THE PROMOTION OF ACCESS TO INFORMATION ACT (PAIA) AND THE NATIONAL ARCHIVES OF SOUTH AFRICA ACT: A COMPARATIVE ANALYSIS OF THE PREVIOUS AND PRESENT STATUTES GOVERNING ACCESS TO ARCHIVES AND PUBLIC RECORDS WITH SPECIAL FOCUS ON THE IMPLICATIONS OF PAIA FOR PUBLIC ARCHIVES SERVICES

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Introduction

Access by the public to archives and public records in South Africa has been significantly affected by the introduction of the National Archives of South Africa Act (No. 43 of 1996), which replaced the Archives Act (No. 6 of 1962), and the Promotion of Access to Information Act (No. 2 of 2000). This article attempts a comparative analysis of the previous and present statutes governing access to archives and public records with a special focus on the implications of the Promotion of Access to Information Act for public archives services. While the latter Act also provides for access to private records, this article focuses largely on public records.

An organising theme relates to the notion that archives and public records issue from and express power relations within society. Consequently the acts of creating records, keeping them and having access to them are significant indicators of the balance of power in society. The article seeks to explore and question the extent to which the new legislation has shifted the location of power.

The article commences with a general set of motivations for freedom of information legislation, and then offers some theoretical underpinnings relating to the organising theme. The previous position regarding access to public archives and official records, both in terms of statute and in practice, is discussed. The main body of the article discusses the provisions of the Promotion of Access to Information Act (in conjunction with the National Archives Act) regarding access to archives and public records with special focus on the implications thereof for public archives services. This is followed by some administrative implications and a conclusion.

Motivations for freedom of information legislation

> *"… in order to –*
>
> *foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information;*
>
> *actively promote a society in which the people of South Africa have effective access to information to enable them to more fully exercise and protect all of their rights"*

(Preamble to the Promotion of Access to Information Act, 2000)

In the past twenty years there has been a move towards passing statutes granting citizens freedom of access to information held by government in various countries with a strong democratic tradition (Sweden set the precedent in the 18th century), thereby in some measure shifting the location of power in society. Given South Africa's particular history of repression of and injustice to its citizens by the state, and the abuse of power, there is arguably an even greater need for such a mechanism, to foster reconstruction and reconciliation, and the promotion of true democratic values. As indicated in the discussion on the previous position regarding legislation and practice below, access to state-held information in South Africa was historically highly restrictive. In 1994, Harris and Merrett argued that there were two main reasons why a democratic South Africa should be concerned about freedom of information. "First, South Africans must reclaim their history. Any nation that has an incomplete understanding of its past rests on shaky foundations …. Second, government must be made accountable, especially in the light of the historically repressive role of the South African state."[1]

In what follows, five rationales for legislation on access to information in South Africa are advanced.[2] Access to information is a right identified in South Africa's formal processes of transition to democracy and was embodied in both the interim Constitution of 1994 and final Constitution of 1996. The right is provided in section 32(1) of the latter as part of the Bill of Rights as follows: "*Everyone has the right of access to –(a) any information held by the state; and (b) any information that is held by another person and that is required for the exercise or protection of any rights".* The section continues with a requirement that national legislation must be enacted to give effect to this right. The right of access to information may be seen as part of the development of a human rights culture that needs to develop in South Africa. Certainly, given the origins of the principle of access to archives in the French Revolution, the archival profession has traditionally been eager to assert that the citizen's rights are enshrined in archives. "Public records obviously define the relations of the government to the governed. They are the ultimate proof for all permanent civic rights and privileges; and the immediate proof for all temporary property rights and financial rights that are derived from or are connected with the citizen's relations to the government."[3] In South Africa, the need for redress certainly heightened the need for enabling legislation.

Secondly, freedom of information is a necessary pre-condition for an effective and participative democratic society, in which government is both transparent and accountable to its citizens. "Allowing citizens to obtain information is essential for full democratic participation in society, and passing legislation on access to information opens a dialogue between the government and the people. Without full information, the citizen cannot criticize policy. Without a voice and the right to put forward views, the citizen cannot contribute to political and social change".[4] Information thus allows citizens to participate in their democracy, and contest and contribute ideas.

Thirdly, open and accountable administration is promoted by the free flow of information. If a citizen chooses (or a journalist does so on behalf of society), the freedom of information legislation gives the citizen the right to establish what government does and what basis is used for decision-making. Fourthly, following from the previous two rationales, it is argued that participative democracy and accountability encourages better administrative decisions. And fifthly, information

can be considered as an economic resource and its free flow can contribute towards reconstruction and development.

