

FREEDOM OF INFORMATION: PROBLEMS, PROSPECTS AND LESSONS: THE SOUTH AFRICAN EXPERIENCE

Sello Hatang
South African History Archives
Email: sahas@library.wits.ac.za

Abstract

The growing sense that governments are becoming more secretive in response to the threat of terrorism means that citizens as requesters of information call upon records professionals to assist in making governments more open to the need for information. Information professionals can use the African Peer Review Mechanism (APRM) to demonstrate the need for greater transparency to support freedom of information core principles of good governance, participative democracy, and individual self-determination (protection of privacy, access to personal information), and to ensure that information is seen as a socio-economic resource which has positive spin-off for economic development. The South African History Archive (SAHA) has undertaken fieldwork from which lessons can be learned of the difficulties and challenges of balancing an access to information regime with proper implementation strategies. This article aims to look at the South African access to information regime and the challenges that have prevented effective access to information in South Africa as experienced by SAHA. It argues for greater participation by records professionals in striving for greater transparency.

Keywords: Access to Information, Freedom of Information Legislation, South Africa, South African History Archive

Introduction

The African Peer Review Mechanism (APRM), in so far as it addresses issues of access to information, offers an opportunity for records professionals to engage meaningfully with the politics of record keeping, archiving and access. The South African experience demonstrates that we still have a lot to learn so as not make the same mistakes with future access legislation. In the last ten years, about fifty countries have passed Freedom of Information (FOI) laws. However, of these fifty countries, only three have been from Africa and of these three, some of the legislation is still in a draft phase and will remain so unless definite steps are taken. The time has come for records professionals to actively advocate for their countries to pass FOI laws in order to ensure access to records and accountability. It is also important to fight for recognition as to the importance of proper record keeping in good governance.

The South African History Archive

The South African History Archive (SAHA) is an independent archive dedicated to documenting and supporting the struggles for justice in South Africa. In South

African parlance it is a Non-governmental Organisation (NGO). It is a registered trust, governed by a Board of Trustees, which appoints dedicated professionals to achieve its mission. Although at its inception in the late 1980s it was closely connected to the United Democratic Front, the Congress of South African Trade Unions and the African National Congress, it has always been politically non-aligned and committed to collecting material from organisations and individuals across the political spectrum. Its founding mission was to strive to recapture our lost and neglected 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 the making of democracy. With its physical positioning at the University of the Witwatersrand, there is a special endeavour to weave the collections into processes of education for democracy.

SAHA's Freedom of Information Programme

In 2001 SAHA launched its Freedom of Information Programme, dedicated to using the Promotion of Access to Information Act (PAIA) in order to extend the boundaries of freedom of information and to build up an archive of materials released under the Act for public use.

South Africa's Constitution guarantees South Africans the right of access to information, and PAIA gives legislative expression to this right. PAIA came into operation in March 2001 and defines the parameters to the right in relation to information held both by public and private bodies.

Effective and meaningful implementation is hampered by three factors. Firstly, South Africans have been shaped by generations of an absence of the right to information. They have neither the expectations nor the skills to ensure that PAIA is utilised optimally. Secondly, access to records is dependent on the appropriate creation and subsequent management of records. In South Africa, in both public and private sectors, records environments are characterised by a Wild West approach with few if any rules that apply. And thirdly, the state is not adequately resourced to ensure effective implementation. This applies to the governmental bodies, which generate public records, the Human Rights Commission, which monitors implementation, and the courts, which are responsible for interpreting PAIA and dealing with citizens' appeals against denials of access.

What South Africa desperately needs in this new era of freedom of information are organisations committed to promoting public awareness of the opportunities provided by PAIA, supporting human rights requests for information, testing the parameters of access restrictions imposed by information-holding bodies, and building up an archive of material released to the public in terms of PAIA. Given its history and present positioning, SAHA is ideally placed to pursue these multiple objectives. In the last three years, SAHA has made over five hundred requests on behalf of South Africans and other people in the continent, while all released material has been archived.

Overview of PAIA use by SAHA

Use of PAIA by the public in its first three years of operation has been extremely limited, although an increase can be noted in 2005. Statistics are not yet available, but it is clear that the majority of South Africans are not using the legislation. Furthermore, the media have given very little coverage of PAIA and the fact that only a few section 14 and section 51 manuals have been published means that the public does not have ready access to information about available resources. In this context, statistics published by SAHA on its use of the Act give an accurate picture.

