

ACCESS TO INFORMATION NETWORK

2018

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1. INTRODUCTION

The Access to Information Network (ATI Network) was established in 2008, and comprises of several South African civil society and media organisations that support the constitutionally protected right to access to information, and which utilise the Promotion of Access to Information Act 2 of 2000 (PAIA) within their work to access relevant information.

One of the aims of the ATI Network is to ensure that civil society remains heard in the on-going implementation of PAIA, and in doing so, releases an annual Shadow Report reflecting on member organisation's experiences in their use of PAIA and its effectiveness. This report marks the 9th edition of the ATI Network's Shadow Report, and the statistics reflected herein are derived from PAIA requests submitted in the reporting period between 1 June 2017 and 31 July 2018 by the following 9 members of the ATI Network:

- AmaBhungane Centre for Investigative Journalism (amaBhungane)
- Centre for Applied Legal Studies (CALS)
- Centre for Environmental Rights (CER)
- Corruption Watch (CW)
- Equal Education Law Centre (EELC)
- Oxpeckers Center for Investigative Environmental Journalism (Oxpeckers)
- Public Service Accountability Monitor (PSAM)
- Right2Know (R2K)
- South African History Archive (SAHA)

The ATI Network recognises that the right of access to information is fundamental to the protection of other constitutional rights. For example, the right to basic education, the right to a clean and safe environment, and the proper functioning of democratic institutions may be compromised when members of the public and media are unable to access information that would enable more effective monitoring of state organs and private institutions, and the holding of those in power to account.

In the sections below, the ATI Network highlights the experiences of member organisations in their use of PAIA to raise awareness of challenges and trends identified during the reporting period. In addition, the report presents recommendations that aim to address systemic issues encountered in the utilisation of PAIA and further advance the right to access to information in South Africa.

2. PAIA REQUESTS SUBMITTED TO PUBLIC BODIES



In total, 191 PAIA requests were made by member organisations. Out of these 191 requests, 169 PAIA requests (88,4%) were submitted to public bodies.

2.1 Fewer PAIA Requests made to Public Bodies

When compared to previous years, the ATI Network notes the overall low numbers of PAIA applications submitted to public bodies, which may be attributed to a few reasons. For example, organisations may have still been addressing a large number of PAIA requests submitted in the previous reporting year, which have largely remained unanswered and demanded more time in terms of follow-up. The delay caused by information officers and their lack of timely responsiveness has created a weariness amongst organisations in submitting new requests whilst previous requests are still pending. In addition, if it is evident that PAIA requests are not responded to, organisations may be discouraged from utilising PAIA due to the risk of wasting limited time and resources. These factors may have contributed towards fewer requests submitted to public bodies within the reporting period.

2.2 Public Bodies' Compliance within the Statutory Time Frame

The rate of compliance by public bodies within statutory time frames has remained steadily low. In total, only 76 PAIA requests, (a mere 45% of all requests sent to public bodies) received responses within the statutory time frame. It must be noted that 7 (4%) of the total number of requests submitted to public bodies during the reporting period were still pending at the close of the reporting period, as the statutory time limits had not yet lapsed. The remaining 86 requests submitted to public bodies (51%) did not receive responses within the statutory time frame.

Focusing in on specific sectors during the reporting period, 19 (11%) of all public body requests were submitted to state-owned-entities. Requests to municipalities or local government accounted for 9 (5%) of the requests submitted to public bodies. Of those 9 requests for information to local government, only 3 requests were responded to within the statutory time frame.

2.3 Outcomes of Initial PAIA Requests Submitted to Public Bodies

Out of 169 PAIA requests submitted to public bodies, 69 (40.8%) were actively granted access (either in full or in part). The decision to grant the requested record in full amounted to 46 requests (27.2%), whereas the number of requests granted partial access, that is, granted access to only part of a requested record, amounted to 23 (13.6%).

76 of all requests submitted were either expressly refused or were ignored and then deemed refused. The number of those that were deemed refused was 56 (35.4%), meaning they received no response at all and, as the statutorily allocated time had lapsed, were deemed as having being refused. The remaining denials for records were express refusals where a public body communicated its intentions to not release any information. This accounted for 20 of all public body requests, and this percentage is higher than reported in 2017.

Unfortunately, there has been no significant improvement in the number of decisions by public bodies to grant access to requested information, either in full or in part, when compared to figures reported on in the ATI Network's previous Shadow Reports.