Counterbalancing the foregoing powerful arguments for freedom of information to empower citizens and hold government accountable, is the concern that freedom of information mechanisms may lead to subterfuge in the records-creation process, thereby, in some instances, thwarting the objectives of the legislation. Albeit in the context of archival closed periods, TR Schellenberg observed that: "... the shortening of the time period during which records are withheld from the critical scrutiny of scholars may have an adverse effect on the quality of public records that are produced. … public officials may produce records with an eye to history."[5] Likewise, mindful of immediate access to information held by the state facilitated by freedom of information legislation, public officials may document or fail to document transactions so as to protect their own interests rather than those of the public. However, it needs to be noted, as argued in the section on theoretical underpinnings, that any record is a construction and is unlikely to reflect objective reality fully. The concerns noted in this paragraph, although valid, cannot substantially detract from the powerful rationales in favour of freedom of information legislation.

Theoretical underpinnings

In comparing previous and present legislative positions regarding access to archives and public records, this article seeks to assess the extent to which the location of power has shifted in the new dispensation. As noted in a practical way in the foregoing arguments, rights and powers are closely bound up with the ability to access information, and power can thus concomitantly be said to reside in the archives and public records in which official information is contained and in those who control access. Before launching into the detailed analysis which forms the main body of the article, it would be appropriate to seek a theoretical basis for such a discussion, focussing on the nature of archives and the nature of power embodied therein.

Theorists generally apply the concept of archives in a much broader manner than standard archival professional definitions. For the purposes of this article, it is also worth noting that in the Archives Act of 1962, and in practical use, the term "archives" was applied to encompass all public records, irrespective of age or place of custody. This broader understanding of the term should inform understanding of the ideas of the theorists and their relevance to the article.

From Jacques Derrida's work on archives[6], I take some ideas that might inform the theme of this article. Derrida traces the origin of the term itself back to classical Greece, where the meaning of *arkheion* was the residence of the superior magistrate or *archon.* Archons signified political power, and made or represented the law. Their residence was where the official documents were kept, and they were considered to be both guardians of and interpreters of the documents. "They have the power to interpret the archives. Entrusted to such archons, these documents in effect speak the law: they recall the law and call on or impose the law." This place of custody "… marks the institutional passage from the private to the public, which does not always mean from the secret to the nonsecret".[7] Derrida sees the "archontic" function not only as comprising the deposition of the archive on a stable substrate by

the hermeneutic authority, but it also entails the power of consignation. “The archontic principle of the archive is also a principle of consignation, that is, of gathering together.”[8] And consignation is in an external place.

The point is that the process of recording or creating, and accessing or interpreting of memory entails the exercise of power. Derrida asserts that ”[t]here is no political power without control of the archive, if not of memory.” And he goes on to argue that “[e]ffective democratization can always be measured by this essential criterion: the participation in and access to the archive, its constitution, and its interpretation.”[9]

Near the beginning of his argument, Derrida alludes to the intersection between the substrate and the authority becoming at once visible and invisible. This theme is developed in conjunction with Freudian psychoanalysis to suggest fundamental contradictions in the concept of the archive; that, as with the Freudian death drive, together with conditions that permit “archivization”, there will always be a destructive force, introducing forgetfulness (the “archiviolithic”). “The archive always works, and *a priori*, against itself”.[10] It is from this internal conflict that Derrida derives the notion of “archive fever”, which is the title of his work. This again points to the power relations that are at play in the creation and preservation of memory, as well as in the *recalling* of memory. And that archives are constructed in nature and do not embody a complete and neutral representation of events or reality.

Michel Foucault’s view of archives also hinges on their constructed nature, issuing from and expressing power relations. His definition is similarly very broad: the archive being the assemblage of all discursive formations in a given society. It is also a system: “the archive is first the law of what can be said, the system that governs the appearance of statements as unique events.”[11]

The previous position regarding access to public archives and official records in South Africa: legislation and practice

Access to public records and archives in apartheid South Africa was governed by various pieces of legislation, including the 1962 Archives Act and the 1982 Protection of Information Act. While the statutory restrictions on access, which will be described below, were not in themselves unduly prohibitive in comparison with similar statutes internationally, they certainly gave precedence to state control over access to information. The statutes located the power to regulate access firmly in the hands of the state and political authority. According to Harris and Merrett, it was however in the *implementation* of the statutes that “…restrictions were manipulated to secure an extraordinary degree of opacity in government and … South Africa’s national information system became grossly distorted to the benefit of government propaganda in an attempt to preserve the power of a white elite and its allies.”[12]

In a few instances related statutes did provide for public access to official records. For example, the legislation governing the courts and deceased estates made provision for records of court proceedings (except those held in camera) and estate papers to be accessible automatically without restriction. Certain “offices of record”[13] such as the Registrars of Deeds, and of Births, Marriages and Deaths, were governed by legislation which defined and allowed for conditional public access to the records they maintained under certain conditions. But the only mechanism that

provided for anything approaching a broad right of public access to information held by government was the Archives Act itself.

