Affirmation to realisation of the right of access to information: Some issues on the implementation of PAIA

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'Information sharing is important because the people who are to benefit the most from the implementation of the Operational Plan [for Comprehensive HIV/AIDS Care, Management and Treatment for South Africa] are poor people who need treatment in the public sector. They must have accurate information at their disposal so that they can make important decisions about accessing treatment'.[1]

1 INTRODUCTION

South Africa is one of 57 countries in the world that have laws that establish mechanisms to access government-held information and is the first country in Africa to enact freedom of information laws.[2] How the right of access to information forms the foundation for a democratic dispensation and an accountable government and civil society has been described by many authors.[3] For example, the right of access to information is often depicted as the 'oxygen of democracy' or the 'oxygen of knowledge' and underpins and supports other fundamental human rights and freedoms.[4] South Africa's repressive and, in some instances, tyrannical apartheid regime went to great lengths to keep sinister activities under wraps, and denied both black and white South Africans the right of access to information and

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1 Updated first report on the implementation of the operational plan for the comprehensive HIV/AIDS care, management and treatment for South Africa, July 2004.

2 Open Society Justice Initiative (OSJI) 2004.

3 McKinley (2003), OSJI (2004), Ruth (2000), Dimba (2002).

4 Drawing on provisions in Article 19 of the Universal Declaration of Human Rights, Andrew Puddephatt (2002 xi-xii) set out five reasons why access to information is a fundamental human right:
   (i) Without access to information, it is not possible to have informed political debate.
   (ii) Secretive societies have a 'political culture of rumour and conspiracy' that makes it extremely hard to have public debate.
   (iii) Secrecy is joined at the hip with corruption.
   (iv) Freedom and openness of information is essential to societal development.
   (v) Access to information is a key element in holding governments accountable.

its concomitant right to privacy. South Africa's new democratic dispensation saw the forging of a potentially powerful and far-ranging 'Open Democracy Bill' out of which the Promotion of Access to Information Act (PAIA) was born.[5] Richard Calland described this process to the right of access to information in the following way:

> Typically for undemocratic governments, South Africans were deprived of the oxygen of knowledge. Information has a fundamentally empowering quality; although clearly it cannot be a sufficient condition for democracy, it is certainly I would argue, a necessary one. Democratic government, by definition, creates a permissive environment in which citizens may breathe; and in which there is space for debate, for disagreement, for protest. Information, and the growth of knowledge it serves, lubricates these freedoms and offers substance to the democratic discourse.[6]

This 'lubricating' quality of the right of access to information is illustrated in a different way by Saras Jagwanth's conception of this right as supporting and facilitating all the other rights in the Bill of Rights. She argues that the right of access to information is a 'component part' of the other fundamental rights, that it can be used to give effect to and safeguard the other rights, as well as assist with the enforcement of them.[7]

While access to information has an important role to play in the smooth functioning and implementation of other human rights, the right in and of itself, gives power and freedom to people who can utilise it. In its assessment of the state of freedom of information in the Southern Africa region, the international NGO, Article 19 wrote the following:

> The widespread acceptance of the need for freedom of information legislation is recognition of the fact that in a democracy, access to official information is vital to ensure that the people retain ultimate control over the functions of government. Freedom of information allows citizens to scrutinise their officials, to participate in decision making and to exercise their rights and responsibilities in an effective and informed manner. Fundamentally, official information belongs to the public. It is a national resource which should be used solely for public purposes.[8]

On this view, official information should automatically be viewed as a possession of the citizenry, and the right of access to information may, thus, have more to do with what Jonathan Klaaren described in a somewhat different context, as 'access to a mechanism for access to information'.[9] In South Africa, the heart and soul of the right of access to information is found in section 32 of the South African Constitution[10] while the legal and

5 For a description of the history of the PAIA, see Currie and Klaaren (2002) 1–11.
6 Calland (2001).
7 Jagwanth (2002) 13.
8 Ruth (2000) 6.
9 Klaaren (2002) 20.
10 Section 32 of the Constitution of the Republic of South Africa Act 108 of 1996 reads as follows:
(1) 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.
(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

practical mechanisms to give shape to the right are found in Promotion of Access to Information Act. Indeed PAIA sets out its own objectives in the following way (section 9):

(a) to give effect to the constitutional right of access to—
  (i) any information held by the State; and
  (ii) any information that is held by another person and that is required for the exercise or protection of any rights;
(b) to give effect to that right—
  (i) subject to justifiable limitations, including, but not limited to, limitations aimed at the reasonable protection of privacy, commercial confidentiality and effective, efficient and good governance; and
  (ii) in a manner which balances that right with any other rights, including the rights in the Bill of Rights in Chapter 2 of the Constitution;
(c) to give effect to the constitutional obligations of the State of promoting a human rights culture and social justice, by including public bodies in the definition of 'requester', allowing them, amongst others, to access information from private bodies upon compliance with the four requirements in this Act, including an additional obligation for certain public bodies in certain instances to act in the public interest;
(d) to establish voluntary and mandatory mechanisms or procedures to give effect to that right in a manner which enables persons to obtain access to records of public and private bodies as swiftly, inexpensively and effortlessly as reasonably possible; and
(e) generally, to promote transparency, accountability and effective governance of all public and private bodies by, including, but not limited to, empowering and educating everyone—
  (i) to understand their rights in terms of this Act in order to exercise their rights in relation to public and private bodies;
  (ii) to understand the functions and operation of public bodies; and
  (iii) to effectively scrutinise, and participate in, decision-making by public bodies that affects their rights.

