

**Submission on behalf of the South African History Archive
and the
PAIA Civil Society Network**

on

**the Proposed Amendments to the
Rules of Procedure for Application to Court in Terms of the
Promotion of Access to Information Act, 2000
(Act 2 of 2000)**

(circulated on 14 April 2014)

to

the Rules Board for Courts of Law

(established by section 2 of the Rules Board for Courts of Law Act, 1985
(Act 107 of 1985))

16 May 2014

Background:

The South African History Archive

Established in 1988 by anti-apartheid activists, the South African History Archive (SAHA) is an independent human rights archive committed to documenting, supporting, and promoting greater awareness of historical and, since 1994, contemporary struggles for justice and accountability.

As well as servicing academic and research communities, both domestically and internationally, the organisation positions notions of accessible archive and records as central components of human rights and governance culture, discourse and practice.

SAHA aims to:

- recapture lost and neglected histories;
- record aspects of South African democracy in the making;
- bring history out of the archives and into schools, universities and communities in new and innovative ways;
- extend the boundaries of freedom of information in South Africa;
- raise awareness, both nationally and internationally, of the role of archives and documentation in promoting and defending human rights.

SAHA's core two programmes are:

The Freedom of Information Programme (FOIP) which aims to create awareness about the right of access to information, and increase compliance with and use of the Promotion of Access to Information Act, 2000 (Act 2 of 2000) (PAIA) in South Africa. FOIP is committed to demonstrating the right to know as an enabling right, fundamental to the realisation of other human rights both within South Africa, and across the continent, in order to invigorate citizen demand for the right.

The Struggles for Justice Programme which is responsible for developing and using SAHA's archival collections to support broader reconciliation efforts in helping South Africans to develop the means to understand and come to terms with the past in order to build a stronger, shared future for all.

(Further information about SAHA's work with access to information can be found on our website: www.saha.org.za)

The PAIA Civil Society Network

The PAIA Civil Society Network (PAIA CSN) was established in November 2008 in response to the need for greater collaboration and cooperation amongst organisations and individuals with a direct interest in the full and effective implementation of PAIA.

The PAIA CSN is a coalition of member organisations committed to working together to strengthen and advance the effective use and optimal implementation of all aspects of PAIA as the enactment of, and a mechanism to enable, the Constitutional right to

access information; in order to build and promote a culture of openness, accountability and transparency in South Africa; and as a basis to realise other rights.

The PAIA CSN actively monitors the implementation of PAIA by public and private bodies by compiling and analysing statistics collected by members, including through an annual report known as the “PAIA Shadow Report”. This report reflects the experiences of the network’s member organisations in using PAIA during the previous 12 months. The report is designed to complement the work of the South African Human Rights Commission in monitoring the implementation of PAIA by providing a perspective on implementation from organisations that utilise the rights in the Act on a regular basis.

Additionally, the PAIA CSN provides public comment that encourages and promotes the implementation of PAIA for the benefit of all individuals and organisations within South African civil society. (Further information about the PAIA CSN is available at: <http://foip.saha.org.za/static/paia-network>)

Members of the PAIA CSN are:

Centre for Applied Legal Studies (Wits University)
Centre for Environmental Rights
Corruption Watch
Khulumani Support Group
Open Democracy Advice Centre
Public Service Accountability Monitor (Rhodes University)
South African History Archive

The Proposed Amendments to the Rules of Procedure for Application to Court in terms of the Promotion of Access to Information Act, 2000 (Act 2 of 2000)

SAHA and the PAIA CSN welcome the opportunity to comment on the proposed amendments to the Rules of Procedure for Application to Court in terms of the Promotion of Access to Information Act, 2000 (Act 2 of 2000) (PAIA Rules), given the need to ensure these rules support timely and cost effective applications to the Court, where litigation is necessary after an internal appeal to a public body or directly from a decision of a private body, regarding access to information.

This submission is made in order to support the Rules Board for Courts in its role of encouraging access to justice by implementing practical and well understood rules that work to ease the burden of litigation, which can act as a barrier to individuals, communities and civil society, in realising their Constitutional right of access to information.

This is particularly important in an environment where the PAIA CSN 2013 Shadow Report notes that the overall performance of information holders decreased in 2013 as compared to the network’s assessment of previous years. In particular, the PAIA CSN noted that there has been a decrease in the full release of records requested by information holders – from 35% in 2009, to 22% in 2011, and now down to an all-

time low of 16% for the 2012 / 2013 reporting period. Additionally, the PAIA CSN Shadow Report notes that refusals of requests for access are on the rise, with 66% of initial requests refused and a substantial increase in deemed refusals at 54% of all requests submitted in the reporting period (excluding those that were still pending at the end of the reporting period).

In general terms, these submissions reflect our general satisfaction and support for the currently proposed arrangements as set out in the new draft PAIA Rules.