Paradoxically, while access to official records was generally restrictive, with a few exceptions noted below, no general provision existed to protect the legitimate interests of the public, such as personal privacy. The exceptions relate mainly to statutory restrictions on access to records of adoptions and administrative restrictions on access to records of births. Thus, again in this context, the power to regulate access to and use of information gathered officially rested with state, with scant regard being given to the legitimate interests of individual citizens.

In the Archives Act, the very language in which the provisions regarding access were couched was prohibitive, indicating that state and political control, rather than the interests of users, were paramount. For example, the relevant section (9), commences with a provision that *"no person shall have access to any archives*" other than provided by the Act and any other law. And while rights of access were provided, in section 9(5), the Minister was given the power "*at any time*" to *"withdraw any authority so granted*". The specific provisions and their implications are discussed below.

In terms of section 2, but subject to other provisions in the Act and any other Act of Parliament, every member of the public had, free of charge, access to all archives in archives depots dating from after a specified date, which was extended on a five-yearly basis. Prior to a 1979 amendment, the closed period was 50 years, in line with prevailing international practice. The date specified in the amendment to the Act was 31 December 1950, which meant that a closed period of 30 years was the intention. However, the five-yearly extension of the "open" period meant that the period of blanket closure varied between 30 and 35 years. This unusual mechanism therefore acted restrictively in itself. Its origins are presumably linked to the strong emphasis by public archivists in regulating the management of current records of government and a desire to dovetail these practices with efficient archival administration. This is borne out by the *Archives Instructions* requiring governmental bodies to close current volumes on dates coinciding with those specified in the legislation.

This right of access was qualified by sub-sections 9(2)(b)(i) and (ii), in terms of which the Minister could "*on the grounds of public policy direct that access to any such archives or accessions be withheld*", and the Director of Archives could refuse access to archives or accessions on the grounds of their fragile condition, or pending the classification, repair or other treatment thereof. There was a right of appeal to the Minister in terms of decisions of the Director of Archives. The latter provision is unlikely to have constituted a significant infringement of rights of access in practice, but merely delays. The powers given to the Minister were however potentially problematic and were in practice used in a manner that was restrictive. The meaning of what "public policy" might be was nowhere defined and could obviously be applied quite arbitrarily. In the words of TR Schellenberg, in the context of access to archives, "[t]he public interest is an imponderable thing that may mean one thing at one time and another at another time."[14] As Harris and Merrett document, this provision was applied by Ministerial decree to close all access to a range of archives groups for extended periods between 1980 and 1990 with the obvious intention of restricting access to information to maintain political hegemony.[15] This instance was in effect an isolated case and was allegedly the result of an autocratic personal decision at the whim of the then Prime Minister in reaction to a single incident of a

researcher revealing sensitive information [16]. In the words of Harris and Merrett however, it did "… illustrate that it is imperative for the grounds on which policy restrictions can be applied to be established in law".[17]

Provision was made in section 9(4) for any person upon application to the Minister to be given access to archives *"to which members of the public have no access*", i.e. those in the closed period. While in practice this function was delegated to the Director of Archives, the legislative provision located the power with political authority and moreover provided no statutory basis upon which such decisions could be made, so that arbitrary decision-making was possible. Given the delegation of the function, in practice it is unlikely that there was overt political interference in the process, though the writer's personal observation showed that the lack of guidelines for public archivists to identify what was considered to be "sensitive" was problematic. And between 1980 and 1990, access was granted to 6 750 items and refused in the case of only 159 items.[18] This situation regarding guidelines was rectified in 1991, when the State Archives Service adopted a document specifying categories of information that are internationally accepted as requiring prolonged confidentiality. This still fell short of a publicly debated set of criteria, and was of course subject to interpretation.

The Act also regulated access to public records still in the custody of offices of origin, but made this the prerogative of the senior officials. *"[T]he head of such an office may, in his discretion and on such conditions as he may determine, but subject to the directions of this Act and any other law, authorize any person to have access to such archives*" (section 9(6)). This provision again made access subject to potentially arbitrary decisions.

