IMPACT OF SOUTH AFRICA'S PROMOTION OF ACCESS TO INFORMATION ACT AFTER THREE AND A HALF YEARS: A PERSPECTIVE

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Abstract
The article concerns South Africa's relatively new, and largely untested Promotion of Access to Information Act (PAIA). The South African History Archive (SAHA) is the most frequent user of PAIA. About half its requests are for others. Comments and suggestions on PAIA noted by SAHA overwhelmingly concern implementing PAIA, and not amendments. Issues regarding record keeping involve implementing and maintaining appropriate standards and training staff on these standards and PAIA, and extending the scope and content of organisations' obligation to produce a manual to facilitate requests for information. Legislation on privacy should not inhibit preservation of and access to significant records more than strictly necessary. PAIA's provisions for automatically disclosing information without request should be enhanced. Legislation allowing more liberal access than PAIA should be maintained. Issues concerning records created during the Apartheid era include the need for an audit and voluntarily disclosure, removing exemption of Cabinet records from disclosure and limiting the period for which their disclosure can be refused, release of operatives of agencies responsible for state security from undertakings of secrecy and replacing legislation passed during the Apartheid era which restricts access to information more than PAIA, with legislation consistent with the constitutional right to information. Cheap and accessible dispute-resolution under PAIA without litigation, and allowing more streamlined interpretations of PAIA's provisions on issues such as confidentiality, privacy and the public interest is required. Relief from fees under PAIA should be based on income and purpose of access.

The South African History Archive's freedom of information programme

The South African History Archive (SAHA) is an independent non-governmental archive dedicated to documenting and supporting struggles for justice in South Africa. Its founding mission was to strive to recapture lost and neglected South African history and to record history in the making. This informed a focus on documenting the struggles against Apartheid. Today there is an equal emphasis on documenting and supporting the ongoing development of democracy in South Africa.

South Africa's Constitution enshrines a right of access to information. The Promotion of Access to Information Act 2000 (PAIA) gives legislative expression to the right. In 2001, SAHA launched a Freedom of Information Programme dedicated to using PAIA to extend the boundaries of freedom of information and build up an archive of materials released under the Act for public use. To date SAHA has submitted well over 200 requests. About half of the requests were on behalf of individuals. It has made over a dozen internal appeals against refusals of access to information and several appeals to the High Court, only one of which remains outstanding, all the rest being settled on terms satisfactory to SAHA. SAHA has also undertaken considerable work in public education and advocacy, including sharing of information in national and international networks on freedom of information, publication of

articles and delivery of presentations on PAIA.

In the course of pursuing its Freedom of Information Programme, SAHA has noted a number of comments with respect to the operation of PAIA and suggestions for its reform. These are outlined later in this article. It is notable that they focus overwhelmingly on problems with implementing PAIA, rather than on amendments to the Act (South African History Archive and Public Service Accountability Monitor 2003). The actual provisions of the Act are amongst the most comprehensive of their kind in the world. It is therefore important that it be implemented effectively, in accordance with the commendable intentions of the drafters.

Recent developments with respect to the Promotion of Access to Information Act 2000

A pleasing recent development was the publication by the Human Rights Commission in February this year of statistics with respect to requests to each public body subject to the Act. Section 84 of PAIA requires that these statistics be published annually on the basis of information which each public body is in turn obliged to submit to the Commission annually pursuant to Section 32 of PAIA. While the statistics must be published annually, those published in February relate only to PAIA's second year of operation. The statistics relating to the Act's first year of operation have not appeared. The coverage of the statistics is not comprehensive and they contain various anomalies (Sorensen 2004a). However, they provide far more extensive information about the operation of PAIA than any yet published. Lack of such statistics has previously been noted by SAHA as a limitation on the ability to assess the impact of the Act (South African History Archive and Public Service Accountability Monitor 2003).