While these objectives are detailed and laudable, three years into the operation of PAIA, there have been problems with its utilisation and its implementation. A recent study conducted by the Open Society Justice Initiative (OSJI) on the implementation of freedom of information laws in five transitional democracies[11] found that South Africa had 'some serious problems with implementation which need to be addressed if the right of access to information is to be enjoyed in South Africa, and if the South African law is to set standards for the African continent'.[12] This view is supported by the experiences of other South African NGOs and studies conducted by them.[13] At present, there seems to be a sharp divide between the values, purpose and content of the right of access to information, and the way these are given effect through PAIA.

11 The countries that were studied were Armenia, Bulgaria, Macedonia, Peru and South Africa.

12 OSJI (2004) 127.

13 See McKinley (2003) and Tilley & Mayer (2002) 72–80 for the experiences of Open Democracy Advice Centre; Allen (2002) 80–85 for the experiences of the Public Service Accountability Monitor (PSAM); and the South African History Archives (SAHA) Annual Reports 2001–2003 for SAHA's experiences.

It is the argument of this article that while PAIA is a forward-looking, robust and detailed law, a number of shortfalls or shortcomings have come to the fore since the Act came into effect in 2001. This article will present a case study that brings into relief some of the problems with the utilisation of PAIA's promises, the implications of non-implementation of PAIA on other socio-economic rights, while it will also focus on concerns about timing mechanisms within the Act. The article will conclude with a number of recommendations based on provisions in other laws as proposed remedies to the problems highlighted, as well as support recommendations made by the South African History Archive, the Open Democracy Advice Centre (ODAC) and the Freedom of Expression Institute (FXI).

2 CASE STUDY: THE TREATMENT ACTION CAMPAIGN, PAIA AND ANNEX A

The Treatment Action Campaign (TAC) was formed in December 1998 to campaign for greater access to comprehensive treatment for people living with HIV/AIDS (PWAs).[14]

Since its inception, the TAC has engaged the South African government and multi-national pharmaceutical companies on making anti-retroviral therapy (ARVs) affordable, accessible as well as available in the public sector. The TAC has employed a number of legal and extra-legal strategies in its campaign for access to comprehensive health care, which include demonstrations, petitions, public meetings, use of the media, litigation and appeals and applications to independent monitoring bodies and tribunals.[15] One of its key campaigns has been to advocate for a governmental nation-wide plan for the provision of ARVs to PWAs. On 19 November 2003, after a protracted and distressing battle, during which time numerous PWAs unnecessarily died without access to treatment, the government published its national ARV plan entitled the 'Operational Plan for Comprehensive HIV and AIDS Care, Management and Treatment for South Africa'.[16]

It was a logical step for the TAC to shift its efforts and energies from exerting pressure on government to produce a national policy on ARVs, to the implementation of the Operational Plan. All of the TAC's activities have been informed, and are driven by, the urgency of an estimated 600 daily deaths of South Africans with HIV/AIDS who cannot access treatment. This reality, together with the principle that the time frame within which a policy should be implemented forms an essential part of monitoring that

14 See Treatment Action Campaign's constitution.

15 For some examples of strategies employed see Beresford (2003) and Heywood (2001) for a discussion of TAC's intervention in the Pharmaceutical Manufacturers' Association case brought against the South African government on the constitutionality of an amendment to South Africa's Medicines and Related Substances Control Act; and Heywood (2003) for a description of the Constitutional Court case on the provision of Nevirapine to pregnant women with HIV/AIDS.

16 Department of Health 2003.

policy, made it vital for the TAC to acquire the time frames of the Operational Plan as quickly as possible in order to effectively monitor the progress of the ARV roll-out.[17] The need for the time lines is articulated in a TAC Press Release in the following way:

> It is important that ordinary citizens are able to help government with the implementation of the Operational Plan and that they can hold government accountable. But this can only be done properly if we know the dates when clinics and hospitals will begin treatment, the number of people that each clinic or hospital will be able to treat and how many additional health-care workers each clinic or hospital will hire to help implement the programme.[18]