In the case of records of the South African Defence Force, which are kept in the custody of the Force's own archives depot, the Act made access subject to the approval of the Minister of National Education acting in consultation with the Minister of Defence (section 9(7)). Granting of access was therefore entirely the prerogative of political office-bearers. It is standard international practice for longer term confidentiality of military records to be observed,[19] but in South Africa's case, no cut-off date was specified. As a prerequisite to considering access, a user was required to undergo a security clearance process.

The present position: The provisions of the National Archives of South Africa Act (No. 43 of 1996) and the Promotion of Access to Information Act (No. 2 of 2000) regarding access to archives and public records, and the implications thereof for public archives services

The provisions of the National Archives Act (NAA) (which came into operation on 1 January 1997) regarding access to archives were conceptualised in the light of the shortcomings in the previous legislation, and with a view to meshing with the provisions of envisaged "open democracy" or "freedom of information" legislation, which was required in terms of constitutional provisions. The provisions of NAA regarding access to archives were thus framed to be subject to any other Act of Parliament dealing with access to public records (section 12(1)).

The Act provides unrestricted access to archives in the custody of archives repositories after 20 years, calculated from the end of the year in which a particular document was created. As the open period is extended annually, the closed period

should never be longer than 21 years (section 12(1)(a)). The power to grant access to public records in the closed period upon request was given to the National Archivist, rather than the Minister (section 12(2)(b)). The only grounds for refusing access, and which are accorded to the National Archivist, are related to the fragile condition of a record, and there is a right of appeal to the National Archives Commission (section 12(3)). The Act constituted a significant advance in liberalising access and shifting the location of power, but anticipated broader enabling legislation to extend rights of access, and define concomitant grounds for withholding access to public records.

The provisions of the Promotion of Access to Information Act (No. 2 of 2000) (PAIA) (which came into operation in March 2001) take precedence over NAA regarding access to all public records, both in the closed and open periods and whether or not they are in archival custody. But the provisions also mesh with those of NAA to enable the continued operation of the latter. The relevant sections are 3, 5, 6, 20 and 86, the contents and implications of which are discussed below. The Act applies to a record of a public body (and a private body) regardless of when it came into existence (section 3), i.e. irrespective of age or custody. It takes precedence over any Act prohibiting or restricting the disclosure of a record, or which is inconsistent with an object or provision of PAIA (section 5). In section 6, provision is made for other legislation in terms of which access to records may be given to be included in Schedules to the Act, and nothing in the Act then prevents such legislative provisions to remain in force. In the transitional provisions in section 86(2), provision is made for any other legislation not referred to in the Schedules which provides access to records and which *"...is not materially more onerous than the manner in which access may be obtained in terms of … this Act…*", for a period of 12 months until a Bill is introduced in Parliament proposing the amendment of the Schedules to the Act (section 86(1)). And section 20 provides for the transfer of requests for access in considerable detail. In essence, the crucial provisions relating to public archives services in this section are that if a request for access is made to the information officer and "*the record's subject matter is more closely connected with the functions of another public body"* (section 20(1)(b)); or "*the record was created by or for another public body: or was not so created by or for any public body, but was received first by another public body"* (section 20(2)(c)), the information officer must within 14 days transfer the request to the information officer of the other public body. The section also provides for similar transfer in cases in which the record requested is not in the possession or under the control of the body which received the request (section 20(1)(a)); and in cases in which the commercial information the record contains as defined in section 42, is of greater commercial interest to another body (section 20(1)(c)).

The implications of the foregoing provisions for public archives services which operate in terms of either NAA or provincial archives acts modeled on it, are as follows. Steps need to be taken to ensure that such legislation is included in the relevant Schedule to PAIA, to enable access to archives to continue being given in terms of archival legislation. In the interim, until March 2002, section 86(2) of PAIA permits such provisions to remain in force, as they are certainly less onerous to users than having to resort to requests in terms of PAIA. Indeed, the scheduling of archival legislation is required precisely to ensure that archival access procedures remain as streamlined as possible for both users and archives services. Scheduling will enable public records in the custody of public archives services older than 20