It is apparent that the Human Rights Commission had considerable difficulty persuading public bodies to comply with the requirements of Section 32 of PAIA. Intervention of the Minister of Justice and Constitutional Development was required before the current rate of compliance was achieved (Sorensen 2004a). Whilst this is obviously a concern at one level, it is encouraging at another, in so far as it demonstrates political commitment at a high level to implementation of PAIA. It is not the only recent instance in which personal intervention of a government minister has apparently resulted in improved compliance with PAIA (South African History Archive 2004). It is also pleasing that the Human Rights Commission itself has stated in response to its experience with compiling the statistics that it is considering developing a more stringent monitoring and reporting mechanism in order to ensure that there is better compliance with Section 32 of PAIA (Sorensen 2004a).

Concerns regarding provisions and implementation of PAIA [1] **enforcement** [2]

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. What is sought is a forum which can be accessed after refusal of a request by a public or private body or rejection of internal appeal against refusal of a request by a public body, but before resort to court action. In a report commissioned by the Human Rights Commission last year with respect to its role

under PAIA, SAHA expressed the view that any such dispute-resolution mechanism should provide for the making of binding orders and not merely recommendations for the resolution of disputes. The Open Democracy Advice Centre, the other non-governmental organisation commissioned last year to research aspects of this issue by the Human Rights Commission, shares this view. This would place the onus on a body against whom an appeal has been upheld to apply to a court for review of such a decision, rather than placing the onus on a requester to appeal to a court against a body's refusal to follow a recommendation made to it by the independent decision-maker.

In April 2003 Mr Verne Harris, SAHA's then Director, spent a week in Canada examining the country's statutory model for resolving disputes over access to information. What was most impressive was the extent to which at federal level the Information Commissioner's interventions led to resolution of disputes and avoided expensive litigation. In our own work, we have thus far settled out of court six of seven cases in which we instigated litigation. On each occasion, the State Attorney has played an important role in mediating the dispute and facilitating a settlement. This is precisely what an Information Commissioner could do at a fraction of the cost. Whilst Canada's Federal Information Commissioner cannot in fact issue binding orders, he operates within a long-standing democratic system characterised by an entrenched culture of governmental openness and accountability, a feature not yet present in South Africa's young democracy.

Moreover, even in Canada it has been suggested that the Federal Information Commissioner should be better resourced and given the power to make binding orders (Roberts 2002). It has been suggested that Provincial Information Commissioners' order-making power encourages parties to settle their disputes before orders are made. By contrast, the Federal Information Commissioner has antagonised government by issuing subpoenas and publicly advocating for freedom of information without the power to ultimately order release of information sought by applicants. Separate Information and Privacy Commissioners also exist in Canada, a model not favoured by SAHA for reasons outlined below.

SAHA believes that a single body should be responsible for dispute-resolution under both PAIA and any legislation passed to give effect to the right to privacy under South Africa's Constitution. Many complexities exist in balancing the rights to privacy against that of access to information which is also constitutionally entrenched in South Africa (South African Law Reform Commission 2003). If separate bodies dealt with disputes involving each right, a third authority or independent process would be required to ensure that they were appropriately balanced when there were conflicts in decisions arrived at. This appears to be unnecessarily unwieldy and costly. In 2003, the South African Law Reform Commission published a paper on "Privacy and Data Protection" to facilitate input into proposed legislation on privacy. This paper also discusses the possibility of a single forum for resolution of disputes regarding both access to information and privacy and discusses existing dispute-resolution mechanisms of this type (South African Law Reform Commission 2003).

SAHA also believes that the body responsible for dispute-resolution under PAIA and legislation protecting privacy should be responsible for other functions with respect

to these rights. These include promotion, publicity, education, advice, assistance, monitoring and reporting to Parliament. PAIA currently assigns responsibility for these functions to the Human Rights Commission and responsibility for resolution of disputes over substantive rights to the courts and those over mal-administration to the Public Protector. The draft Open Democracy Bill (the original basis for PAIA) provided for a similar model, under which an independent Open Democracy Commission was to monitor the Act's effectiveness and propose amendments thereto. The proposal for such a Commission was not incorporated into PAIA in its final form. This role is instead performed by the Human Rights Commission which devotes three full-time staff to such activities. The Head of Research and Documentation, of which the PAIA Unit is a part, also devotes significant time and energy to the unit and a committee called "PAIA.com" oversees its work.

