and their primary focus is on protecting their employer rather than fulfilling the objectives of PAIA. The attitude of the DIO in question is not unique. On the contrary it would appear that officials are loathe to disclose information and tend to treat provisions for non-

²⁰⁹ Parliament of the Republic of South Africa 2007.

²¹⁰ Harris, Verne "From Gatekeeping to Hospitality" (2009) in *Paper Wars* 211.

²¹¹ Allan 2009, 199.

²¹² Research Study Questionnaire.

disclosure 'as a shopping list for reasons to refuse information."²¹³ As such it comes as no surprise that government has lost every single PAIA case that has reached the High Court.²¹⁴

In some ways the apparent resistance to openness is surprising considering that PAIA was born out of the recognition that openness and accountability were essential prerequisites for a democratic state. However, one must understand that the political culture in South Africa, has its roots in the struggle for freedom, and the success of the struggle in turn depended largely on 'undemocratic' operations.²¹⁵ As such the liberation movement was tightly run with decision making left in the hands of a few and criticism and dissent was seldom allowed, "lest they expose divisions within the movement, which could be exploited by the enemy."²¹⁶ The result is that even today supporters of the ANC are ready to overlook their shortcomings and the feeling is that "a popularly elected democratic government" needs to be given "an extended chance".²¹⁷ As such a regime of ATI, which threatens to expose the weaknesses of the state may be naturally viewed in a negative light.

4.3.4 The failing state of demand

Irrespective of how advanced an ATI regime is or how concrete its guarantee to transparency is, it will be of little effect or value in the absence of a strong demand for information. This is especially true in South African where despite the existence of a constitutional guarantee to ATI and legislation to give expression to this right, demand for information remains low.²¹⁸ The Justice Survey reveals that several departments in the PGWC, including Provincial Treasury and Community Safety, noted that they received no PAIA requests whatsoever for the year 2008/09 whilst other key departments such as Local Government and Housing and Health noted extremely low numbers of requests.²¹⁹ This paucity of requests offers government a legitimate excuse to divert resources to causes other than PAIA compliance and implementation with the inevitable result that in the absence of an adequately developed demand side, "the law is likely to wither on the vine."²²⁰ Calland and Neumann suggest that citizens, civil society and community organisations must take the lead in developing the demand side of the law by taking responsibility for monitoring government efforts and using the law.²²¹ However, it is contended that government has a key role to play in facilitating the

²¹³ McKinley 2003, 22.

²¹⁴ Calland 2009, 15.

²¹⁵ Gumede, William "South Africa: Building a Democratic Political Culture" in *South Africa, Democracy and the Retreat of Intellectuals* (2009) 13.

²¹⁶ *Ibid*, 14.

²¹⁷ Gumede 2009, 15.

²¹⁸ Kisoona 2010, 2.

²¹⁹ The Department of Local Government and Housing received 6 requests and the Department of Health received 11 requests.

²²⁰ Calland & Neuman 2007, 3.

²²¹ *Ibid*.

use of ATI legislation and the primary burden of creating and sustaining a demand side should not be shifted away from government.

The low levels for demand for information are due to, inter alia, a combination of issues, the key ones of which are discussed below together with an assessment of the way in which PAIA obligates government to combat these challenges.

4.3.4.1 Lack of awareness of the right to ATI

It is obvious that the public cannot use PAIA unless they are aware of its existence, what the right to ATI entails, how it can be used to their advantage and the procedures governing a request for access. This study revealed two disturbing patterns. Firstly, there was general ignorance of the right to ATI. Only 3 participants had ever heard of PAIA and none were aware of how a request should be made. It is important to note that the participants in this study were all literate and had post matric qualifications. As such their lack of knowledge warrants particular concern as it indicates that even the educated, middle class elite are not familiar with what is regarded as a fundamental human right. It also raises the likelihood that non-literate or uneducated persons will not have heard of the right to ATI or of PAIA in particular.