years to continue being made freely available according to existing procedures. Access to records in archival custody that are younger than 20 years must be dealt with in terms of PAIA, and in terms of section 20, access requests must be transferred to the governmental body functionally responsible for them. Exceptions regarding records younger than 20 years, are those that are freely accessible in terms of other legislation, like records of deceased estates. Furthermore, there are many cases in which the office of origin no longer exists and has no obvious successor body. Requests for access to records of such bodies would have to be managed by the information officer of the archives service, following all the procedures of PAIA and the Regulations issued in terms of it, and using the criteria in Chapter 4 of Part 2 of PAIA *(Grounds for Refusal of Access to Records*). In the case of non-public records (formerly termed "accessions") in archival custody, they will continue being made available in terms of archival legislation, but where restrictions placed on access are still in force, requests would need to be dealt with in terms of Chapter 4 of Part 2. (The implications will be discussed in greater detail below.) Thus, while the burden of managing PAIA requests will largely be transferred, public archives services will still potentially have a demanding task in dealing with requests. This will be both in terms of devising and utilising mechanisms to manage the transfer process and secure responses (a potentially problematic task), and of the actual consideration of requests that cannot be transferred. The foregoing is an interpretation based on an understanding of what is implicit in PAIA, and therefore needs to be confirmed by an official legal opinion.

The management of requests for access to non-public records which have restricted access determined on acquisition and embodied in, for example, wills or letters of donation and acceptance, provides an interesting example of one of many areas of uncertainty in the application of PAIA. It could be assumed that the relevant information officer would have the discretion to "override" such restrictions if they are not consistent with the grounds for refusal contained in Chapter 4 of Part 2 of PAIA. An example might be a request for access to the private and semi-official papers of former Prime Minister J B M Hertzog (whose incumbency ended in 1939, and who died in 1943), the granting of access to which, even recently, has posed difficulties. In dealing with requests, the National Archivist felt it necessary to consult with a widow of Hertzog's son in compliance with conditions such as that the information may not be used "to divide the Afrikaner people". The question arises whether, if the information officer grants access in terms of PAIA in conflict with a stipulated condition or restriction, a contractual undertaking might not be violated. Presumably an official legal opinion on the matter would be a necessary step for the National Archives, in terms of which future decisions could reliably be considered. It is nevertheless possible that a decision that is in conflict with a condition could be challenged in the courts. This, together with other points made in the paper, points to a much more complex legal framework that public archives services now have to administer in respect of access.

The exclusion of certain public bodies from the operation of PAIA places a question mark over the administration of access to their records in archival custody. Section 12 of PAIA provides that the Act does not apply to a record of the Cabinet and its committees; various judicial functions, including courts; and an individual member of Parliament or of a provincial legislature in that capacity. The National Archives has custody of the former category of record, and all public archives services have extensive holdings of records of courts. It might be assumed that this

exclusion should not affect the interpretation given above that archives older than 20 years in archival custody may continue to be made available in terms of NAA, and as mentioned above, access to records of courts is generally not restricted. But as PAIA as a whole takes precedence over other legislation, this interpretation would also need to be confirmed by way of an official legal opinion.

Another complexity affecting access to archival records, but one that might afford both greater transparency to the public and administrative convenience, is that PAIA provides in section 15 for the voluntary disclosure and automatic availability of certain records. The intention is to enhance freedom of access to information. Information officers of public bodies must at least annually submit to the Minister responsible for PAIA (Justice) a description of categories of records that are automatically available without the necessity of a PAIA request. The Minister must publish such information at least annually in the *Government Gazette* at the expense of the relevant body. This implies that public bodies are encouraged to make categories of records automatically accessible on a voluntary basis. The provision opens up the option that public archives services could utilise it in respect of records younger than 20 years, especially as section 15(4) provides for the deletion of any part of a record contemplated by this section that may or must be refused in terms of Chapter 4 of Part 2 of PAIA. This would at once facilitate and streamline public access to records in archival custody that are in high demand, and potentially ease the administrative burden. Such an option would potentially apply to records of any public body, but would be particularly relevant to cases in which there is no successor body. Examples are the Multi-Party Negotiating Process and the Truth and Reconciliation Commission. In the latter case, there would clearly have to be exclusions in terms of Chapter 4 of Part 2 of PAIA, which would have administrative implications the extent of which cannot yet be determined, but overall, the option should lessen the administrative burden. Once again, the foregoing is an interpretation that would need to be confirmed by means of an official legal opinion.

While PAIA seeks to facilitate transparency and accountability, it necessarily has a concomitant imperative to protect legitimate needs for confidentiality and secrecy. It does so principally by means of defining *Grounds for Refusal of Access to Records* in Chapter 4 of Part 2, both of a mandatory and discretionary nature. It is an irony, given the intentions of PAIA, that these provisions will inevitably in many cases make access to public records more restrictive than was the case under the previous regime. Given the discretionary nature of many grounds for refusal, power is again located within the ambit of senior public officialdom and its interpretative abilities. A potentially controversial provision in this Chapter, and one that seems to run counter to the overall purpose of PAIA, is that access to information on the operations of governmental bodies may be refused (section 44). In the words of Richard Calland, chairperson of the Open Democracy Advice Centre, “individuals will have to be vigilant to ensure that we don’t end up with Swiss cheese, where the exemptions create so many holes in the law that it undermines it completely”.[20] On the other hand, provision is made for mandatory disclosure in the public interest if it would reveal evidence of a substantial contravention of the law or imminent and serious public safety or environmental risk (section 46). The advance for a democratic society is that despite the limitations, the grounds for refusal are defined in law, giving the public rights of contestation. Part 4 of PAIA provides both for internal appeals against decisions of information officers, and applications to court. Extensive reporting mechanisms are provided by PAIA in section 84, in terms of