Overview of Proposal:

By way of background it is understood that the current PAIA Rules dated 9 October 2009 will be repealed and replaced with the new draft PAIA Rules, circulated on 14 April 2014. The new draft PAIA Rules will place greater reliance on the Rules Regulating the Conduct of Proceedings of the Magistrates' Courts of South Africa (Magistrates' Court Rules) and the Uniform Rules of Court (Uniform Rules). In general terms this can be expected to bring greater uniformity, and hence compliance with those requirements.

Comments:

In relation to the specific proposed amendments, our comments are as follows:

Rule 2/confirmation of 180 day timeframe for making applications

It is anticipated that the additional clarity of the timeframe for making Court applications in PAIA litigation, at least in the next version of the PAIA Rules, will provide useful guidance, or a timely reminder, for those that conduct PAIA litigation infrequently.

Rule 3 /deletion of Court fees rules and distance for service address

While the clear listing of fees can be of assistance to individuals, communities and civil society in researching potential costs when considering PAIA litigation, and for that reason is encouraged, it is understood that the removal from the new draft PAIA Rules accords with the arrangements in other rules and will not prevent that information being broadly available in other accessible fora.

Additionally, it is suggested that, assuming the Courts continue to be able to waive Court fees in both the Magistrates' Courts and High Courts, that the criteria and process for making such an application should also be made public in broadly accessible fora.

The removal of the requirement for an address for service within 8 kilometres of the Court accords with Rule 55 for the Magistrates' Courts and the Uniform Rules for the High Court, which now only provide limitations on the location from the Court for larger law firms.

Rule 3/removal of procedures for information applications in the Magistrates' Courts (including requiring an explanation for each document relied upon by applicants)

Rule 55 of the Magistrates' Court Rules will now provide the procedure for the Magistrates' Courts, noting the Uniform Rules sets out the procedures for the High Courts. It is expected that this uniformity will ensure greater compliance with the requirements for lodging applications. It is anticipated that greater compliance with Court rules is likely to lead to less success for those arguing technical defences in PAIA litigation. This is broadly welcomed.

As you may be aware, section 91A of PAIA requires the head of an administrative region for each Magistrate's Court to provide a list a designated and trained Magistrate to preside over PAIA matters. Unfortunately the effectiveness of that legislative amendment is undermined where training is unavailable or not completed, and the list of trained Magistrates is not publicly available.

While the potential for timely and more cost effective PAIA litigation in the Magistrates' Courts has been available since late 2009, it appears that the use of the Magistrates' Courts has not achieved the efficiencies that were contemplated. To the extent that Magistrates are trained and designated, there appears to be little public information about who those Magistrates are, and when and where PAIA matters can be brought before Magistrates' Courts. In making this submission, we seek to take the opportunity to ask that the Rules Board consider whether promulgation of additional PAIA Rules could require compliance by the head of an administrative region for each Magistrate's Court in providing a list of those designated and trained Magistrates, perhaps as part of the application process.

In terms of drafting, it is suggested that the Rule 3(1) wording "information officer or the head of a private body" which is taken from the current PAIA Rules, could be clarified in the new draft PAIA Rules by adding in some additional clarity to provide: "information officer *in relation to a public body* or the head of a private body". It is anticipated that the other minor typographical error in this subrule will be amended.

In relation to Rule 3(2) it is noted that the PAIA internal appeal procedure does not apply in relation to some public bodies and all private bodies. It is understood that the rule does not require the reasons for failing to exhaust the internal appeal procedure in those cases. Consideration of the wording of this subrule may be able to make this clearer.

It is assumed that the third party procedures in the Uniform Rules and Magistrates' Court Rules will apply in these circumstances. It is anticipated that the minor typographical errors in Rule 3(3) will be amended when the new draft PAIA Rules are finalised.

More generally, the removal of the requirement for an explanation of the relevance of each and every document is also welcomed. This reduction in the matters that must be fully ventilated in an application reduces what may become an additional bureaucratic requirement for applicants contemplating PAIA litigation. In an environment where PAIA litigation is the only mechanism for appeal against

decisions of private bodies, and the most recent PAIA CSN Shadow Report notes a substantial increase in deemed refusals, we consider any and all efforts to remove limitations on applicants bringing PAIA applications before the Courts an important mechanism to strengthen and openness and transparency in South Africa.

Similarly the proposed harmony with the so-called draft 2013 PAJA Rules is also generally supported.

Rule 4/rules for ex parte Representations

The move to clarify that supporting documents need only be provided “where applicable” in accordance with *M&G Media Limited v president of the Republic of South Africa and Others* 2013 (3) SA 591 (GNP) is welcomed.

However, it is suggested that further clarification as to what documents (for example the application and all affidavits) provided in ex parte representations must be made under oath in writing, may be of assistance in future PAIA litigation matters, given the previous confusion on this issue.

For further information, please contact:

Catherine Kennedy – Director, South African History Archive, Tel: 011 718 2561 / catherine@saha.org.za

Freedom of Information Programme – Secretariat of the PAIA CSN, Tel 011 718 2563 / foip@saha.org.za