Secondly many of the participants felt that government was secretive and justifiably so. This trend seems to support the idea that “effective and meaningful implementation has been hampered by the fact that South Africans have been shaped by generations of an absence of the right to information...Freedom of Information, as an idea and as a culture, has not yet taken root in the country. South African’s have neither the expectations nor the skills to ensure that PAIA is used optimally...”²²² The important question however is whether government must take some responsibility and action in addressing the issue of lack of awareness. Whilst the Latin maxim, *Ignorantia juris non excusat* or ignorance of the law is no excuse, may hold true in certain contexts, PAIA specifically obligates the state to promote and fulfil the right to ATI.²²³ Section 9(e) in particular compels the state to empower and educate the public to understand their rights in terms of PAIA in order that they may exercise the right. PAIA does not prescribe the manner in which the State must fulfil the positive obligation of educating the public on the right to ATI. The non-specificity should not serve as dissuasion from fulfilling its education function but rather as an invitation to public bodies to be creative in the tools they design and use to promote PAIA awareness. These tools may include the use of the internet, public campaigning to sensitise the population, media advertisements and even training of all officials with the view that they will act as PAIA implementing agents in their daily interactions with the public.

²²² Allan 2009, 192.

²²³ Section 9 (e) PAIA

In the PGWC, there is no co-ordinated programme aimed at educating the public on its rights in terms of PAIA. However, certain departments such as that of Local Government and Housing and Education are taking certain (albeit limited) steps to popularise the Act. Local Government and Housing includes a copy of the PAIA brochure compiled by the SAHRC in large volumes of outgoing correspondence and front office staff have received training on the Act. The Department of Education has an easy to use electronic database of important information related to PAIA.²²⁴ These steps are however far from sufficient and do not constitute as sufficient compliance with the duty to educate the public.

4.3.4.2 **Infrastructural and physical barriers**

The effect of Apartheid on the living conditions of the majority of the South African public is still clearly visible. Apartheid entailed far more than simply dividing the nation along racial lines, it provided a basis upon which the country was geographically racially partitioned and the allocation of resources was skewed in favour of the white minority. The legacy of Apartheid is that a great deal of South African's live in poverty and continue to lack access to basic services. The result is that even where there is awareness of PAIA and procedural know-how, citizens often lack the ability to use the Act. This is especially true for citizens who do not have access to transport and telecommunication facilities. The lack of infrastructural access is compounded by physical barriers such as difficulties in physically accessing buildings in order to file a request or being blocked from making a request.

In a 2004 study conducted by the Open Society Justice Initiative (OSJI) on ATI Practices in 14 countries, several attempts by a research participant to file a PAIA request failed.²²⁵ In some instances the participant was not permitted to enter into public buildings and in other instances was told that she would have to call first. Numerous calls were left unanswered. In yet another instance the participant was directed to the incorrect building a few kilometres away. For a person with limited access to transport it may not be possible or cost effective to travel to another office or building. Likewise it may not be possible to initiate a request via the telephone or to have the resources to make prior arrangements before submitting request. These factors not only hamper ATI but prevent it in the case of requesters who lack the resources, determination and time to pursue a request. As the OSJI points out, "the ability to submit requests is the first step in any ATI process. Where requesters are blocked from submitting requests...this amounts to a serious violation of the right to information."²²⁶

²²⁴ Visit the website for further information at http://wced.school.za/documents/infoact/from_wced/index_infoact.html.

²²⁵ Open Society Institute 2006, 94.

²²⁶ *Ibid* 84.

4.3.4.3 Language, literacy and compromised abilities

In addition to the infrastructural impediments to accessing information, requesters are also challenged by language and literacy incompetencies and in some cases compromised physical abilities.

Notwithstanding the fact that South Africa recognises 11 official languages, English is the lingua franca and generally the language of business, politics, the media and government. English is, however, only spoken as a mother tongue by approximately 8.2% of the population.²²⁷ PAIA does not prescribe the language in which a request must be made and it therefore follows that a request in any of the official languages will be permitted. However, during this study, numerous telephonic attempts to various departments in the PGWC and internet searches, for PAIA request forms in any language other than English and Afrikaans, yielded nothing. Similarly a search for a Xhosa version of the s 14 PAIA manual from any department in the PGWC proved fruitless. Equally concerning was the fact that all the information officers who participated in this study indicated that they did not speak Xhosa and would therefore be completely reliant on the assistance of Xhosa speaking colleagues if ever they needed to assist someone wanting to make a request in Xhosa or if ever they had to process a request in Xhosa. There was agreement amongst the research participants that this would take up a considerable amount of time and effort and as information officers they could never really be truly satisfied that the request was adequately captured or responded to.