Options for an independent dispute-resolution mechanism intermediate between refusal of requests or rejection of internal appeals and litigation in the courts include enhancing the existing powers of the Human Rights Commission or the Public Protector or establishing a new Information and Privacy Commissioner or specialist court or tribunal. The draft Open Democracy Bill provided for the latter. The relevant provisions were not included in the final version of PAIA on the grounds of cost and there does not appear to be any realistic prospect of consideration of this option being revisited.

SAHA also believes that the Public Protector is not adequately equipped to provide such a forum for dispute-resolution because:

- Its role is limited to disputes over mal-administration, whereas what is required is a more effective mechanism to deal with disputes over enforcement of substantive rights under PAIA and legislation protecting privacy.
- It deals solely with the public sector, whilst PAIA covers both the public and private sectors.
- It has no power to make binding orders.

Section 8 of the Human Rights Commission Act allows the Commission to attempt dispute-resolution through mediation, conciliation or negotiation and to rectify any act of omission regarding fundamental rights. It also has an additional power conferred by other legislation. In its report to the Human Rights Commission on its role with respect to PAIA, SAHA argued that these provisions do not allow it to undertake dispute-resolution under PAIA because PAIA establishes a legislative scheme for enforcing the Act conferring specific powers to resolve disputes on the Public Protector and very vague and general powers of this type on the Human Rights Commission. Given these provisions, neither PAIA nor the Human Rights Commission Act should be interpreted to allow the Commission to "cut across" the dispute-resolution functions conferred on the Public Protector or to go beyond the specific role assigned to it by PAIA.

The Commission itself, however, takes the view that its role regarding constitutional rights in general allows it to resolve disputes under PAIA in light of PAIA implementing such a constitutional right. The Commission's Legal Department does in fact informally attempt to resolve disputes and its Complaints Committee of three

Commissioners considers disputes which cannot be resolved informally. This is also subject to oversight by PAIA.com. However, SAHA recommended to the Commission that any existing uncertainty over its power to resolve disputes under PAIA should be removed if it was to take responsibility for dispute-resolution under PAIA between refusal of requests or rejection of internal appeals and recourse to litigation in the courts. In particular, SAHA recommended:

- Removal of the current role of the Public Protector in dispute-resolution under PAIA.
- Specifically conferring power to resolve disputes on the Human Rights Commission under provisions of both PAIA and legislation protecting privacy. Similar provisions should apply to an alternative independent Information and Privacy Commissioner if the relevant functions are not conferred on the Human Rights Commission.

Whichever forum is chosen for the new dispute-resolution mechanism under PAIA and legislation protecting privacy, SAHA also believes that it should exhibit the following features:

- Establishment under statutory provisions conferring coercive powers of dispute-resolution more explicitly than PAIA does. PAIA currently uses words such as “may” and “if reasonable” in reference to the Human Rights Commission’s exercise of its powers under the Act.
- Specific time frames within which the Human Rights Commission or independent Information and Privacy Commissioner must deal with disputes.
- Possible assignment of particular Commissioners to issuing binding orders if the body conducting dispute-resolution is also responsible under PAIA and legislation protecting privacy for preliminary attempts at dispute-resolution, for example, advising parties of statutory rights, facilitating handling of application or complaints by public or private bodies. Concern has been expressed that a binding dispute resolution mechanism would be seen as insufficiently independent if it was administered by the same body which also advises parties of their rights or assists their efforts to obtain redress at an earlier stage of the process. SAHA does not believe that such activities are necessarily inconsistent with making binding orders, as they do not necessarily involve judgments on the substantive merits of claims. However, assigning particular Commissioners solely to the part of the process involving binding dispute-resolution is a means to overcome this problem if necessary.