The reporting period also recorded a larger number of records that were transferred to other state departments after the initial request was submitted. In terms of section 20 of PAIA, an information officer has a duty to transfer a request if they are aware that the records requested are kept within another public body. A total of 23 (13%) of the PAIA requests submitted to public bodies were transferred, either in full or in part to other departments.

2.4 Grounds for Public Bodies' Refusal to Grant Access

Chapter 4 of PAIA states specific grounds of refusal that must be relied upon when a request for access to information is denied. Unfortunately, for a large part of requests submitted, information officers from public bodies continue to ignore requests without providing any reasons, or by providing inadequate reasons. This regular failure to cite any, or adequate, reasons for refusing access to records frustrates the objectives of PAIA and demonstrates poor recordkeeping and a lack of accountability on the part of the relevant public body.

On occasion, public bodies have also expressly denied being in possession of requested records, even though it is clear that they exist. SAHA, for example, has experienced the continuous abuse of section 23 of PAIA. In one instance, SAHA requested records of a tender that was awarded according to the public body's website and news reports. Strangely, the public body responded to the PAIA request by indicating that the record did not exist, or could not be found. Such a denial and refusal of PAIA requests reflect an increased lack of transparency amongst public bodies in South Africa.

In addition to this, there is a noticeable trend amongst most public bodies who were requested to provide information during the reporting period, to show a lack of interest in attending to PAIA requests and, even when they do, to not do so timeously.

Non-responsiveness to PAIA requests can be narrowed down to active and passive deemed refusal. Active deemed refusals occur when the information officer receives the PAIA request through a functional email address of his/hers and, having seen it, actively chooses not to respond to it within the timeframe, or decides not to respond at all. An example of this is where public bodies only sent late responses to PAIA requests during the appeal stage, after ignoring prior PAIA notifications, demonstrating that the public body had received the initial request and was aware of it. In the case of passive deemed refusals, the information officer may not have received the request, and would therefore be unable to respond. This could be due to a faulty or outdated email address provided, or a downright failure to actually open the email, even if the information officer received it. These examples illustrate the various failures by public bodies in ensuring transparency and taking the necessary steps to make information accessible.

Apart from wilfully ignoring requests, the lack of responses could also be attributed to other factors, which include: an ignorance of PAIA processes; insufficient training of public bodies on PAIA; a nonchalant attitude of information officers towards PAIA requests; poor communication within relevant bodies, and a disregard for the prescribed timeframes within which requested records should be provided. Although there was evidence of technical failures, the percentage of those pales in comparison to non-responses caused by human errors and omissions. SAHA's experience illustrates this point and involves requests submitted to a number of provinces earlier in 2018 relating to the state of mental health in South Africa. By the end of the reporting period, none of the provinces had been able to sufficiently provide SAHA with these records.

The general attitude and response to these requests has been very discouraging, to the extent that most of these provinces do not even have updated PAIA Manuals or designated information officers that respond to PAIA requests. Interestingly, other bodies provided incomprehensible reasons for their failure to respond. A particular information officer claimed that the computer system within their organisation was faulty and as such, could not access his emails. Another organisation referred SAHA to an online post that was irrelevant to the request and, by the end of the reporting period, had still not been able to hand over the requested records to SAHA. In other cases (reported by member organisations) where follow-up phone calls were made, some organisations could not even ascertain what the reasons for non-response were, or who the specific information officer was.

This lack of response to PAIA requests places a heavy burden on the requester who is confronted with an additional challenge of following-up on the request, even in cases where access has been granted. Furthermore, due to a lack of communication by the relevant body, the requester is left unsure of when the records will be made accessible.

2.5 Internal Appeals Submitted to Public Bodies

A total of 47 new internal appeals were submitted to public bodies during the reporting period, challenging both express refusals and deemed refusals. During the reporting period, 23 appeal submissions resulted in a substitution of the original decision to grant full access to the requested records. 2 internal appeals resulted in the confirmation of the original decision and 1 request was transferred at appeal stage, despite PAIA making no provision for transfer at this late stage

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Internal appeals remain recorded as deemed dismissals or simply ignored by public bodies.



As happens at the initial stage of a PAIA request, a failure to respond to an appeal within the statutory time frame is deemed to be a dismissal of the appeal in terms of section 77(7) of PAIA. In some instances, however, active decisions are later provided, outside of the prescribed timeframe.

Only 10 internal appeals were responded to within the statutory time frame of 30 working days.