Furthermore, PAIA requires that requests must be submitted in writing.²²⁸ In a country however, where more than of the population is illiterate and many suffer from impaired abilities such as blindness this requirement cannot easily be fulfilled. In obvious recognition of this, PAIA provides that information officers must assist those who cannot submit written requests.²²⁹ However, this assistance will off course necessitate access to the services of an information officer whether physically or via an electronic medium such as the telephone or internet. As explained above access to basic services coupled with infrastructural barriers and geographic location can work together to make it impossible to even access the assistance required to make a PAIA request. This is especially so for those suffering physical impairments as their accessibility of basic services such as transport and user friendly built environments is severely limited.

Assuming that a person who is unable to submit a written request is able to access the services of an information officer, such person will still be dependent upon the co-operation of

²²⁷ South Africa.Info “ The Languages of South Africa” (2010) available at www.southafrica.info/about/people/language.htm [accessed 6 October 2010].

²²⁸ Section 18 PAIA.

²²⁹ Section 19 PAIA.

the information officer. He or she may not only need assistance in the physical capturing of the request but assistance on how to frame the request. This will necessitate that the information officer is fully affray with the records management within the public body and has the time and resources to assist.

4.4 Conclusion

It is abundantly clear that ten years since the enactment of PAIA, the state of access in South Africa remains not only weak, but in some respects threatened. On the demand side “citizens simply do not seem to be making significant use of their right to know”²³⁰ and on the supply side it would appear that many public bodies lack the mechanisms necessary to ensure speedy, effective and efficient response to the demands of PAIA. The causes are complex and multidimensional and it would be impossible to identify a single key factor that has led to the current situation. The euphoria that accompanied the adoption of the Bill of Rights has steadily reached an anticlimax. The question however is whether legislative amendments are necessary to sharpen the PAIA sword or whether the focus on same is in fact misguided and unwarranted.



²³⁰ Collin & Darch 2009, 237.

CHAPTER 5 – WAY FORWARD AND CONCLUSION

5.1 Introduction

It has been argued that PAIA has the necessary ingredients to protect and promote the right to ATI and give expression to the constitutional guarantee of access to information. However, in order to turn the right of information into a living reality it is necessary that the State take pro-active steps to operationalise the law. It is submitted that the legislative framework of PAIA must be supported by three pillars - the identification of PAIA champions, the adoption of clear plans and processes, and the resource allocation necessary to implement such plans and processes.

5.2 Identifying champions

The adoption of ATI legislation is only the first step in protecting and promoting the right to ATI. As has been shown, in order for ATI legislation to be successful it must operate in an environment of openness and accountability. A lack of commitment to the principles of openness will “undermine the law by sending conflicting messages to those responsible for administering the legislation.”²³¹ The South African experience has shown that those who want to exercise their right of access are faced with a “generally ‘hostile’ officialdom that tends to treat provisions for non-disclosure (in PAIA) as a shopping list for reasons to refuse information.”²³² As such it is abundantly clear that if PAIA is to be successful a culture of openness must be fostered.

It is submitted that the most effective manner in which a culture of openness can be developed is through the appointment of official PAIA champions whose key responsibility must be the promotion and protection of the right to ATI. It is envisaged that such champions will exist at three strategic levels, namely through the SAHRC in its capacity as a state institution supporting democracy, at senior political level within a particular public body and at the level of senior administrative officials. All three levels should support each other and work in concert, as far as possible, to create and sustain plans and processes for the proper

²³¹ Commonwealth Human Rights Initiative “Implementing Access to Information-A Practical Guide for Operationalising Access to Information Laws” (2008) available at http://www.humanrightsinitiative.org/publications/rti/implementing_ati.pdf [accessed 6 May 2010] 5.