Lessons learned through problems encountered by SAHA

- It has been encouraging to see the professionalism and level of co-operation demonstrated by a number of state agencies in implementing the Act. Worthy of particular mention is the South African National Defence Force (SANDF), which has appointed deputy information officers, secured training for staff, created an effective mechanism for dealing with requests, and displayed diligence and courtesy in all its dealings with SAHA. A third of all SAHA requests have been directed to the SANDF. Key issues highlighted by SAHA's experience with the SANDF are that in at least one case, the SANDF created a record in order to satisfy a SAHA request. This goes well beyond PAIA requirements. In several other cases the SANDF released records having 'masked' certain pieces of restricted information, which ordinarily would have placed the whole record outside of SAHA's reach. This has important implications for interpretation of PAIA's provision for the separation of restricted from unrestricted material.
- A definite problem encountered by SAHA is the lack of access infrastructure in most government departments. Ensuring that proper records management systems are put in place and appointing relevant officials to deal with requests is crucial in establishing an information regime. Of what value is the right of access to records, when proper records have not been created in the first place? A good example of this is SAHA's continued efforts to accumulate evidence of Apartheid era Security Police records used by the TRC, which are inaccessible at present due to poor record keeping.
- In SAHA's experience it is crucial that archivists and records managers advocate for recognition of FOI so that when decisions on access are taken they are consulted. A lack of advocacy by archivists has been very clear and in most cases responsibility is only taken at a functional rather than active level.
- The lack of implementation capacity in government is clearly a serious problem. By and large, existing officials have simply been given additional responsibilities under the Act. Few have experience and expertise in record keeping. Training by the Justice College and other institutions is

- only touching the tip of the iceberg. The Human Rights Commission, with its manifold duties and responsibilities in terms of the Act, is just beginning to develop its capacity.
- It is interesting to consider that South Africa has a history of secrecy where the opposing sides in the struggle – the apartheid government and the liberation movements – were forced to keep their activities underground to ensure their respective survival. The case of access to the TRC archive is the residue of this culture where access is restricted due to uncertainty about what might be revealed.
 - In light of the above it is also important that old anti-access legislation be repealed before FOI legislation is put in place. An example of the South African case is the 1982 Protection of Information Act, which works against the operations of PAIA.
 - SAHA, together with partner organisations, has advocated for the appointment of an Information Commissioner who can ensure effective implementation of the Act. In South Africa, departments have been slow to process requests, which impedes the flow of access. An Information Commissioner would provide the means for expediting requests from departments. Access under PAIA can be an extremely expensive business, particularly when access is refused and the court stands as the only means of challenging a refusal. The creation of a commissioner would offer an alternative and cost-effective dispute resolution mechanism.
 - SAHA's expert knowledge of government record keeping has facilitated the request process. But what of those without such knowledge? Here the issue of the manual, which each body that is subject to PAIA must publish, is of crucial importance. Up to now very few manuals have been published. There is a lack of guidance in the Act and the Regulations as to the minimum content requirements for the manual. It is essential that each manual provides a comprehensive and meaningful disclosure of record keeping systems.

Conclusion

Despite all the problems outlined above the prospects offered by an access to information regime far outweigh the difficulties encountered. There is clearly a need for records professionals to engage with their governments in order to make sure that proper-record keeping is seen as part of good governance. Past experience of the Act should be taken into account by countries that are still in the process of passing FOI legislation so that the problems encountered might be resolved or avoided in the future.

References

Harris, V. 2002. Using the Promotion of Access to Information Act. Available <http://www.wits.ac.za/saha/publications/>. Accessed 14/05/2005.

Harris, V & Hatang, S. 2002. Reviewing South Africa's Access Act after one year. Available <http://www.wits.ac.za/saha/publications/>. Accessed 14/05/2005.

South Africa. 1996. The Constitution of the Republic of South Africa, 1996. Act No. 108 of 1996. Republic of South Africa Government Gazette, Volume 378, No.17677.

South Africa. 2000. Promotion of Access to Information Act, 2000. Act No.2 of 2000. Republic of South Africa Government Gazette, Volume 416, No. 20852.

South African History Archive (SAHA). 2001-2004. *Annual reports*. Available www.wits.ac.za/library/saha. Accessed 10.05/2005.