In the case of the Human Rights Commission, the likely volume of cases would be such that particular Commissioners may also need to be assigned specifically to dealing with disputes under PAIA and under legislation protecting privacy. All these considerations highlight the need to commit additional resources to ensure the effectiveness of any new independent dispute-resolution mechanism, for items such as staffing and training. Those interviewed by SAHA for the purposes of its previous research regarding PAIA felt that there is not currently sufficient championing of the right to access to information at higher levels of government. These comments admittedly pre-dated the more recent ministerial intervention mentioned above. However, it is noted again that the Commission itself stated that it is considering developing a more stringent monitoring and reporting mechanism to ensure that public bodies comply with the requirement to submit statistics with respect to

requests under PAIA (Sorensen 2004a). All of this suggests that the Human Rights Commission is currently inadequately resourced to perform its role with respect to, for instance promotion and education, even before considering its role regarding dispute-resolution and any new functions which it may assume under legislation protecting privacy.

Introducing a new forum for dispute-resolution under PAIA and legislation protecting privacy would also require re-examination of existing arrangements for resolving disputes under PAIA. In particular, consideration should be given to whether internal appeals against refusal of applications or dismissal of complaints under PAIA or legislation protecting privacy should be compulsory (they currently are under PAIA). Concern exists that adding an extra step to the process, involving the Human Rights Commission, or an independent Information and Privacy Commissioner, could further delay applications. Given the uneven performance of different departments under PAIA, SAHA is in favour of the retention of internal appeals, but only as a voluntary step in dispute-resolution. For similar reasons, SAHA believes that if the Human Rights Commission or Information and Privacy Commissioner is not given power to make binding orders (as it has recommended it should be), recourse to that forum should also only be a voluntary step.

Finally, the courts' role should also be considered in light of criticism of the High Court as an insufficiently quick, cheap and accessible dispute-resolution forum under PAIA. Given this, there is a need to consider recent assignment of responsibility for litigation under PAIA to Magistrates' Courts as an alternative to the High Court and the prospects which this may raise of cheaper and more accessible dispute-resolution in the courts. SAHA supports this step regarding dispute-resolution under both PAIA and legislation protecting privacy. Consideration should also be given to referral of cases for mediation by courts to the Human Rights Commission or Information and Privacy Commissioner. However, this would only supplement the independent role for a dispute-resolution mechanism intermediate between rejection of requests or refusal of appeals and recourse to the courts. Fuller consideration of the issue would require more extensive assessment over a longer period of the experience of users of PAIA involved in litigation under the Act, particularly in light of the recent commencement of the role of the Magistrates' Court.

Record keeping and voluntary disclosure of records

There is a need for maintenance and implementation of appropriate archival standards for the creation and retention of records which ensure that documents subject to access under PAIA exist and are readily retrievable. This is an issue being increasingly recognised around the world as crucial to the effectiveness of legislation providing for freedom of information. It was, for example, a major topic of discussion at the second annual international conference of Information Commissioners held in Cape Town in early February 2004. Various initiatives are being considered to explore the links between effective record keeping and freedom of information and the role which the former plays in supporting the latter. In general terms, there is a need for increased resourcing for upgrade and maintenance of record-keeping systems facilitating the effective and efficient implementation of PAIA. Greater resources should also be committed to training of management and staff in

administration of such systems and in compliance with PAIA.

In South Africa, a number of specific issues exist regarding facilitation of access to records. Firstly, a review of governmental declassification procedures should be conducted to ensure consistency with the constitutional right to access to information and PAIA. Specifically, there is a need for:

- A comprehensive, co-ordinated archival audit of surviving security records created and/ or maintained under Apartheid.
- Systematic voluntary disclosure of records by State agencies, particularly those which were or are part of the security establishment. This could be accomplished using Section 15 of PAIA which required a public body to publish in a manual a description of records held by that body, including specific reference to those records available without needing to invoke PAIA.
- Release of former operatives of Apartheid's security establishment from secrecy undertakings grounded in the Protection of Information Act 1982 preventing them from speaking publicly about their activities whilst employed by the state. Memories of such operatives are particularly important given mass destruction of records under Apartheid from 1990 to 1994.
- Repealing the Protection of Information Act (POIA) and replacing it with a new Act consistent with the right of access to information under South Africa's Constitution and PAIA. POIA's current constitutionality is doubtful (Klaaren 2002).