²³² Mckinley 2003, 22.

implementation of PAIA and to lobby for adequate resource allocation. The role and responsibilities of the champions should be as follows:

5.2.1 The South African Human Rights Commission

In light of the fact that PAIA envisages that the SAHRC will play a major role in ensuring the effective implementation and operation of PAIA it is suggested that it should do, inter alia, the following:

- ❖ Act as a co-ordinating body to set up formal structures with the various proposed PAIA champions. These structures should operate at national, provincial and local level and should meet regularly to discuss, debate and where possible resolve implementation issues.
- ❖ Significantly increase its public awareness campaigns through the usage of various media forms and active engagement with communities at ground level. Campaigns should be ongoing.
- ❖ Take concerted steps to strengthen its ties with civil society as a means of enhancing its capacity and assisting it in formulating and administering its plans in relation to PAIA.
- ❖ Redesign the structure of the s 32 reports to ensure that information received is reliable and easy to analyse. The current form has been criticised for not providing a proper reflection of the state of access in the country and these concerns must be addressed.²³³
- ❖ Take steps to ensure compliance by public bodies with their reporting responsibilities. This may include naming and shaming non-compliant bodies, facilitating electronic based reporting, securing reports through formal structures, as proposed, issue regular reminders and offers of assistance, involve civil society in the process and reward compliant bodies with certificates of recognition.
- ❖ Devise a comprehensive training programme to be rolled out to officials in all public bodies. The programme should not be a 'one size fit all' but should be adaptable

²³³ Darch & Underwood 2009, 239.

depending on the operational structure of each public body and the intended audience. Such training can become part and parcel of a public body's induction programme and be done internally within public bodies based on the SAHRC model.

- ❖ Training for Information Officers and Deputy Information Officers should be detailed and on going.
- ❖ Set up a help-desk facility specifically for queries from public officials.

5.2.2 Political champions

It is often assumed that a politician's role is to "create jobs, encourage economic activity, enhance the welfare and well-being of his subjects, preserve the territorial integrity of his country, and fulfill a host of other functions."²³⁴ In truth, however, "his primary responsibility is to his party and its member" and "his relationship is with his real constituency - the party's rank and file - and he is accountable to them the same way a CEO (Chief Executive Officer) answers to the corporation's major shareholders."²³⁵ As such it is obvious that for PAIA to succeed it must have buy-in from a political level. In the absence of a strong and committed political impetus for proper implementation the legislation is likely to be worth no more than the paper on which it is written. As such it is imperative that political champions, as wielders of public power and guardians of the public purse, act as formal PAIA champions within each specific public body. Such champions should accordingly be responsible for:

- The creation of a formal committee within the public body to ensure that an access agenda is aggressively pursued and that plans and processes are devised implemented and monitored.
- Ensuring that issues of transparency are firmly placed on the public platform by repeatedly and vocally committing the body to the objectives of PAIA.
- Lobbying for the allocation of adequate resources to ensure optimal operationalising of the Act.

²³⁴ Vaknin, Sam "The Role of Politicians" (2007) available at at <http://www.globalpolitician.com/23197-politics> [accessed 6 October 2010].

²³⁵ *Ibid.*

- Rewarding officials by means of formal recognition and commendation for actively pursuing the principles of openness in their work and reinforcing the notion that public officials must only “serve the politicians according to the law and it is not their job to spare them embarrassment or inconvenience.”²³⁶
- Taking the necessary steps to ensure that the right to ATI is vigorously protected and not compromised when developing policies and agenda’s. PAIA must in short “not be seen as a competing priority and an isolated deliverable that is divorced from government’s social priorities”.²³⁷
- Spearheading processes to ensure that there is coherence between PAIA and any other internal policies, operating procedures and standing instructions relating to record making, keeping and dissemination.

5.2.3 Senior administrative officials

Whilst the accolades for excellent service delivery are often attributed to the politicians in an administration it is in fact the officials that oil the machinery of the public service. However, notwithstanding the general low levels of recognition they receive, “in the heart of most public servants lies the conviction that service to the public, to the public interest, is what makes their profession like no other. It is why they chose it, for the most part, and why they keep at it, with enthusiasm and conviction, despite difficulties and frustrations along the way.”²³⁸ As such senior administrative officials must take proactive steps to ensure that all public officials under their management view the fulfillment of the objectives of PAIA as integral to their responsibility to serve and not as an add on function that has no relation or relevance to their everyday duties. In this regards senior administrative officials in each directorate should ensure that:

- ❖ Staff receives proper and regular training in PAIA.

²³⁶ Access to Information Review Task Force (2002), 28.

²³⁷ Kisoan 2010, 4.

²³⁸ Access to Information Review Task Force 2002, 25.