Indeed the 'Updated first Report on the Implementation of the Operational Plan for the Comprehensive HIV/AIDS Care, Management and Treatment for South Africa' showed that by March 2004, less than 10 000 people were receiving ARVs[19] – five times less than the target set by the Operational Plan of the 53 000 people.[20] If the Department published detailed time lines, it would help civil society (and the Department) to monitor the extent of the roll-out, and identify shortfalls, problems and possible solutions timeously. It would also show government's political and symbolic commitment to making a public sector ARV programme a reality – an aspect that has been sorely lacking in South Africa's recent history.[21] Indeed the duty of the government to produce timelines for a policy that gives effect to the content of section 27 of the Constitution was articulated in the 2002 case of *TAC and others v the Minister of Health and others*.[22] In this case, Botha J found that 'a country-wide [mother-to-child transmission of HIV] prevention programme is an ineluctable obligation of the State'[23] and highlighted the importance of timelines to such a programme, in the following way:

> The plan of the tenth respondent[24] has all the elements of a co-ordinated and programmatic plan. It is driven by a time scale . . . The programme of the respondents[25] lacks the impetus that is required for a programme that must move progressively. If there is no time scale, there must be some other built-in

17 The intimate connection between information sharing and implementation is clearly demonstrated by TAC's subsequent experiences with the ARV roll-out. Since the commencement of the public sector provision of ARVs, TAC has worked closely with provinces to assist with and monitor the roll-out. In a *Mail & Guardian* article, the following is noted: 'TAC spokesperson Nathan Geffen said the rollout was best in provinces such as the Western Cape and Gauteng where officials were willing to share information and work together with civil society' (Maclennan (2004)).

18 TAC 2004.

19 Hassan (2004) 5.

20 Department of Health (2003) 248.

21 See Choritz (2004) and MacFarlane (2004a and 2004b) for an account of the South African government's deplorable delay in adequately dealing with, and its mismanagement of, the AIDS epidemic.

22 (2002) 4 BCLR 356 (T).

23 at 386A.

24 The MEC of the Western Cape. The court found that 'in contradistinction [to the other respondents] the tenth respondent has a coordinated plan that already reaches 50% of pregnant women in the Western Cape and will have reached 90% in the next phase of the roll out'.

25 The Minister of Health and the MECs of the other eight provinces in South Africa.

impetus to maintain the momentum of progression. It must be goal driven. As stated in Grootboom case supra at p 71 there is a balance between goal and means. Sometimes the goal will enforce the creation of the means. Sometimes the attainment of the goal will be delayed for lack of means. What I find unacceptable in the respondent's approach is the formulation that once the lessons have been learnt from the test and research sites, the roll out will follow as the means allow. That does no justice to the exigency of the case . . . To the extent that the impression was created in the affidavits filed on behalf of some of the respondents that the further roll out of the programme will depend on the availability of resources, it must be dispelled. The resources will have to be found progressively. The availability or resources can only have an influence on the pace of the extension of the programme. But there must be a plan for a further roll out. Only if there is a coherent plan will it be possible to obtain the further resources that are required for a nationwide programme, whether in the form of a reorganisation of priorities or by means of further budgetary allocations'.[26]

In its executive summary, the Operational Plan noted that its Annex A.1 contained a 'week-by-week schedule for the pre-implementation period' and Annex A.2 contained the 'detailed implementation plan,'[27] but no such documents were attached to the Operational Plan when it was published on the Department of Health website on 19 November. The TAC formally requested copies of the Annexes by writing to the Minister of Health on 20 February 2004. After receiving no substantive response, TAC submitted a formal request in terms of PAIA on 3 March. No response was received, which meant a deemed refusal[28] took place on 3 April, and TAC lodged an internal appeal on 21 April.[29] By 21 May – the deadline for a response to the internal appeal – no correspondence was received from the Department[30] and the TAC filed court papers on 18 June.[31]

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26 385G–386C.

27 Department of Health (2004) 51 pars 135–136.

28 S 27 of PAIA gives the following description of a deemed refusal: 'If an information officer fails to give the decision on a request for access to the requester concerned within the period contemplated in section 25(1), the information officer is, for the purposes of this Act, regarded as having refused the request'.

29 The founding affidavit noted that TAC wrote to the Minister of Health on 1 April referring to their letter of 20 February and advising her of the formal request in terms of PAIA on 3 March (par 46). On 7 April, TAC also wrote to Chair of the Social Cluster of the ANC requesting her to intervene in the matter (par 49). No substantive responses were received to either of the two letters and TAC decided to lodge an internal appeal (par 50).

30 In the founding affidavit it is stated that the deputy information officer phoned the TAC attorney on 30 April, acknowledged receipt of the original request and confirmed that she had the annexes in her possession. The deputy information officer allegedly noted that the annexes were 'parliamentary communications' and that she would contact the Government Communication and Information Service before reverting back to TAC 'with a view of making the annexes available to [TAC]'. The TAC attorney tried to follow up with the deputy information officer, but she was not available and did not return her calls (pars 51–52 of founding affidavit by Zackie Achmat). The answering affidavit states that the deputy information officer admits to the gist of the telephone conversation, but '[s]he denies that she said the annexes were "parliamentary communications". She accepts that her belief was mistaken' (par 43.2 of answering affidavit by Karmani Chetty).