A second issue also concerns Section 15 of PAIA and the equivalent Section covering private bodies (Section 52). Its is suggested these sections should be more prescriptive by expressly requiring specific categories of information to be identified as automatically available without need to make a request under PAIA. Presently, it is merely required that any records which are in fact so available are identified as such.

Thirdly and more generally still, the application of the requirement to publish a manual to the private sector has been the subject of considerable practical difficulty. Commencement of the application of the relevant section of PAIA (Section 51) has already been postponed on a number of occasions. Concerns have been raised about the difficulty of complying with and enforcing the requirement that every private body covered by PAIA (a huge number) produce a manual regarding records which it holds. In SAHA's view, this should be addressed by:

- Narrowing the scope of private bodies covered by the requirement by reference to the rationale for PAIA's coverage of the private sector; that is, allowing access to information necessary for the protection or exercise of any right. This would suggest that private bodies to be covered should include multinational and other private bodies with influence over people's lives similar to or greater than that of governments by virtue of sheer size or scale of operations and private bodies performing functions historically delivered by the public sector, whether as a result of privatisation or contracting-out (Currie and Klaaren 2002: 18-22).
- Prescribing in greater detail the content which the organisations covered by the requirement, (whether public bodies subject to Section 14 of PAIA or private bodies subject to Section 51), need to include in their manuals, in light

of criticism of their usefulness. PAIA currently requires manuals to indicate "subjects" on which records are held and "categories" of records on each subject with "sufficient detail to facilitate a request to a record of the body". Regulations should be made to require that an index list records held by reference to a body's structures and functions, their purpose, scope, administrators, users and connections with other structures and functions and to the relevant classification system and finding aid(s).

Finally, there should be a review of the exemption, by regulations made under PAIA, of the National Intelligence Agency and South African Secret Service from the requirement to produce a manual. Given the important role SAHA believes manuals could play in linking sound record keeping to effective access to information, it also strongly suggests that any further exemptions from the requirement be avoided.

Relief from fees

Section 22 of PAIA provides for the making of regulations exempting appropriate categories of requesters of information from payment of fees. Despite the fact that the Act has now been in operation for three and a half years, such regulations are yet to be made. The only current provision for exemption from fees is that made under Section 22 itself for requests for files relating to the requester personally. This is a matter which obviously has a great practical impact on the huge numbers of poor South Africans for whom a fee of thirty five South African Rands per request from a public body and fifty South African Rands per request from a private body (Government of South Africa 2002) seriously restricts the practical usefulness of PAIA. Various difficulties have arisen in precisely identifying criteria upon which relief from fees should be granted. It is nevertheless suggested that regulations providing for such exemptions (by reference to ability to pay and purpose of access) should be expedited as matter of priority.

The Act should also require the that time spent on severing disclosable information from that subject to exemption from disclosure under PAIA and on routine declassification of governmental information be specifically recorded. The latter should be expressly excluded from fees calculated and imposed for preparation of records subject to release. The need for such routine declassification as a part of good recordkeeping has already been referred to above and individual requesters of information under PAIA should not be required to personally pay for it.

Time limits

PAIA should provide for the processing of urgent requests for information in a period shorter than the generally prescribed period of 30 days under Section 25. In certain circumstances, provision for a longer period to deal with requests could be desirable, provided that any extension is authorised by the person requesting the information.