3.0 REQUESTS TO PRIVATE BODIES

As in previous years, the number of PAIA requests submitted to private bodies was comparatively very low. Only 22 PAIA requests were submitted by member organisations to private bodies over the reporting period. This accounts for approximately 12% of the total number of PAIA requests submitted during the reporting period. Of these 22 PAIA requests, none were deemed to be refused due to a failure to provide a decision within the prescribed statutory time frame. 10 requests (45.4%) were responded to with decisions to grant access to the records requested, either in part or in full. 7 requests (31.8%) were expressly denied, and the decision for 5 requests (23%) falls outside the reporting period.

PAIA requests to private bodies are rarely made. This is due, in large part, to the additional burden of having to prove that the information is “required for the exercise or protection of any rights” in terms of section 50 of PAIA. In addition to the records being “required for the exercise or protection” of rights, the legal test developed by our courts is that information must be reasonably required and a substantial advantage, or an element of need, on the requester’s part should exist. While this test does not appear to be overly burdensome, particularly given the multitude of constitutional rights that often require information in order to effectively exercise those rights, we still find that private bodies in South Africa view requests for information with suspicion, seeking to rebuff the request on the basis that “an element of need” has not been established. No internal appeal mechanism exists in terms of requests made to private bodies, meaning that applicants must resort to costly litigation to review unsatisfactory PAIA decisions. This has a chilling effect on the use of PAIA in terms of requests made to private bodies.

An example of this approach was seen in response to requests submitted by the Centre for Environmental Rights (CER) in 2018 to a number of mining companies. These requests were aimed at assessing whether these mining companies were complying with the conditions of their water use licenses. The CER justified these requests on the basis that the CER’s work promotes and advances the protection of section 24 of the Constitution (our environmental right); that the CER works to encourage improved environmental compliance monitoring and enforcement by authorities; that the CER works to ensure that there are consequences for the violation of environmental laws; and that this work includes assessing whether private companies comply with their environmental authorisations (including water use licenses). While many companies responded positively, a handful were defensive (particularly Glencore Operations South Africa (Pty) Ltd) and vehement in their view that the CER was not entitled to the information requested on the basis that “an element of need” had not been established.

Without access to the data which shows the impact of these companies on water resources (rivers, wetlands, etc.) it is impossible to assess whether these companies are complying with their obligation to protect water resources, and to ensure that other users of water are not negatively impacted by their activities. The link between this information and the right of all South Africans to a healthy environment is clear. Another interesting, and fairly common, response from some of those companies was to request payment of a massive fee for the reproduction of the requested records. Universal Coal Development (Pty) Ltd, for example, requested payment of almost R3,000 on the basis that it had apparently spent 85 hours “searching and preparing the record for disclosure”. Payment was demanded without any prior indication from the company that this amount of time was needed.

This is contrary to PAIA, which requires that a private body must notify a requestor when more than 6 hours are anticipated for preparing the requested record (section 54(2) of PAIA read with the regulations). The CER pointed this out to the company, indicating that it could not be expected to pay such a fee without having been notified beforehand. The CER accordingly negotiated the payment of a lower fee - limited to printing costs and 6 hours of record preparation. These examples illustrate the hoops through which civil society must jump in order to gain access to information from private companies.

4.0 DENIED AND DELAYED ACCESS TO INFORMATION JEOPARDIZING THE RIGHT TO EDUCATION

4.1 Infrastructure Plans Remain Outstanding

In June 2018, Equal Education Law Centre (EELC) requested the Department of Basic Education to provide detailed implementation plans of each of the nine provinces, as contemplated by the Regulations Relating to Minimum Norms and Standards for Public School Infrastructure (Regulations).

These plans are compiled by Members of the Executive Council (MECs), and indicate how these norms and standards will be implemented throughout each province. MECs were obliged to provide these plans to the Minister of Basic Education by 29 November 2017. The Department of Basic Education provided the plans of eight provinces, and merely indicated that the final plan (compiled by the Eastern Cape) was still outstanding, without any further justification.

While the majority of the provincial plans were forthcoming, this response questions the meaning of “adequate reasons for a refusal”, as contemplated in section 3(a) of PAIA. These provincial plans are crucial in understanding how public school infrastructure will be addressed on an annual basis, and are necessary to ensure that transparent, effective planning and proper implementation takes place. The Department of Education’s refusal to provide such a plan on the grounds of it being outstanding, with no further indication of whether, or when it can be expected, reveals a minimum level of accountability that affects civil society’s ability to hold provincial department’s to account.