31 *Treatment Action Campaign v Minister of Health*, Case no 15991/04, 14/12/2004, unreported.

The Department of Health filed their answering affidavit on 22 September.[32] Dr Karmani Chetty, acting Director-General of the Department and thus in terms of PAIA also the Information Officer, submitted the answering affidavit. The answering affidavit described the process of drafting the Operational Plan and noted that the Task Team appointed for it, consisted of ten working groups responsible for different aspects of the Operational plan.[33] It noted that the Clinton Foundation worked on proposed timelines, but that due to a lack of time, there had been no consultation with the Foundation and their proposals were never accepted by the task team nor presented to MinMec[34] or to Cabinet.[35] The respondent noted that '[d]ue to an oversight all references in the [Operational] plan and the executive summary to the time line annexes were not removed.'[36] Chetty noted that TAC was not in any event entitled to the timelines and that she, as Information Officer, 'would have had, and do still refuse the request in s. 44(1) of the Act.'[37] She states that it seemed that the deputy information officer did not reply to the request due to work pressures[38] and that the Department had no obligation to reply to the request as the obligation clearly lay on their deputy information officer.[39] It was noted that the deputy information officer had difficulty recalling receipt of the internal appeal[40] and also that she resigned on 1 June 2004.

2.1 Court order

After considering the fact that the timelines were never part of the Comprehensive Plan, the TAC withdrew its action for them[41] and sought an order for costs when the Minister failed to make a tender for them. The case was set down for 4 November 2004 in the Pretoria High Court.

During argument, the Department in essence contended that

(a) the application for costs lacked merit;

(b) that the TAC ought to have tendered costs for the Minister as it effectively failed in its application;

32 After the TAC filed the case, the Department had 15 court days to file a notice of intention to oppose. The Department asked for an extension and only filed on 13 July. Similarly, the Department had until 3 August to file its answering affidavit, but it asked for an extension and only filed its answering affidavit on 22 September. In its answering affidavit the Department noted that the delay was caused by the Department and State Attorney relocating their offices and that the deputy information officer and other key employees were not longer employed by the Department and that it was therefore difficult to consult with them in order to complete the answering affidavit (par 7 of the answering affidavit).

33 Par 14.

34 A governmental body that consists of the Minister of Health and the different provincial executives responsible for health (called MECs).

35 Par 15.

36 Par 17.

37 Pars 28.2 and 29.4.

38 Par 28.3.

39 Par 39.2.

40 Par 42.4.

41 Par 4 of the replying affidavit of Zackie Achmat.

(c) that the application was unnecessary and the requests for the time lines were frivolous and vexatious;

(d) the application did not require the information for any meaningful purposes;

(e) that it would be unfair to suggest that the respondent's conduct was the fundamental cause of litigation.[42]

The judgement was delivered on 14 December 2004. Ranchod AJ found that the Minister of Health did not comply with the constitutional obligations set out for public administration in section 195(1)(a), (f) and (g) of the Constitution, which read as follows:

> **195 Basic values and principles governing public administration**
>
> (1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:
>
> (a) a high standard of professional ethics must be promoted and maintained;
>
> . . .
>
> (f) public administration must be accountable;
>
> (g) transparency must be fostered by providing the public with timely, accessible and accurate information;

Ranchod AJ further found that 'the failure of the respondent and her department to respond to the applicant's request in terms of [PAIA] and to the applicant's subsequent appeal under [PAIA] was in breach of their obligations under [PAIA]'.[43] Thus, at the heart of the case was the Department's failure to inform the TAC of the oversight of the references to the Annexes in the Operational Plan, and were TAC timeously informed, the application would not have been lodged.[44] The Minister was consequently ordered to pay TAC's costs on a scale as between attorney and client.

2.2 Impact on the TAC

Upon receiving the answering affidavit on 22 September, ten months after the publication of the Operational Plan and almost seven months after the TAC's official request for Annex A in terms of PAIA, the TAC learnt for the first time that the record it was seeking was not officially sanctioned as part of the Operational Plan, and that the Department was not willing, in any event, to make the draft versions of Annex A available to the TAC. Even if TAC were to access the draft Annex A, from an advocacy and monitoring point-of-view these would be of much less value than officially sanctioned timelines. A substantial period of time had passed in which TAC could have embarked on advocacy and litigation campaigns to compel the Department to commit to timelines for its ARV roll-out.

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42 *Treatment Action Campaign v Minister of Health* Case no 15991/04, 14/12/2004, unreported, 6–7. Available: www.tac.org.za/Documents/judgement.doc.

43 *Ibid* 12.

44 *Ibid* 9.