which the Human Rights Commission must include detailed statistics in its annual report to the National Assembly in respect of each public body regarding requests granted and refused, as well as appeals, complaints and applications to courts and the Public Protector. This process will also promote public accountability and transparency. A further significant factor weighting power in favour of the citizen-requester is that as far as a public record is concerned, the purpose for which it is requested may not be taken into account when the decision to grant or refuse access is made (section 11(3)).

From an archival perspective, the protection of personal privacy as grounds for refusal of access constitutes a special point of interest. No such provision is contained in the national archival legislation of either 1962 or 1996. While PAIA provides for such protection in section 34, the interpretation in this article regarding the continued applicability of access provisions for public records older than 20 years in terms of NAA, as well as non-public records without access restrictions, means that there is currently no protection of personal privacy where such records are concerned. Government does intend to pass specific legislation in this regard, but its terms are as yet unknown. The imposition of a 100-year closed period regarding birth registers transferred to the National Archives was, as far as could be established, an administrative decision rather than one based on a statute. In various other known instances in which records are legally open for public use, public archivists are uneasy about unresolved access dilemmas relating to personal privacy. These include non-public records containing psychological profiles and case histories of individuals, and police records containing reports of informers on gatherings of named individuals suspected of engaging in homosexual activity. In concluding her study on the ethics of disclosing personal information in public archives, Heather MacNeil writes: "… archivists can best assure an appropriate balance between the individual's right to privacy on the one hand, and society's need for knowledge on the other, by conducting themselves professionally in accordance with principles that satisfy the moral requirement of respect for persons. Respect for the humanity and dignity of all persons, and the self-containing sense of responsibility arising from it, are the forces that will guide archivists through the ethical dilemmas that present themselves when the competing values of individual autonomy and freedom of inquiry confront each other."[21] Though this is a valid observation, archivists would arguably be supported in their task if the principles concerned could as far as possible be defined in legislation. A suggested interim solution, with qualifications, is given in the next paragraph but one.

A related issue is the direct protection of the well-being of an affected individual himself or herself. The provisions of section 30 of PAIA regarding health or other records do provide detailed steps for protection in such cases. If the information officer is of the opinion that disclosure of a record provided by a health practitioner in his or her capacity as such to the relevant person might cause serious harm to his or her physical or mental health, or well-being, he may consult with a health practitioner who has been nominated by the relevant person. And if the health practitioner is of the opinion that disclosure may cause serious harm, *"the information officer may only give access to the record if the requester proves to the satisfaction of the information officer that adequate provision is made for such counselling or arrangements as are reasonably practicable before, during or after the disclosure of the record to limit, alleviate or avoid such harm to the relevant person."* (section 30(3)(b)). The person responsible for the counselling must also be given

prior access to the record (section 30(3)(b)). The immediate implications for public archives services are that they will need to carry out an audit to identify records that need to be treated in this manner. But it also connects with the issue of personal privacy, as there is the question of public access to such records that are older than 20 years. A proposal for archival management of the issue is contained in the following paragraph.

Further dilemmas for public archivists emanate from other grounds for refusal of access that might still be valid even in the case of records older than 20 years in archival custody. Aside from military records, those relating to international relations are typically sensitive for longer periods. A suggested possibility for managing such cases as well as the interests of personal privacy, including health records, would be for public archives services in conjunction with offices of origin where appropriate, to define extended closure periods according to the needs of each particular case in terms of Chapter 4 of Part 2 of PAIA itself. This would need to be well documented and be reflected in the archival finding-aids for both archivists and users to observe. Such a practice would coincide with that followed in countries which do not have a specific closed period for public records, such as Canada and the USA. It will obviously make archival administration more complex in some ways, but would address legitimate needs for protection of information. Section 6 of PAIA tends however to mitigate against such a reading, as it provides that nothing in PAIA prevents the giving of access to a record in terms of any legislation referred to in its Schedules. Then again, in the case of personal privacy, PAIA provides in section 34(2)(c) that access to a record "*may not be refused … insofar as it consists of information already publicly available*". This too suggests that protection of personal privacy in archival public records older than 20 years, such as the arrangement regarding birth registers, is currently technically illegal. Thus an official legal opinion is necessary to provide guidance on addressing these needs and the acceptability of the proposal made in this paragraph.