The ninth plan was eventually received on 22 August 2018, two months after the EELC’s request, and almost 9 months after it was due in terms of the Regulations. It must be noted that, in March 2019, the Bisho High Court held, amongst others, that the Regulations must be amended to oblige the Minister to make these plans publicly available. The Department of Education appealed the judgment, but the Constitutional Court rejected the appeal on the basis of having no prospects of success.

4.2 Failure to Provide Access to School Sanitation Audit

In June 2018, EELC requested the Department of Basic Education to provide a School Sanitation Audit (the Audit), and accompanying Education Infrastructure Expenditure report, which provides for a costed implementation plan for the Audit.

This Audit was requested by President Cyril Ramaphosa in a press statement released on 16 March 2018. It required that the Minister of Basic Education conduct an audit of all learning facilities comprising of unsafe structures within a month, and to present a plan rectifying these challenges within 3 months. On 22 March 2018, the Minister of Basic Education publicly committed to completing the Audit and costed plans. However, at the time of EELC’s PAIA request, the time frames in which these were to be presented had expired.

By the end of the reporting period, the Department of Basic Education had still not responded to this request, hampering civil society’s ability to consider the plans in place, and ensure that all relevant schools have been identified.

4.3 Ongoing Request for Information on Collaboration Schools Pilot Project

EELC submitted PAIA requests to the Western Cape Department of Education (WCED) in 2017, during the previous reporting period, for information related to the WCED's Collaboration Schools pilot project. The requests were only partially successful. In January 2018, the WCED indicated that requests for this information could be made through ordinary correspondence, as it was publicly available.

In light of this commitment, the EELC has since proceeded to make requests through a series of letters. By the end of the reporting period, this approach had been successful to the extent that it had fostered better relations with the WCED, and avoided further processes of compiling formal PAIA requests. However, the EELC has experienced delays in receiving information, and in the event that information is not forthcoming, would necessitate a PAIA request that could potentially result in further delays.

5.0 DELAYS, NON-COMPLIANCE WITH COURT RULES AND THE MISUSE OF SECTION 80 OF PAIA TO FRUSTRATE ACCESS TO INFORMATION

The Centre for Applied Legal Studies (CALs) launched an application in the Pretoria High Court following a deemed refusal of a PAIA request, and a dismissal of the internal appeal by the Department of Correctional Services (DCS) in 2015. CALs requested an investigative report compiled by DCS in the Mangaung Correctional Centre after a series of incidents took place while the prison was under the control of Bloemfontein Correctional Contracts (Pty) Ltd (BCC) and G4S Secure Solutions (G4S).

In response to the request, in September 2015, CALs received a letter from DCS stating that they were informing BCC and G4S of the request, and that they were in the process of obtaining their response to the report and establishing whether they consent to disclosure of the report. DCS further requested that the application be held in abeyance, pending the responses from BCC and G4S. When, after 6 months, no response was forthcoming, CALs informed DCS that it would set the matter down as unopposed if it did not receive the report or an answering affidavit. The parties subsequently made an agreement that the matter be postponed sine die and that DCS either furnish CALs with a report or file an answering affidavit within 20 days. The report was not forwarded to CALs, nor was there an answering affidavit filed and as such, the matter was set down for hearing on 15 December 2017. On 5 December 2017, CALs received communications stating that G4S had only received a notification of the request on 22 November 2017, despite the fact that DCS had indicated to CALs in September 2015 that they were informing G4S and BCC of their request. In the same communication of 5 December 2017, G4S insisted it had a direct and substantial interest in the matter and wished to consider its position. CALs received similar correspondence from two other parties, but G4S was the only party who indeed applied to intervene in the matter. On 15 December 2017, an order was obtained by agreement granting G4S leave to intervene and ordering that G4S and DCS file an answering affidavit by 31 January 2018.

Neither G4S nor DCS filed an answering affidavit on 31 January 2018. However, G4S launched an interlocutory application requesting that the matter be heard in terms of section 80(3) of PAIA in camera and that CALs be bound to secrecy on the contents of the report. G4S claimed that the information CALs sought was confidential. CALs' position was that, for all intents and purposes, G4S is an organ of state when running the prison and its records are subject to disclosure. CALs further contended that the "in camera" application was one of bad faith and that G4S was only filing it to frustrate and delay access to information.