SAHA's experience, almost entirely with public bodies, has been that the requirement that a request under PAIA be responded to within 30 days is very rarely met in practice. Statistics kept by SAHA record average times taken to respond to a request by each body to which a request has been made. Statistics for 2003 indicate

that the “average response time”, so to speak, was just under 150 days for public bodies, although interestingly it was only just over 30 days for private bodies (South Africa History Archive 2003). Sections 27 and 58 of PAIA currently provide for “deemed refusal” of a request for information under upon expiry of the time limit for responding. One highly effective means of encouraging requestees to improve their performance in this respect would be replacement of this provision with one for “deemed acceptance” of such a request.

The requirement in Section 78(2) of PAIA that court action be commenced within 30 days of receipt of a decision on access provides too little time for consideration and preparation of litigation. Section 78(2) is in any case inconsistent with the reference to 60 days in Section 77(5)(c) and should at the very least be amended to remedy this inconsistency.

Scope of exemptions from PAIA and from disclosure

Given the generality and breadth of exemptions from disclosure under PAIA, it is unsurprising that most debate over reforming its substantive (as opposed to procedural) provisions focuses on exemptions. In addition, exemptions from application of PAIA itself, as distinct from exemptions allowing refusal of particular requests for information, are less clearly defined than they could be.

Records excluded from application of PAIA itself include those of the Cabinet and courts. Those of courts, excluded under Section 12(c), must relate to judicial functions. However, no attempt is made to further define such records and the distinction between records relating to judicial and non-judicial functions is not easily drawn. The definition of records of “Cabinet” under Section 12(a) should expressly exclude records of Cabinet during Apartheid. Moreover, if the view were taken that PAIA applies to the exclusion of even other legislation permitting more liberal access to information than PAIA, any such legislation permitting access to records of Cabinet would, on strict application of this principle, be inoperative and such records entirely exempt from disclosure, regardless of how old they are. This article takes a different view, on the basis that such a restriction could well be unconstitutional and that statutes should be read, if possible, as being constitutional (South Africa History Archive 2003). However, the fact that this is a possible interpretation of the interaction of PAIA and other legislation, in accordance with which custodians of public records might act, highlights the need for an explicit time limit on the exemption of records of Cabinet from PAIA.

The scope of the exemption from disclosure of records subject to undertakings of confidentiality, (South Africa 2000, see Sections 37(1)(a) and 65), should be restricted to ensure that simply agreeing with another party that certain information should be kept confidential is not sufficient to allow the exemption to be invoked, if the substantive nature of the documents does not justify this. Moreover, undertakings of confidentiality should not permit the exemption to be invoked indefinitely, regardless of restrictions on the undertaking itself. Such restrictions apply explicitly for example to legislation providing for in-camera hearings of the Truth and Reconciliation Commission (South Africa 1995, see Section 29). Thus far, however, SAHA’s argument that these express restrictions on the confidentiality of

such hearings should be given effect to have not found favour. Expensive litigation may prove to be the only way to resolve the issue. PAIA should explicitly limit the time for which undertakings of confidentiality are permitted to apply.

Even when exemptions from disclosure of information under PAIA otherwise apply, the information can be released in the public interest under Section 46 or Section 70 of PAIA, in the case of requests for information from public and private bodies respectively. However, the circumstances under which information can be released in the public interest are currently so narrow as to raise doubts as to whether they adequately give effect to the constitutional right to access to information to which PAIA intends to give effect. These circumstances should be broadened by removing the need for the information sought to reveal evidence of a breach of the law or a serious and imminent threat to public safety or the environment. Release of information under Section 46 or 70 should be permitted whenever the public interest in disclosure outweighs the harm caused by disclosure of the information.

PAIA's interaction with other legislation [3]

Parliament should pass the legislation stipulated in Section 86 of PAIA. The legislation was required to list in a Schedule to PAIA other legislation providing for more liberal access to information than in PAIA, in terms of which access may be granted without need for a request pursuant to PAIA or reference to restrictions otherwise applying under PAIA. The consequence of failure to pass this legislation is not entirely clear. It should thus be enacted urgently.