- ❖ Staff that have PAIA specific functions are held accountable for same in terms of their job descriptions, performance plans and ratings.
- ❖ The directorate diligently implements PAIA plans and processes as adopted by the public body.
- ❖ Professional excellence in documenting and managing information is encouraged and rewarded and the state of information management is regularly inspected.
- ❖ Strong and regular messages on the importance of transparency is transmitted to all staff who are encouraged to practice such principles without fear or favour.
- ❖ PAIA related issues are discussed as a standing agenda point in management and staff meetings.

The above suggestions are aimed at creating a culture of openness from the most junior level in a public body to the most senior. The rewards of a culture of openness are not simply an improved administration but must be seen also as a means of fostering a public sector ethic of service to the public, enhancing job satisfaction and raising the esteem in which public servants are held by the communities they serve and in which they live.²³⁹

5.3 Plans and processes

The adoption of carefully thought out plans and related processes is at the heart of the implementation of PAIA. Without a clear plan of action that is vigorously implemented and adhered to, even the best intentions of PAIA champions will yield little value. Plans and processes must focus dually on stimulating the supply and demand side of ATI as the two are interrelated and dependent on each other.

The precise nature, format and content of plans and processes will depend largely on the organizational structure of the public body, its location within the public sector, the nature of

²³⁹ Pope, Jeremy (2003) "Access to Information: Whose Right and Whose Information?", *Transparency International Global Corruption Report 2003*, available at http://www.transparency.org/publications/gcr/gcr_2003 [accessed 6 October 2010] 20.

its duties and obligations and its resource constraints. The following recommendations relate specifically to the Provincial Government of the Western Cape:

- ❖ The creation of a dedicated PAIA Unit, which must be centrally based on a shared model to save costs. The Unit must work extremely closely with officials in each department and must oversee the processing of requests and the compliance with and promotion of the Act both within and beyond the administration.

- ❖ Record making and record keeping must be drastically improved and due account must be taken of the challenges associated with electronic record keeping. Clear and precise file plans must be developed for all departments and descriptions of records and their whereabouts should be accessible to the entire administration via an electronic interface.

- ❖ Every department should identify the type of records with the most public significance and interest and ensure that these records are freely available without recourse to PAIA. Similarly, in a bid to reduce requests for certain types of information, the PGWC should implement and devise a 'sunshine policy' to make certain meetings open to the public.

- ❖ The PGWC should harness, together with local government, community partnerships aimed at marketing and promoting the use of PAIA.

- ❖ PAIA public awareness campaigns should form part of the ordinary operating procedures of the PGWC. Creative ideas include PAIA related messages on call waiting, the inclusion of a summary of PAIA on the back of all official correspondence, including e-mails and special PAIA pages on both the intranet and Cape Gateway.

- ❖ Usage should be made of existing government platforms to make PAIA more accessible to the public such as Thusong Service Centre's.²⁴⁰
- ❖ Physical barriers to access should be removed as far as possible, with due regard for safety concerns. PAIA forms should be available at the front office of all departments and there should similarly be PAIA drop-off boxes for depositing requests. Front office staff should receive special training.
- ❖ Relationships with civil society must be fostered and encouraged through regular interactions. In this regard support chapters should be created which include representatives of the PGWC, civil society and other public bodies.

5.4 Resources

The identification of PAIA champions and the formulation of clear plans and processes to implement the legislation are no doubt crucial to its success. However, any efforts at proper implementation will be a failure in the absence of insufficient resources and budget preparation. Whilst it is appreciated that enforcing the right to ATI, "is an expensive and time consuming aspect of government work' there is no doubt that it has the ability to save government large amounts of money by reducing corruption, preventing errors and wrongdoing and stimulating efficient and effective service delivery."²⁴¹ As Nat O'Connor points out, "any serious cost-benefit analysis of FOI must include the estimated savings that are generated including cost savings to the state which were largely brought about through information revealed by FOI requests."²⁴²

The formulation of a budgetary regime for ATI will require considerable and detailed planning. It will need to take into consideration the responsibilities for PAIA implementation at a national, provincial and local level. It is submitted that PAIA requires both direct and indirect

²⁴⁰ A Thusong Service Centre is a one-stop service centre providing information and services to communities, through the development communication approach, in an integrated manner. For further information visit <http://www.thusong.gov.za/about/what/index.htm>.