CALS contended further that the invoking of section 80(3) was premature and that instead, G4S could have bought the in camera application only once they had responded to CALS' request formally through their initial court application to access the documents. Section 80(3) should not be used to avoid explaining grounds for refusal. In fact, the wording of section 80(1) of PAIA makes it clear that the power of the courts to use section 80(3) is only triggered at the hearing when the court determines whether access to information should be provided or not.

By the end of the reporting period, G4S had neither filed replying papers nor had they attempted to set their own matter down. Consequently, CALS had chosen to set the matter down for hearing on 29 October 2018.

6.0 USING PAIA IN THE FIGHT TO PRESERVE A NATIONALLY PROTECTED AND STRATEGIC WATER SOURCE AREA

On 9 January 2018, Oxpeckers submitted two sets of PAIA requests to the Dr. Pixley Ka Isaka Seme Local Municipality and the Gert Sibande District Municipality respectively. The PAIA applications individually requested a number of documents associated with a possible application by mining company, Atha-Africa Ventures (Pty) Ltd, to the relevant municipalities for a change in land-use in respect of its proposed Yzermyn Coal mine, which is to be located in the Mabola Protected Environment area in Mpumalanga.

After pressing the Department of Mineral Resources (DMR) for weeks on end, Oxpeckers was able to secure some documents which allowed them to do a follow-up investigation that revealed that Atha-Africa was indeed going ahead with an application for a change in land-use in the Mabola Protected Area (a rezoning of the land from agriculture to mining). Since 2014, Oxpeckers has been fighting alongside numerous environmental organisations for the Mabola Protected Area to remain untouched by mining activities.

The Mabola case is significant in terms of the area's national protected area status accorded to it by virtue of the ecological sensitivity of the region. It is one of five areas in Mpumalanga that has been afforded protected area status, intended to preserve areas of strategic ecological, historical, or cultural value.

The Mabola Protected Environment is also significant from a water perspective. The area forms part of the Enkangala Drakensberg Strategic Water Source Area: one of 21 listed national strategic water source areas in South Africa. This key water zone is the source of South Africa's major rivers which support communities and economic activities downstream. The area is also home to a freshwater ecosystem serving agriculture interests across the province.

Opponents say mining in Mabola could have devastating long-term impacts, including the drying up of wetlands, contamination of the underground water systems, and creation of acid mine drainage which is known to have dire impacts on the health of communities and wildlife. For this reason, Oxpeckers continues to expose the tactics (for example, hidden public participation adverts, and social media threats to those opposing mining in Mabola and the questionable granting of licenses) of mining companies such as Atha-Africa in an effort to spur civil society movement to fight for environmental and human rights.

On 6 September 2018, Oxpeckers submitted another PAIA request to the DMR requesting documents pertaining to any application(s) by, or on behalf of, Atha-Africa to the Minister of Mineral Resources and/or the Department requesting an extension of the commencement period of its mining right in terms of section 25(2)(b) of the Mineral and Petroleum Resources Development Act. In that request, Oxpeckers also asked for all correspondence, including emails, between the DMR and/or the Minister and Atha-Africa in respect of commencement of mining operations as contemplated in section 25(2)(b) of the Act; and all notices and/or other communications issued by the DMR and/or the Minister to Atha-Africa or its agent/s in respect of commencement of mining operations.

A response to this PAIA request was provided on 17 October 2018 and the request was partially granted. The request for all correspondences, notices issued and other communication(s) including emails between the DMR and Atha-Africa, or its agent, in respect of the commencement of mining was refused. The reason given for this refusal was that “in terms of section 44 (a)(ii) subject to subsection (3) and (4) the information officer of a public body may refuse a request to a record of the body if the record contains an account of a consultation, discussion, or deliberation that has occurred for the purpose of assisting to formulate a policy or take a decision in the exercise of a power or performance of a duty conferred or imposed by law”.

The request for any applications by or on behalf of Atha-Africa requesting an extension of the commencement period of its mining right was granted.

Oxpeckers was advised in October 2018 that the DMR’s regional manager of the Mpumalanga region would stipulate access fees payable for the production of the records and the records would then be produced upon receipt of the fees. Attempts to contact the regional office of the DMR to follow up on the access fees payable and the granting of the records were not successful, as the telephone lines rang unanswered. Emails sent to the officer at the regional office pertaining to the records did not receive a response. The information officer at the national office was contacted and undertook to look into why the records had not been handed over to Oxpeckers.