This case study provides some commentary on the Department's stance towards TAC (and to some extent wider civil society's participation in the roll-out of ARVs), as well as the neglectful manner in which the Department views the assignment of timelines to the Operational Plan. Specifically for the purposes of this article, the case study serves as illustration of the absence of information systems and adequate information management by the Department, how its laxity impacted detrimentally on the requestor and its constituency, and the general failure of PAIA mechanisms to deal with urgent requests. In the following sections the article will analyse the case study in terms of the implementation of PAIA, and its timing mechanisms.

3 POOR COMPLIANCE AND IMPLEMENTATION

Justine White argued that '[i]n many ways, open democracy legislation is only as effective as its enforcement provisions . . .'[45] In her article White lamented the lack of mechanisms that would oversee the implementation of Open Democracy legislation after Cabinet's changes to the Open Democracy Bill (out of which PAIA was born). The sad consequences of the absence of persuasive enforcement mechanisms are demonstrated by the research study conducted by the OSJI. The OSJI study noted that its results for requests answered in South Africa were 'disappointing' and that there were serious problems with implementation of PAIA.[46] It found that less than one in four requests in terms of PAIA were answered,[47] and that nearly 62% of the requests submitted had the result of deemed refusals.[48] It issued the following warning: 'if each request must be litigated, the Act as a whole will fall into disuse by those it was primarily aimed at. It will only be used by those who already have access to power and information. Thus it is critical that these implementation issues are dealt with'.[49] FXI also cautions against the trend that only an elite group will be able to utilise the Act.[50]

The most significant factor in the proper implementation of the right of access to information is the positive and co-operative attitudes of information officers, deputy information officers and others involved in the process of making information available – not only after a formal request has been launched in terms of PAIA, but more generally in making documents and other information about private and public institutions available to the general public. Tilley and Mayer wrote that '[u]nlike most

45 White (1998) 74.
46 OSJI (2004) 15.
47 OSJI (2004) 127.
48 OSJI (2004) 131.
49 OSJI (2004) 137.
50 '[T]he Act risks becoming an elite instrument, with usage being restricted to middle class individuals and a handful of Non-Governmental Organisations (NGOs). Much more work needs to be done to ensure the social appropriation of this right [of access to information]' in (FXI 'Access to Information' undated).

legislation, even if the provisions of [PAIA] are perfect, its implementation relies largely on the attitude of the officials who implement it'.[51] In their interviews with officials responsible for requests or implementing the Act, the OSJI found that despite the fact that officials supported the general principles and the concept of PAIA, they had strong reservations about the motives of people requesting information:

- Although they would like to give people information, they have seen how easy it is to distort that information;
- The abuse of the Act by politicians does not promote the good image of government to be responsive to issues because the politicians distort the information;
- The rights of access to information can sometimes put government on the defensive;
- Disclosure of information can be used adversely against government;
- They feel that the Act does not protect government from requestors who have what they may regard as "ulterior motives" when requesting the information;
- PAIA is now seen as part of a new front in the political battleground.[52]

Calland attributed this suspicious attitude of officials to the 'South Africa bureaucracy lack[ing] the confidence to see that openness is a friend and not a foe'.[53] The OSJI study noted how PAIA is 'not a sufficient priority to holders of information' and that government does not necessarily view it as relevant 'to the task of transforming a largely unequal society'.[54] The combination of officials who are mistrustful of requests for information and do not regard them as particularly important, together with government's lack of commitment towards PAIA do not bode well for the proper and speedy implementation of PAIA's provisions. These intrinsic problems were clearly illustrated by the case study. If one were to take in good faith the Department's defence in its answering affidavit and accept that the delay in notifying TAC that the annexes were not part of the Operational Plan was solely due to the deputy information officer's work pressures and negligence, then the case study demonstrates how the lack of interest and duty as shown towards PAIA and absence of proper management within the Department prevent the proper functioning of PAIA and the public's access to information. On the other hand, if one is to take the view that the Department was wilfully obstructive in handling the TAC's request as the disclosure of the information 'could be used adversely against government', then it is clear that PAIA lacks the mechanisms and sanction to effectively deal with what SAHA aptly defines as 'state obduracy'.[55] In either event, PAIA failed to assist the TAC.

51 Tilley and Mayer (2002) 78.
52 OSJI (2004) 135–136.
53 Calland (2002) xviii.
54 OSJI (2004) 136.
55 SAHA Annual Report (2002) 18.

In its current form, PAIA does not provide expressly for penalties against negligent or obstreperous officials or institutions[56] – these are left to the courts or possibly to the Public Protector. Many authors have pointed out that the courts are not an effective system for a speedy, inexpensive and user-friendly way to realise one's right of access to information. Section 83 of PAIA gives the South African Human Rights Commission (SAHRC) a number of duties, but does not provide any mechanisms to the SAHRC to enforce compliance with the Act. ODAC views the SAHRC's role as that of champion of PAIA – to promote and advocate for PAIA but not that of enforcer.[57] Section 91 of PAIA amended the Public Protector Act so that the Public Protector could investigate issues of maladministration in issues regarding PAIA.[58] Neither SAHA nor ODAC is particularly enthused about the Public Protector's role in the implementation of PAIA and its ability to provide sanction. SAHA noted the high case load of the Public Protector, that there was little co-ordination between the SAHRC and the Public Protector[59] and that it has no power to make binding orders.[60]