²⁴¹ O'Connor Nat " An Economic Argument for Stronger Freedom of Information Laws", *TASC Discussion Paper* (2010) available at

http://issuu.com/tascpublications/docs/an_economic_argument?mode=embed&layout=http%3A%2F%2Fskin.issuu.com%2Fv%2Fflight%2Flayout.xml&showFlipBtn=true [accessed 3 September 2010] 8.

²⁴² O'Connor 2010, 8.

resource allocations. On a direct level specific line budget resources must be allocated to the SAHRC and all provincial and local government departments for the functioning of PAIA units. On an indirect level, all spheres of government must take into account the objectives of PAIA when drawing up budgets for each of its programmes. Thus the implementation of PAIA will not be successful with a focus on limited objects of expenditure and line items but requires instead careful and creative means of including PAIA in ordinary budgetary plans.

5.5 CONCLUSION

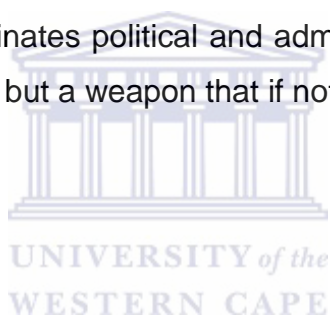
It has been 16 years since the inception of democracy in South Africa, yet millions of our people continue to live in deplorable poverty with little or no access to basic essentials. The transformation of South Africa from an Apartheid State in which human dignity, equality and freedom was reserved for the benefit of a privileged few, to a democratic state that values all, is incomplete. The Constitution is undoubtedly a shining light but true democracy can only be secured by means of good governance. It is in this context that the right to ATI finds real expression. Access to information is essential for public participation and the enforcement of socio-economic and political rights. It improves the efficiency and effectiveness of government operations and is a key tool in the fight against corruption. In short it is a means of delivering good governance to the citizenry.

The right to access to information in South Africa is constitutionally protected and finds leverage in the Promotion of Access to Information Act. It has been submitted throughout this paper that PAIA is sound in content, scope and balance. Nonetheless, the state of ATI in the country tells of a sorry tale where the right is seldom exercised by ordinary members of the public and where a tendency towards secrecy is matched by an ineffective system of openness. However, it is argued that the weak state of ATI is not due to any flaws in PAIA itself but rather as a result of a host of socio-political and technical implementation problems.

PAIA serves as a prime example of when a law alone is simply not enough to translate into meaningful benefits. As Richard Calland aptly describes it, “some laws you can pass they can sit on the shelf, gather dust, and serve a useful purpose. A law such as this [PAIA], like a car that’s not used, will atrophy, if it’s not used.”²⁴³ The impediments facing the successful implementation of PAIA are as wide as they are varied. They are in many ways rooted in the

²⁴³ Darch, Colin and Underwood, Peter “Freedom of Information Legislation, State Compliance and the Discourse of Knowledge: The South African Experience” (2005) 37, *The International Information and Library Review*, 79.

fact that despite democracy, the historically excluded sectors of our society continue to be information illiterate and without access to the tools that facilitate the exercise of the right to FOI.²⁴⁴ In other ways, the state of ATI is quite simply a reflection of weak administrative compliance and readiness. It has been argued that the provisions of PAIA are aimed at promoting and protecting openness and that the Act must be interpreted through the lens of these principles. The limitations to access in PAIA are reasonable and justifiable and whilst certain amendments may be of value they are certainly not necessary or a prerequisite to ensure openness. On the contrary PAIA conforms to internationally recognized standards and gives expression to a right that is constitutionally protected. However, for PAIA to be a successful instrument in the quest for openness it must operate within a framework where its ideals are championed at key levels in government, where proper plans and processes have been put into place and where resources are allocated to meet its requirements. The quest for openness is a journey and not a destination and thus the proper implementation of PAIA will require a considerable and concerted effort by the State on an ongoing basis to ensure that a culture of openness dominates political and administrative discourse. In short PAIA is not a blunt sword by any means but a weapon that if not used will serve little purpose.



²⁴⁴ *Ibid*, 82.

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M&G Media Limited versus the President of the Republic of South Africa (4 June 2010), North Gauteng High Court Pretoria (unreported).

Phato v Attorney-General, Eastern Cape, 1995 (1) SA 799 (E) 1253 (CC) 1291.