Following numerous attempts to follow up with the regional office in late 2018, Oxpeckers got hold of a representative of the regional Mpumalanga office in early 2019 and was told that the office did not have the requested records. Oxpeckers requested that this be communicated to them in a formal affidavit detailing the attempts made to find the records, but this was unsuccessful as the officer Oxpeckers had been communicating with stated that he no longer had the capacity to fulfil the requests since he was no longer the designated person to deal with PAIA requests at the regional office.

Notably, in November 2018 a precedent-setting judgment was handed down in the Mabola case whereby the North Gauteng High Court set aside the decisions of the Minister of Mineral Resources and the Minister of Environmental Affairs taken under the Protected Areas Act to grant Atha-Africa permission to mine in the Mabola Protected Environment. The decision to allow mining was referred back to the Ministers for reconsideration. The judgment was subject to an appeal application by Atha-Africa which was refused by the North Gauteng High Court on 22 January 2019.

Background information: <https://oxpeckers.org/2018/05/is-mabola-open-for-mining/> and <https://oxpeckers.org/2018/10/mabola-review/>

7.0 ALTERNATIVES TO PAIA: PUBLIC ACCESS TO ZUMA FOUNDATION FINANCIALS

In August 2017, AmaBhungane approached the Department of Social Development's Non-Profit Organisation (NPO) Directorate for access to the records of various non-profit foundations linked to the Zuma family.

Section 25(2) of the Nonprofit Organisations Act provides that all members of the public "have a right of access to inspect any document that the director is obliged to preserve". Regulations provide further that any person may inspect any constitution, report, or document submitted to the Directorate at the office of the Directorate during business hours, any day of the working week. Notably, the provision is similar to the Companies Act's right of access to share registers.

The intention of the NPO Act's public access provision is to promote good governance, transparency, and accountability of NPOs. Despite the clear and unqualified right of access provided by the NPO Act, AmaBhungane's request was met with resistance. NPO Directorate officials directed AmaBhungane to use PAIA, which is legally untenable, as it would allow PAIA's exemptions from disclosure to be invoked and significantly extend the period in which to receive records. The Directorate further contended that the NPO Act was incompatible with PAIA, and that PAIA superseded the NPO Act. A High Court challenge was launched in June 2018 whereby AmaBhungane challenged the Directorate's contention that PAIA superseded any other access provision. PAIA, AmaBhungane's papers argued, only applies to the exclusion of another Act where that other legislation "prohibits or restricts the disclosure of a record of a public body or private body and is materially inconsistent with an object, or a specific provision, of [PAIA]".

The Department conceded and made most of the requested records available in August 2018, without the matter being heard before the court. By the end of the reporting period, AmaBhungane, through their attorneys, had put the Department on terms to disclose the outstanding records. This is an important victory confirming the unqualified access provisions of the Nonprofit Organisations Act, and is applicable to other access matters where a specific public or private body has legal provisions that provide for a greater degree of public access, without the use of PAIA.

8.0 LITIGATION

8.1 Reserve Bank Shielded from Releasing Apartheid Era Crimes Information

An alarming decision was handed down by the Johannesburg High Court on 19 March 2018 in the matter of *South African History Archive v South African Reserve Bank and another*. In 2017, SAHA approached the High Court for relief after the South African Reserve Bank (SARB) refused to release records related to Apartheid era crimes. The details of the case were discussed in the ATI Network's previous report. Disturbingly, the judgment handed down agreed with the SARB and provided a shield for individuals linked to Apartheid era financial crimes.

Many commentators have noted that the judgment failed to appreciate the importance of historical records and their relevance in fighting contemporary economic crimes. A lack of understanding of the public interest override is also evidenced in the decision to protect individuals' interests over the public good. An additional blow to transparency is that the judge granted a costs order against SAHA without providing any explanation as to why the case brought by SAHA merited a deviation from the established BioWatch principle.

This judgment has the potential to prevent effective public interest litigation, which is already too costly, and hinder the advancement of Constitutionalism.

SAHA intended to appeal the matter and was granted leave to appeal in the Supreme Court of Appeal. If we are to strengthen our constitutional democracy, it is imperative that information relating to past and present economic crimes becomes publicly accessible.