ODAC pointed out that one of PAIA's greatest weaknesses 'is the absence of an enforcement remedy' that is 'accessible, affordable, specialist and speedy'.[61] ODAC is a proponent for the creation of an independent Information Commissioner that has express order powers, while the SAHRC could complement it by continuing its role as champion, trainer and disseminator of information.[62] They view this independent body as providing the opportunity to disappointed requestors to resolve their issues at an 'intermediary mid-point',[63] which will be more accessible, affordable and quicker than the courts. ODAC noted that in order for such a body to function properly and provide a service of a high quality, it would need to develop special expertise and specialisation in access to information law, sufficient political and institutional weight and independence, that it should have strict time limits in which it should execute its duties, have far-reaching powers such as 'the power to see the document in question, to subpoena where necessary and to sanction non-compliance', and sufficient resources.[64]

56 It should be noted that the Department of Justice and Constitutional Development has put forward proposed amendments to PAIA and its complementing Regulations that provide for penalties to contraveners of provisions of the Act that relate to the compilation of the manual - See ss 24 and 25 of Judicial Matters Second Amendment Act of 2003 and GN 38 of 2004.

57 ODAC (2003).

58 SAHA makes the following interesting point: 'Though neither the draft Open Democracy Bill nor PAIA is particularly clear about this, it seems that the intention was for the Public Protector to investigate maladministration in the sense of a failure by a body to comply either on a systematic or individual level with the duties imposed by the Act' (SAHA July (2003) 8).

59 SAHA (2003b) 11 12.

60 SAHA November (2003a) 8.

61 ODAC (2003) 5.

62 ODAC (2003) 5.

63 ODAC (2003) 7.

64 ODAC (2003) 16 17.

This is in keeping with the provisions of the 'Model Freedom of Information Law' that the organisation Article 19 has drafted in order to provide guidance and a blueprint to countries that are drafting their own information laws. Article 19's Model Law provides for an Information Officer that has operational and administrative autonomy,[65] decides cases in instances where a public or private body has failed to comply with obligations set out by access to information legislation,[66] has the power to impose penalties,[67] has powers of investigation[68] and may request to see any record.[69] The Model Law also makes it a criminal offence amongst other things to obstruct access to records.[70] It is the argument of this article that the establishment of an Information Officer that exhibits the characteristics and powers set out above, and one that is well-resourced and offered enough institutional support,[71] would greatly enhance the influence and strength of the provisions in PAIA as well as assist the general public in utilising their rights of access to information under this Act.

4 TIMING MECHANISMS

In their submission on the Open Democracy Bill, FXI made the following point about requests and urgency: '[A] request for access to information carries with it an element of urgency, irrespective of whether the request was an urgent or ordinary request in the first place. Disclosure of information can hardly be effective if an appeal against a non-disclosure succeeds only several months after the initial request'.[72] The right of access to information should thus be closely linked to issues of time in order to properly realise the content of this right.

PAIA makes no distinction between 'non-urgent' and 'urgent' requests and thus has no expediting mechanism. The case study clearly illustrates the need for provisions that will allow, under well-defined criteria, for

65 Mendel (2001).
66 Mendel (2001) 41.
67 Mendel (2001) 42.
68 Mendel (2001) 44(1).
69 Mendel (2001) 44(2).
70 Section 49 of the Model Law reads as follows:
(1) It is a criminal offence to willfully –
(a) obstruct access to any record contrary to Part II of this Act;
(b) obstruct the performance by a public body of a duty under Part III of this Act;
(c) interfere with the work of the Commissioner; or
(d) destroy records without lawful authority.
(2) Anyone who commits such an offence under sub-section (1) shall be liable on summary conviction to a fine not exceeding [insert appropriate amount] and/or imprisonment for a period not exceeding two years.
71 White criticised the lack of adequate financial support of the SAHRC after the Cabinet made changes to the Open Democracy Bill and wrote the following in support of investment in independent monitoring Open Democracy bodies: 'Passing an Act, which by its very nature requires strong institutional support and backing, without giving it any such institutional support, is tantamount to disowning its aspirations and casting it loose to fend for itself' (White (1998) 75).
72 FXI 'Specific comments on the Open Democracy Bill' undated.