It is nevertheless SAHA's view that the transitional provision under Section 86 of PAIA for application of more liberal arrangements for access to information continues to apply until such time as the legislation which is required to be passed under that Section 86 is enacted. PAIA only purports to give effect to the constitutional right to access to information in the context of the existence of other legislation. A danger exists that the right may fail to be adequately given effect to by legislation unless the transitional provision for continued application for access that is more liberal than that provided for by PAIA continues to apply. The courts are obliged to interpret legislation as being consistent with the Constitution. Substantive rules of common law must also be reshaped to ensure consistency with the Constitution where necessary. It should also be the case that rules of statutory interpretation, such as that providing for later legislation to prevail over earlier inconsistent legislation, should not apply when this would result in legislation being interpreted as unconstitutional, and where a plausible alternative interpretation would be able to preserve the legislation's constitutionality. Continued application of the transitional provision is a plausible interpretation of Section 86 of PAIA and should thus be favoured over an interpretation which might result in the constitutional right of access to information not being given full effect to by legislation as required.

Moreover, the view that PAIA should override earlier legislation providing for access to information on more liberal terms than does PAIA necessitates an extremely restrictive interpretation of Section 15 of PAIA. Section 15 requires that a public body must at least annually submit to the Minister for Justice a description of categories of records automatically available to the public without needing to make a request

under PAIA, including those available for inspection under any other Act, for purchase or copying from the body and from the body free of charge. The Section thus appears to contemplate application of legislation providing for more liberal access to information than does PAIA. It would not be impossible to interpret the Section restrictively to apply only whilst the transitional provisions of Section 86 are in force (although it is of course argued here that they remain in force until such time as Parliament legislates in the manner which PAIA requires it to) and then only to other legislation passed after PAIA. However, this would certainly risk access to information being more restrictive under PAIA than it was before PAIA was passed in some instances. This seems unlikely to have been the intention of the legislative or constitutional drafters. It is suggested again that PAIA should be interpreted to permit continued access pursuant to legislative arrangements for access which are more liberal than those provided for under PAIA.

More generally, SAHA is concerned to impress upon legislators that a risk exists that PAIA would fail to fully give effect to the constitutional right to access to information if other legislation providing for more liberal access to information is repealed or amended to restrict such access. A particular concern is that the current review of the National Archives Act of South Africa, which presently provides for open access to records more than twenty years old, should not result in amendments to that Act which create an unconstitutional denial of the right of access to information. Given that privacy is a major reason, if not the major reason for considering such amendments, SAHA believes the Law Reform Commission's investigation into proposed legislation protecting privacy should also address this issue.

SAHA rejects the suggestion that amending the National Archives Act to allow denial of access to records over twenty years old on any ground on which it may be denied under PAIA must necessarily give effect to the constitutional right of access to information. It is suggested that because PAIA gives effect to the constitutional right, provision in any legislation for refusing access to information on a ground on which it could be refused under PAIA must necessarily be consistent with the right. It is noted again, however, that PAIA only purports to give effect to the constitutional right of access to information in the context of existence of other legislation, such as the National Archives Act. To suggest otherwise is to call into question competence of the legislative drafters who must have understood that the constitutional requirement is that PAIA in conjunction with other legislation allowing more liberal access to information should give effect to the right to access, not that PAIA alone should do so. Restricting access to information under the National Archives Act to a greater extent than the Act currently does could thus result in PAIA alone failing to fully give effect to the constitutional right of access to information. SAHA thus opposes the suggestion that the constitutional right of privacy justifies the National Archivist being given broad discretion to refuse access to any record more than twenty years old on any ground on which access can be refused under PAIA.

PAIA seeks to balance the public interest and constitutional right of access to information against the constitutional right to privacy. It does so by restricting access to information from the private sector to that required to protect or exercise any right and allowing refusal of access to public or private records on the grounds of personal privacy, subject to release of even private information in the public interest.