A major implication of PAIA for public archives services, as for other public bodies, which is contained in section 14, is the need to produce a manual on the functions of, and index of records held by it. This requirement is obviously necessary to give effect to the purpose of PAIA, yet given the diverse nature of archival holdings, it possibly places a particular obligation on archives services to devise an appropriate means of compliance. Public bodies have been given a year to implement this requirement, but it nevertheless is a priority concern for archives services to address. The manual must contain inter alia, a description of the structures and functions of the body; *"sufficient detail to facilitate a request for access to a record of the body, a description of the subjects on which the body holds records and the categories of records held on each subject*" (section 14(1)(d)); the latest notice regarding the categories of records of the body which are available without a person having to request access in terms of PAIA; as well as details on the services rendered by the body. Over and above the difficulties posed by the diverse nature of archival holdings then, the requirement is extremely exacting. As far as archival records are concerned, it may be possible simply to cross-reference the existing well-developed manual and automated archival finding-aids, which was the route taken by the National Archives of Canada in compliance with a similar requirement.[22] But the institution's own records would need to be accounted for in the manual, and all the other prescribed information would need to be included.

A further implication of PAIA requirements relates to the records management function of public archives services. A direct requirement relates to the retention of records that are adjudged as not having archival value. Public archives services in South Africa have not in the past prescribed retention periods for such records, but have merely required governmental bodies to determine their own retention periods for their non-archival records, taking various requirements into account; to record them in systems and schedules so as to promote a systematic records disposal programme; and to inform the archives service of the periods concerned to facilitate its monitoring role. In certain cases, the National Archives collaborated with relevant authorities such as the Auditor-General, to ensure that published disposal authorities contained prescribed retention periods in respect of non-archival records. PAIA in section 21 requires that in cases in which a record is requested, the information officer must take steps that are reasonably necessary to preserve the record, without deleting any information contained in it, not only until a decision is taken regarding access, but also to allow for an internal appeal or legal proceedings. Further, section 90 makes it an offence if any person with intent to deny a right of access, conceals, destroys, damages or alters a record. It might be argued that existing records management practices as prescribed by the National Archives are adequate to address these requirements, and that the burden of proper planning and appropriate judgment rests with the office of origin. However, taking the changing nature of records creation processes in the electronic era into account, as well the fact that the public archives services are "… reaching only the tip of the record-keeping iceberg in public bodies across the country" and "… only a sliver of the state's electronic records resources is under any form of archival control"[23], it seems that a thorough, legally-informed review of existing practices may be needed, and ideally, a legislative framework for governing records retention.

PAIA as a whole has certainly renewed the importance of the records management function of public archives services. Without sound record-keeping, and the application of records management principles in the electronic environment, the ability of public bodies to comply with PAIA will be severely compromised. Merely to publish the manual contemplated in section 14 implies the need for record-keeping systems to be well-structured. For public bodies to deal with requests efficiently, further implies that the systems need to be applied properly. From the quotations in the previous paragraph, there is every reason to believe that current record-keeping structures and practices in public bodies are far from adequate to meet the noble ideals enshrined in PAIA. Arguably, a means of stronger enforcement of NAA is required. Making this possible would require a relocation of the National Archives (and possibly of provincial archives services) within the structures of government, and an enormous increase in resources.

Some administrative implications of PAIA for public archives services

There are a range of administrative implications for public archives services flowing from PAIA, which must be addressed to enable them to comply with PAIA and requests received in terms thereof. While the archives services are located within Departments, the heads of which will automatically be the information officers, in terms of section 17, deputy information officers need to be appointed. Given the nature of the archives services, it would arguably be necessary for them to have

such an appointment on their own establishments. Section 13 provides for a body determined to be part of another body to be declared as a separate body. Given their functions, this option may be appropriate for public archives services.