Dissertations (unpublished)

Britz, Johannes (2002) 'A Critical Analysis of Information Poverty from a Social Justice Perspective'. Unpublished D Phil Thesis, University of Pretoria, available at <http://upetd.up.ac.za/thesis/available/etd-07212007-122555/unrestricted/00front.pdf> [accessed 12 July 2010].

Legislation & policies

Interim Constitution of South Africa, Act 200 of 1993.

Promotion of Access to Information Act 2 of 2000.

Protected Disclosures Act 26 of 2000.

Protection of Information Bill 6 of 2010.

Provincial Government of the Western Cape "IT-End User Policy" (2008) available at <http://dws.wcape.gov.za/dmsv525/download?WEBID+51112> [accessed 10 September 2010].

APPENDIX "A"

<p style="text-align: center;">THE PROMOTION OF ACCESS TO INFORMATION ACT- RESEARCH QUESTIONNAIRE ONE: OFFICIALS IN THE PROVINCIAL GOVERNMENT OF THE WESTERN CAPE</p>
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Study Purpose

I am currently completing my LLM in Constitutional Law with the University of the Western Cape. As part of my course requirements I am completing a mini-research paper on the Promotion of Access to Information Act 2 of 200 ("PAIA"). My research focuses around the issue of whether PAIA must be amended to improve the state of access to information in South Africa.

I would like to invite you to participate in the research study by completing this questionnaire.

Procedures

If you agree to complete the questionnaire, kindly do so via return e-mail, by no later than 15 August 2010. The questionnaire can be e-mailed to faebrahim@pgwc.gov.za or to my private e-mail address- fatimaebr@gmail.com.

Confidentiality

The information that I collect from this research project will be kept confidential. Your name will not be used in any report coming from this study. Any information that might identify you will be removed.

Participation

You do not have to take part in this research if you do not wish to do so. You are not required to answer any questions that you are not comfortable with.

Who to contact

If you have questions about the study kindly contact me at the details below:

Fatima Ebrahim

Tel: 073 260 3836/ 021 483 3655

Email: fatimaebr@gmail.com or faebrahim@pgwc.gov.za

NAME:	
POSITION/JOB TITLE:	
DEPARTMENT:	
NUMBER OF YEARS IN THE PUBLIC SERVICE:	

1. Do you know what the Promotion of Access to Information Act 2 of 2002 (PAIA) is? If yes how were you made aware of its existence?
2. What is the purpose of the Act?
3. Do you believe that your department properly implements the provisions of the Act?
4. If a member of the public contacts you in connection with obtaining certain information what will you advise such a person to do? Would you give them the information requested?
5. Can you name the information officer and deputy information officer(s) in your department off hand?
6. Do you believe that members of the public are entitled to all information held by government? What information should be confidential or off limits?
7. Would you be interested in receiving PAIA training or do you believe it to be unnecessary?
8. Are you easily able to trace documents within your department? In other words are you familiar with the file plans and document management systems in your department?

9. Do you think that the public derives any real benefit from having access to government information? If so are you able to provide an example of how such information could be useful?

10. Are you of the opinion that government supports a culture of openness and transparency? What makes you think this?

11. What do you think we, as government should be doing to make ourselves more transparent and open to the public at large?



APPENDIX “B”

<p style="text-align: center;">THE PROMOTION OF ACCESS TO INFORMATION ACT- RESEARCH QUESTIONNAIRE TWO: INFORMATION OFFICERS IN THE PROVINCIAL GOVERNMENT OF THE WESTERN CAPE</p>

Study Purpose

I am currently completing my LLM in Constitutional Law with the University of the Western Cape. As part of my course requirements I am completing a mini-research paper on the Promotion of Access to Information Act 2 of 200 (“PAIA”). My research focuses around the issue of whether PAIA must be amended to improve the state of access to information in South Africa.

I would like to invite you to participate in the research study by completing this questionnaire.

Procedures

If you agree to complete the questionnaire, kindly do so via return e-mail, by no later than 15 August 2010. The questionnaire can be e-mailed to faebrahim@pgwc.gov.za or to my private e-mail address- fatimaebr@gmail.com.

Confidentiality

The information that I collect from this research project will be kept confidential. Your name will not be used in any report coming from this study. Any information that might identify you will be removed.