Any legislation which provides for protection of privacy must strike a similar balance, as must administrative arrangements for the implementation of such legislation. It should not limit acquisition or transfer of or access to records under PAIA or other legislation more than is strictly necessary to protect the constitutional right to privacy.

SAHA's history and current work have led to particular concern with ensuring any legislation protecting privacy not restrict collection and maintenance of records of enduring value any more than necessary to protect the constitutional right to privacy. Most particularly, SAHA is concerned with potential impact of such legislation on operation of the National Archives and provincial archives services. More broadly, SAHA wishes to stress that the legislation should not inhibit operation of public or private archives by limiting their acquisition of records of enduring value or access to the records or requiring destruction of such records on grounds of privacy.

Conclusion

It is encouraging that there is now more information publicly available than ever before about the impact of South Africa's Promotion of Access to Information Act. Also pleasing is that political commitment to the successful implementation of the Act is being demonstrated by tangible action on the part of the South African Human Rights Commission and by Ministers responsible for relevant Departments of the South African Government.

There is a particular need to ensure that access to information is also supported at a practical level by the devotion of adequate resources for implementation and maintenance of appropriate archival standards for the creation and retention of records, and to training of management and staff in administration of such standards in compliance with PAIA. The scope of application of the requirement that organisations produce a manual should be extended. The requirement should be made more prescriptive to enhance its usefulness in facilitating requests for information. There is also a need to ensure that any legislation passed to protect the constitutional right to privacy does not inhibit the retention, transfer and maintenance of records of enduring value, or access to such records, any more than is strictly necessary to protect that right. Provisions of PAIA providing for automatic disclosure of information without a formal request should also be made more prescriptive and other legislation providing for more liberal access than does PAIA should be maintained.

Specific attention should be given to records created during Apartheid. A thorough audit of such records should be conducted, voluntary disclosure undertaken, the exemption of Cabinet records from disclosure removed and operatives of agencies responsible for state security under Apartheid freed from undertakings of secrecy as to their work. Legislation passed during Apartheid which restricts access to information more than does PAIA should be repealed and replaced with legislation consistent with South Africa's constitutional right to access to information.

Practical effectiveness of PAIA also depends on the development of a more appropriate mechanism for resolving disputes under the Act than litigation in courts. The mechanism should be cheap, accessible, quick, effective and authoritative.

Consideration should be given to a range of options able to fulfil these requirements in light of existing arrangements for resolving disputes under PAIA and proposed arrangements for resolving disputes under legislation protecting privacy. A cheaper and more accessible mechanism for dispute-resolution would in turn create a greater ability for applicants for access to information to seek resolution of substantive issues with respect to the right of access under PAIA. These include issues such as the scope of the exemption of records subject to undertakings of confidentiality, the balance to be struck between the right of access to information and the right to privacy and the scope of the provision for release of otherwise exempt records in the public interest. For the most economically marginalized members of society of all, however, an issue requiring resolution even before that of accessible dispute-resolution may be that of provision for appropriate relief from fees for applications for access to information under PAIA.

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Endnotes

[1] This entire lengthy section of this article draws heavily upon both SAHA and PSAM (2003) and upon SAHA 2003. Privacy and data protection: submission to the

South African Law Reform Commission. Available: http://www.wits.ac.za/ (Accessed 12 December 2003).

[2] This discussion of enforcement also covers some of the issues in the reports by the South African History Archive, *Strengthening the role of the South African Human Rights Commission in relation to the Promotion of Access to Information Act*, July 2003, and the Open Democracy Advice Centre, *The Promotion of Access to Information Act: Commissioned research on the feasibility of the establishment of an Information Commissioner's Office*, which were both commissioned by the Human Rights Commission. Each organisation was requested to argue a specific case. In SAHA's case at least, it was not necessarily committed as an organisation to the particular case which it was commissioned to defend, but the discussion remains useful.

[3] This section of the article draws heavily upon SAHA (2003); Sorensen (2004a; 2004b).