In terms of section 34(2)(b), public archives services will themselves have to alert providers of information recorded in their own records, such as registers of users, that the information belongs to a class of information that would or might be made available to the public. Regarding fees charged by public archives services for standard services, such as the provision of copies, a reading of the Regulations issued in terms of PAIA together with section 86(2) tends to suggest that once NAA and provincial archives acts have been included in the Schedule, the fees prescribed in terms of PAIA Regulations will apply. Until then, access (and the provision of copies) may continue to be given on the basis provided by NAA. If this reading is correct, it will necessitate a revision of tariff structures and result in a significant increase. For example, the fee for an A4 photocopy supplied in terms of a PAIA request is R1,10 (regulation 3(a)), as opposed to the current Treasury-approved R0,20 charged by the National Archives. Conceivably, measures should be taken to prevent an unreasonable tariff increase which might negatively impact on users of public records that are consulted in reading rooms of archives repositories.

A practical issue to be faced is PAIA's requirement that when access to only part of record may be granted, that part only should be disclosed (section 28). This entails the notion of severability, the practicalities of which need to be worked out. Presumably in the case of paper-based records, it will be feasible to supply copies, which could be used to delete, erase or physically sever parts. In the case of electronic records, a new record might need to be created, from which sections that cannot be made available are deleted.

Finally, the fact that some archival records of national public bodies are in the custody of provincial archives services has implications for the implementation of PAIA by archives services. This is a broader issue relating to provincialisation of the archival function, and management mechanisms will need to be devised in that context. However, in the process special attention needs to be paid to assign responsibility for managing PAIA requests.

Conclusion

According to Derrida, "archontic" power is conferred on those who create, keep and interpret memory such as official records and archives, while democratization results from participation in and access to the archive, its constitution and its interpretation. Compared with previous statutory provisions, to what extent have NAA and PAIA shifted the location of power in favour of the citizen? My analysis has shown that there has been a substantial but only partial shift of power to the citizen. In the archival environment within the framework of NAA, authority has shifted away from political office-bearers, the possibility of closure of archives that are already open for public use in terms of NAA has been removed and the closed period has been significantly reduced. NAA also meshes with the much broader provisions of PAIA, which take precedence over NAA and all other legislation to provide for the first time in South Africa a comprehensive statute giving citizens substantial rights of access to information held by public bodies, irrespective of how recent it may be. The analysis has however also detailed a range

of exceptions and exclusions, such as certain public bodies which are not subject to PAIA, and many mandatory and discretionary grounds for refusing access. Much will also depend on the implementation of the legislation, and the ability of information officers to reach appropriate decisions. The analysis has also articulated concerns that inadequate record-keeping systems and procedures in the public sector and the under-resourcing of the records management function of public archives services could impair the ability of public bodies to comply with PAIA requirements. On the other hand, PAIA does contain elaborate appeal and monitoring mechanisms, which support its democratising purpose. The analysis has also highlighted a range of uncertainties requiring clarification for public archives services. Until these are resolved, the lack of clarity could work against effective implementation by public archives services and jeopardize the intended democratic objectives of PAIA.

Endnotes

1. Verne Harris and Christopher Merrett, “Towards a Culture of Transparency: Public Rights of Access to Official Records in South Africa”, *American Archivist* 57 (Fall 1994), p. 684.
2. Based partly on Lene Johannessen, Jonathan Klaaren and Justine White, “ A Motivation for Legislation on Access to Information”, *The South African Law Journal* 112, 1 (February 1995).
3. T R Schellenberg, *Modern Archives: Principles and Techniques* (Chicago, 1956), p. 9.
4. Johannessen et al, op cit., p. 47.
5. Schellenberg, op cit., p. 226.
6. Jacques Derrida, *Archive Fever: A Freudian Impression* (Chicago and London, 1996).
7. Ibid., pp. 2-3.
8. Ibid., p. 3.
9. Ibid., p. 4.
10. Ibid., p. 12.
11. Michel Foucault: *The Archaeology of Knowledge* (London, 1972), p. 129.
12. Harris and Merrett, op cit., p. 681.
13. These are offices that, as part of their functions, have a specific information recording or registering function and need to maintain authentic records on a long-term basis to fulfil those functions, e.g. Registrar of Deeds and Registrar of Births, Marriages and Deaths.
14. Schellenberg, op cit., p. 226.
15. Op cit., p. 688.
16. Unconfirmed oral intimation of State Archives Service staff member of that time, the late Mr J D Bodel.
17. Op cit., p. 688.
18. Ibid.
19. Schellenberg, op cit., p. 227.
20. Quoted in feature article on the Promotion of Access to Information Act Published in *The Pretoria News*, 23 March 2001.
21. Heather MacNeil, *Without Consent: The Ethics of Disclosing Personal Information in Public Archives* (Metuchen and London, 1992), p. 201.

22. Oral information given by Dr Terry Cook, November 1994.
23. Michele Pickover and Verne Harris, “Concerns raised over Access to Information Act”, *Mail and Guardian*, 11 May 2001.