certain requests to be expedited.[73] Section 9(1) of the Article 19 Model Law provides that a public or private body has to respond to a request 'as soon as is reasonably possible' and definitely within 20 working days. It also provides for an expediting mechanism in terms of section 9(2) – 'Where a request for information relates to information which reasonably appears to be necessary to safeguard the life or liberty of a person, a response must be provided within 48 hours'. The TAC request could certainly be argued as urgent on the grounds of life and liberty or freedom and would necessitate an urgent response. The OSJI found in a survey of 44 freedom to information laws, that the average time-frame for providing information was 17 days, while some countries allowed for extensions if the request was difficult.[74] South Africa's time-frames are far longer than this average – South African information officers have 30 days to decide whether they will grant the request[75] and can extend it for another 30 days under special circumstances.[76] If an internal appeal is lodged, another 30 days can be added onto the original request time before a requestor can apply to a court for relief.[77] It is note-worthy that the OSJI study found that of the five countries, Peru with the shortest time frames answered more requests than the others, and that South African had the longest time frames and also the highest rates of deemed refusals.[78] It is thus foreseeable that shorter time-frames provide impetus to officials to deal with requests on a quicker and more thorough basis. OSJI argues that shorter time frames 'prioritise the right of access to information over other duties and tasks which public officials have to carry out'.[79]

5 RECOMMENDATIONS

A number of the authors and civil society organisations mentioned above have proposed suggestions on how access to information legislation, and PAIA in particular, could be strengthened and its ambit increased. This article would like to support the following recommendations in particular:

1 An independent Information Commissioner is appointed to oversee the implementation of PAIA and to deal with appeals. Such a Commissioner would replace the role of the Public Protector and possibly the courts. She or he would have to be independent and have the power to assign penalties for non-compliance and maladministration of the Act.

2 If an Information Commissioner is appointed, the SAHRC should continue its role as champion of PAIA and should focus specifically on the training of officials and especially the heads of public and private

73 The attorney acting for TAC noted, in her experience of PAIA with the Annex A request, that she found PAIA to be 'a hindrance and is time wasting – it may even be unconstitutional on the ground that it does not expressly permit for urgent requests' e-mail correspondence with Fatima Hassan, attorney at the AIDS Law Project, 18 October 2004.

74 OSJI (2004) 3.

75 S 25(1) of PAIA.

76 S 26 (1) of PAIA.

77 See ss 77 and 78 of PAIA.

78 OSJI (2004) 16.

79 OSJI (2004) 17.

bodies.[80] Proper training can be an important strategy in changing the attitudes of officials towards requests for the better.

3 Amendments should be made to PAIA to provide for an expediting mechanism, while the time-frames for responses should be shortened to the global average of 17 days, or less.

4 Amendments must be made to PAIA to compel officials to acknowledge receipt of requests and internal appeals.[81]

6 CONCLUSION

This article has highlighted a number of problems with PAIA through a discussion of the TAC case study and by drawing on other organisations' experiences and research. While noting the poor implementation of PAIA and the lack of an expediting mechanism, it made a number of recommendations to remedy these and other difficulties encountered by requestors.

The case study is an example of how the denial of the right of access to information has a direct and detrimental effect on other socio-economic rights, such as the right to life and the right of access to health care, and ultimately to social justice. It is vital that PAIA is enhanced, properly implemented and enforced so that it can do justice to the right of access to information enshrined in the Constitution, and also to all its sibling rights and freedoms in Chapter 2 of the Constitution.

BIBLIOGRAPHY

Allen C 'Our experiences of using the Promotion of Access to Information Act' in Calland R and Tilley A eds *The right to know, the right to live – Access to information and socio-economic justice* (2002) Open Democracy Advice Centre, Cape Town

Beresford B *The price of life – Hazel Tau and other v GloxoSmithKline and Boehringer Ingelheim* (2003) 'A report on the excessive pricing complaint to the South Africa's Competition Commission' by the AIDS Law Project and Treatment Action Campaign, July 2003

Calland R 'The right to know is the right to live' Calland R and Tilley A eds *The right to know, the right to live – Access to information and socio-economic justice* (2002) Open Democracy Advice Centre, Cape Town

Calland R 'Access to information: Modern SA and globalisation' plenary address at the *Seminar on Freedom of Information in Central & Eastern Europe* (2001) Budapest, 3–5 October 2001 Available: http://www.opendemocracy.org.za/documents/Richard's%20Paper%20in%20Bucharest.htm Accessed: 19 October 2004

80 The OSJI noted the lack of training of officials in PAIA: 'Indeed, in the interviews, a number of bodies in South African expressed concern that they had not received sufficient guidance in implementing the law, and even where internal systems had been set up, training was still needed by public officials who in some cases did not fully understand or misunderstood certain provisions of the law' (OSJI (2004) 16).