8.2 Political Party Funding: A Gateway to State Capture

Secrecy within the State is the foundation upon which corruption thrives. Secrecy attracts, cultivates, and sustains the corrosive and destructive looting of State resources. The ground becomes fertile for corruption when citizens' ability to access information is thwarted and secrecy is the order of the day. The importance, therefore, of the Party Funding Bill that the National Council of Provinces has adopted, and the judgment of *MyVote Counts v Minister of Justice* is demonstrable! Together, these have the potential to create an environment in which citizens hold politicians accountable, and ensure that the right to vote is exercised in a more meaningful and informed way.

The Party Funding Bill is, among others, intended to regulate the public and private funding of political parties and to prohibit certain donations made directly to political parties. It is clear from a reading of the Bill that fighting corruption through transparency is the overriding purpose. In terms of Section 8 of the Bill, some of the prohibitions include:

- i. Donations from "foreign governments, agencies and foreign persons and entities";
- ii. Parties accepting donations from a person or entity in excess of R15000 000 within a financial year; and
- iii. Money known to or should have been known to have been gained through criminal activities;

In addition to limiting the type of money a political party can receive, parties are required to meet certain disclosure provisions. Political parties must disclose all donations in excess of R100 000 (a contested threshold, which some organisations have argued is too high).

Although other provisions of the Bill were contested, its overall provisions were accepted by all political sides by the end of the reporting period. This Bill was a clear indication that Parliament acknowledged the manner in which State officials can be captured through their political parties and the urgent need to place safeguards. This is why the MVC judgment came at a pivotal time, as a confirmation of the process before lawmakers, and a clear indication by the highest court in the land of the importance of transparency and the right to vote. In what will undoubtedly be a judgment remembered for generations to come, the Court clearly acknowledged the deleterious effects of corruption on the foundations of our constitutional democracy and the urgent need to place markers to protect our political institutions and, in turn, protect our democracy.

The Court ordered that information on the private funding of political parties and independent candidates is essential for the effective exercise of the right to make political choices and to participate in the election. The Court declared that information on private funding of political parties and independent candidates must be recorded, preserved, and made reasonably accessible. The Court also noted that the deficiencies in PAIA made it possible for political parties to hide behind its provisions and refuse to disclose their financial records. It therefore declared PAIA unconstitutional in so far as it relates to the disclosure of political party funds, and ordered Parliament to remedy PAIA's deficiency.

This favourable ruling gave citizens an important tool ahead of the 2019 elections. A very significant part of the judgment is that we need not wait for Parliament to remedy PAIA, or to complete all its processes under the Party Funding Bill. Rather, the Court stated that citizens may use section 32 of the Constitution directly to access information on private funding of political parties.

While the issue of keeping proper records of all party funds will remain important going forward, citizens now have the means to demand records, and oblige political parties to explain when they cannot produce them. Notably, Right2Know (R2K), an ATI Network member, has embarked on a journey to use the MVC judgment to attempt to access funding records from political parties.

9.0 RECOMMENDATIONS

Based on the experiences of ATI Network members both during the reporting period, and over the last number of years, the following recommendations are submitted:

1. Build Capacity within Public Bodies to Respond Appropriately to Requests

Many PAIA requests are sent to public bodies and are received by individuals who are unable to respond appropriately to a request. While some offices appear to have well-trained individuals responding readily to requests, this presence is lacking in many regional and municipal offices.

In addition to designating information officers within public offices, it is necessary for staff to have a basic understanding of what PAIA is and their statutory compliance requirements thereunder. While PAIA requests are drafted by staff of ATI Network members who have been trained in how to word a request, there are individual community members who will not have such training. As such, it ought to be a requirement that public body officials understand, and be aware of, how to address and respond appropriately to PAIA requests that are not drafted as meticulously.

Public bodies often retain records that can easily be produced upon request, and yet have difficulty with production of records due to their poor recordkeeping habits, such as email management. Public body officials have a duty to respond to requests, internal appeals, as well as Chapter 9 Institution complaints, and often do so via email. However, without proper recordkeeping and email management systems in place, requests may go undelivered and therefore unanswered. It follows then that public body officials must improve their recordkeeping management.

2. Simplify the Process of submitting PAIA Requests

PAIA requests are currently required to be submitted in a specific format, making it a formal process that one must comply with in order to have a request considered. This significantly hinders the ability to send requests of individuals who do not have access to the technology that this prescribed format requires. There are numerous individuals who could benefit from the material released through a PAIA request, yet are limited because of the forced format. PAIA requests should be accepted by public and private bodies provided that they are legible and contain relevant information necessary to process the request.