Participation

You do not have to take part in this research if you do not wish to do so. You are not required to answer any questions that you are not comfortable with.

Who to contact

If you have questions about the study kindly contact me at the details below:

Fatima Ebrahim

Tel: 073 260 3836/ 021 483 3655

Email: fatimaebr@gmail.com or faebrahim@pgwc.gov.za

NAME:	
POSITION/JOB TITLE:	
DEPARTMENT:	
HIGHEST QUALIFICATION:	

1. Have you been formally appointed as a deputy information officer?
2. How long have you acted in this position?
3. How many years experience do you have working in the public sector (i.e. for government?)
4. Have you received PAIA training? If yes what form did it take and what was the duration (i.e. who trained you and for how long?)
5. How many PAIA requests do you deal with on average per 6 months?
6. Are you confident in your ability to deal with PAIA requests? Do you feel that you have sufficient skills to properly interpret the provisions of PAIA or do you require more training?
7. Does your job description extend beyond being a deputy information officer or do you exclusively deal with PAIA matters and nothing else? If not, what percentage of your total work does PAIA account for?
8. Do you feel that processing PAIA applications detracts from your other work and takes up time that could be better spent doing something else? If so why.
9. Do you think the administrative work, time and effort involved in processing PAIA requests is justified? In other words is it important and necessary for people to have

access to the type of information they seek or is it somewhat of a waste of otherwise valuable time?

10. If someone requests a record telephonically which you know for certain that you must give to them in terms of PAIA will you still ask the person to submit a formal PAIA request or will you simply give it to them?

11.

Do you assist the public in making PAIA request e.g. by filling out forms, explaining to them how best to phrase a request etc?

12. What are the difficulties and challenges you face in your position as a deputy information officer?

13. What additional resources do you need in order to better serve your position as a deputy information officer?

14. What do you think can be done to encourage the public to make more use of PAIA? Do you do any of the things recommended?



THANK YOU FOR PARTICIPATING IN THIS RESEARCH STUDY

APPENDIX “C”

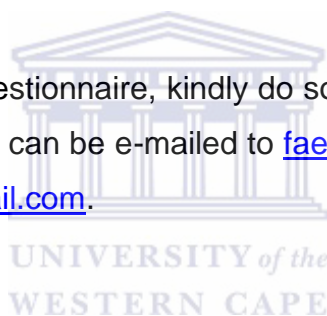
**THE PROMOTION OF ACCESS TO INFORMATION ACT- RESEARCH
QUESTIONNAIRE THREE: MEMBERS OF THE PUBLIC****Study Purpose**

I am currently completing my LLM in Constitutional Law with the University of the Western Cape. As part of my course requirements I am completing a mini-research paper on the Promotion of Access to Information Act 2 of 200 (“PAIA”). My research focuses around the issue of whether PAIA must be amended to improve the state of access to information in South Africa.

I would like to invite you to participate in the research study by completing this questionnaire.

Procedures

If you agree to complete the questionnaire, kindly do so via return e-mail, by no later than 15 August 2010. The questionnaire can be e-mailed to faebrahim@pgwc.gov.za or to my private e-mail address- fatimaebr@gmail.com.

**Confidentiality**

The information that I collect from this research project will be kept confidential. Your name will not be used in any report coming from this study. Any information that might identify you will be removed.

Participation

You do not have to take part in this research if you do not wish to do so. You are not required to answer any questions that you are not comfortable with.

Who to contact

If you have questions about the study kindly contact me at the details below:

Fatima Ebrahim

Tel: 073 260 3836/ 021 483 3655

Email: fatimaebr@gmail.com or faebrahim@pgwc.gov.za

NAME:	
POSITION/JOB TITLE:	
AGE/GENDER:	
HIGHEST QUALIFICATION:	

1. Have you heard of PAIA? If so when and how?
2. If yes do you know what the purpose of this law is?
3. Do you know how to make an application in terms of PAIA?
4. If you require information from government, how would you go about obtaining it?
5. Do you believe you will be given the information you require or do you think it is a waste of time trying to get the information? Why?
6. If government refuses to give you access to the information you seek what recourse do you have?
7. Do you believe that government is open and transparent?
8. What can government do to be more open and transparent?
9. Do you think it is important to have access to government information? Why?

THANK YOU FOR PARTICIPATING IN THIS RESEARCH STUDY