81 FXI 'Specific comments on the Open Democracy Bill' undated.

Choritz S 'Nothing ado about much: The government's response to the HIV/AIDS epidemic in South Africa' *Leadership in HIV/AIDS* vol 1 Issue 2, December 2004

Currie I and Klaaren J *The Promotion of Access to Information Act Commentary* (2002) SiberInk, Cape Town

Dimba MS 'Access to information legislation in Africa' Paper prepared for *Access to information Seminar*, Hua Hin, Thailand, 3 March 2002 Available: http://www.opendemocracy.org.za/documents/Paper%20for%20Bangkok3.htm

Department of Health *Operational plan for comprehensive HIV and AIDS care, management and treatment for SA* 19 November 2003 Available: http://www.info.gov.za/issues/hiv/careplan19nov03.htm Accessed: 19 October 2004

Freedom of Expression Institute (undated) 'Access to information' Available: www.fxi.org.za/accesstoinfo.htm Accessed: 20/09/2004

Freedom of Expression Institute (undated) 'Specific comments on the open democracy bill' Available: www.fxi.org.za/odb_sect1.htm Accessed: 20/09/2004

Hassan F *Our people are suffering, we need treatment: Updated first report on the implementation of the operational plan for the comprehensive HIV/AIDS care, management and treatment for South Africa (operational plan)* Treatment Action Campaign and AIDS Law Project July 2004, Available: www.tac.org.za/Documents/ARVRollout/ FinalFirstARVRolloutReport.pdf Accessed: 18/10/2004

Heywood M 'Preventing mother-to-child transmission in South Africa: Background, strategies and outcomes of the treatment action campaign case against the Minister of Health' (2003) 19 *SAJHR*

Heywood M 'Debunking "Conglomo-talk": A case study of the amicus curiae as an instrument for advocacy, investigation and mobilization' (2001) *Law Democracy and Development* vol 5 (2)

Jagwanth S 'The right to information as a leverage right' in Calland R and Tilley A eds *The right to know, the right to live – Access to information and socio-economic justice* Open Democracy Advice Centre, Cape Town

Klaaren J 'A right to a cellphone? The right of access to information in Calland R and Tilley A eds *The right to know, the right to live – Access to information and socio-economic justice* Open Democracy Advice Centre, Cape Town

MacFarlane 'The most devastating health crisis in history' *Fast facts* No 12/2004 December 2004 South African Institute of Race Relations

MacFarlane 'Passing by on the other side' *Fast facts* No 12/2004 December 2004, South African Institute of Race Relations

Maclennan B 'TAC takes Health Department to court, again' *M&Gonline* 13 September 2004, Available: http://www.mg.co.za/Content/l3.asp?cg=BreakingNews-National&ao=122977 Accessed: 15/09/2004

McKinley D *The state of access to information in South Africa* Paper prepared for the Centre for the Study of Violence and Reconciliation Available: http://www.apc.org/apps/img_upload/69726166726963616f637

56d656e74/CSVR_REPORT_ON_FREEDOM_OF_INFORMATION.doc Accessed: 19 October 2004

Mendel T *Model freedom of information law* Article 19, July 2001 Available: www.article19.org/docimages/1112.htm Accessed: 14/10/2004

Open Democracy Advice Centre (2003) *The promotion of access to information act commissioned research on the feasibility of an information commissioner's officer* Paper commissioned by the SAHRC, Cape Town, 14 July 2003

Open Society Justice Initiative (2004) *Access to information monitoring tool: report from a five-country pilot study* 28 September 2004 Available: http://www.justiceinitiative.org/db/resource2?res_id=102207 Accessed: 19 October 2004

Puddephatt A 'Flow of information empowers ordinary people' in Calland R and Tilley A eds *The right to know, the right to live – Access to information and socio-economic justice* Open Democracy Advice Centre, Cape Town

Ruth E 'Freedom of information in Southern Africa' *Media law and practice in Southern Africa* No.16, October 2000 Available: www.article19.org/docimages/785.htm Accessed: 27/09/2004

South African History Archives *Annual reports 2001–2003* Available: http://www.wits.ac.za/saha/reports.htm Accessed: 19 October 2004

South African History Archives *Submission to the South African law reform commission's investigation into privacy and data protection* November 2003 Available: http://www.wits.ac.za/saha/foi-privacy-and-data-protection.pdf Accessed: 19 October 2004

South African History Archives *Strengthening the Role of the South African human rights commission in relation to the Promotion of Access to Information Act* 'A report by the South African history archive', Paper commissioned by the SAHRC, Johannesburg, July 2003

Treatment action campaign constitution, undated Available: http://www.tac.org.za/Documents/Other/tacconst.rtf Accessed: 22/01/2005

Treatment action campaign press release 'Why the TAC is going to court tomorrow and holding country-wide demonstrations we need a treatment plan timetable now!' 3 November 2004 Available: www.tac.org.za/Documents/AccessToInfoCourtCase/WhyTACGoingtoCourt4Nov2004.htm Accessed: 22/01/2005

Treatment action campaign v Minister of Health Case no 15991/04, 14/12/2004, unreported Available: www.tac.org.za/Documents/judgement.doc Accessed: 22/01/2005

TAC and others v the Minister of Health and others 2002 (4) BCLR 356 (T)

Tilley A and Mayer V 'Access to information law and the challenge of effective implementation: The South African case' in Calland R and Tilley A eds *The right to know, the right to live – Access to information and socio-economic justice* Open Democracy Advice Centre, Cape Town

White J 'Open democracy: Has the window of opportunity closed?' (1998) 14 *SAJHR*