Under Section 18(3), PAIA recognises oral requests if the requester is illiterate or under disability. This section calls upon the information officer to produce the oral request in the prescribed form and provide a copy to the requester. This allowance should be extended to all requesters to improve the communication stream between the requester and the public body. This also grants the information officer an opportunity to assist the requester in providing adequate details regarding the record being attained and information needed to complete the form, so that it can be processed with ease within the department.

Furthermore, public bodies often respond to requests in a way that is unhelpful and often leaves the requester guessing their next step in the process of obtaining information. Section 19 of PAIA, which obliges public bodies to assist requesters, should be enforced to ensure their co-operation. Under this provision, public bodies are required to accommodate requesters should they be unable to submit a request in the formal manner prescribed in section 18(1) of PAIA. This section clearly indicates that a public body shall not deny a request upon receipt if it is not in the prescribed form until they have given the requester an opportunity to seek assistance, or given them time to amend the request, so that it complies with section 18(1). Furthermore, should the request lack sufficient detail regarding the requested records, the information officer must furnish the requester with any information that would assist with the proper completion of the request.

Enforcing these provisions would decrease the number of abandoned PAIA requests caused by potentially frustrating communication requirements.

3. Strong Penalties for frustrating the PAIA Process

There are numerous ways in which a public or private body may frustrate the PAIA request process, causing unnecessary delays in the release of information that should be readily available. For example, they may act in bad faith and attempt to employ sections of the act that do not necessarily apply. PAIA is often completely ignored by public bodies, whether due to poor email management or otherwise.

As it stands, the Information Regulator, established under the Protection of Personal Information Act (POPI), has the ability to enforce sanctions against public and private bodies. However, the provisions granting these powers are not yet operational. Granting the Information Regulator the ability to enforce penalties under PAIA will give the Act more substance and weight as an operational tool to attain access to information.

Our advanced access to information laws are rendered ineffective through their inability to penalise or sanction public or private bodies who fail to comply with their provisions. Any attempt to frustrate the process of releasing information should be punishable, indicating to public and private bodies alike that transparency and accountability are core constitutional values that must be upheld, and legislation governing access to information must be taken seriously in South Africa.

4. Urgent Operationalization of the Information Regulator

As previously noted, the Information Regulator has the ability to oversee compliance from both public and private bodies. It is necessary to make this role fully operational in order to reduce non-compliance with PAIA. Under POPI, the Information Regulator has the ability to investigate, as well as apply penalties and fines for matters related to access to information under PAIA. Making this role fully functional is essential to ensuring cooperation from unwilling bodies.

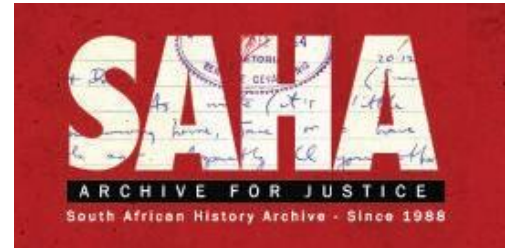
5. Private Bodies need to familiarise themselves with PAIA

Private bodies need to familiarise themselves with PAIA, and in particular, the timelines prescribed therein and the appropriate use of reasons for denying requests. Staff at private bodies ought to be aware of the information that may be obtained through PAIA. It would be helpful if employees within private bodies became acquainted with their PAIA Manuals in order to effectively assist requesters. Furthermore, within the context of private bodies, representatives of companies often deny requests on the basis that “*an element of need*” has not been established, when in fact no specific guidelines exist to determine that “*an element of need*” is present. In light of these unfair methods of denial, it is time for PAIA to include sanctions for public and private bodies that act in bad faith. It would also be helpful to include guidelines or an advisory note on what is considered “*an element of need*”.

6. Easily accessible PAIA manuals and readily available information on information officers

Under Section 14 of PAIA, public bodies are required to produce and continually update a PAIA manual, which includes contact information for relevant information officers. Sending a PAIA request to the correct individual is a crucial step in submitting a successful PAIA request. Public bodies ought to have easily accessible contact pages on their websites with the details of those who can provide information regarding requests and the information officers themselves. In addition, penalties should be applied where public bodies fail to update their PAIA manuals with relevant information, as this constitutes an attempt to frustrate the process.

During the reporting period, the ATI Network comprised of the following organisations:



Centre for Environmental Rights
Advancing Environmental Rights in South Africa



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LAW CENTRE



OXPECKERS
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