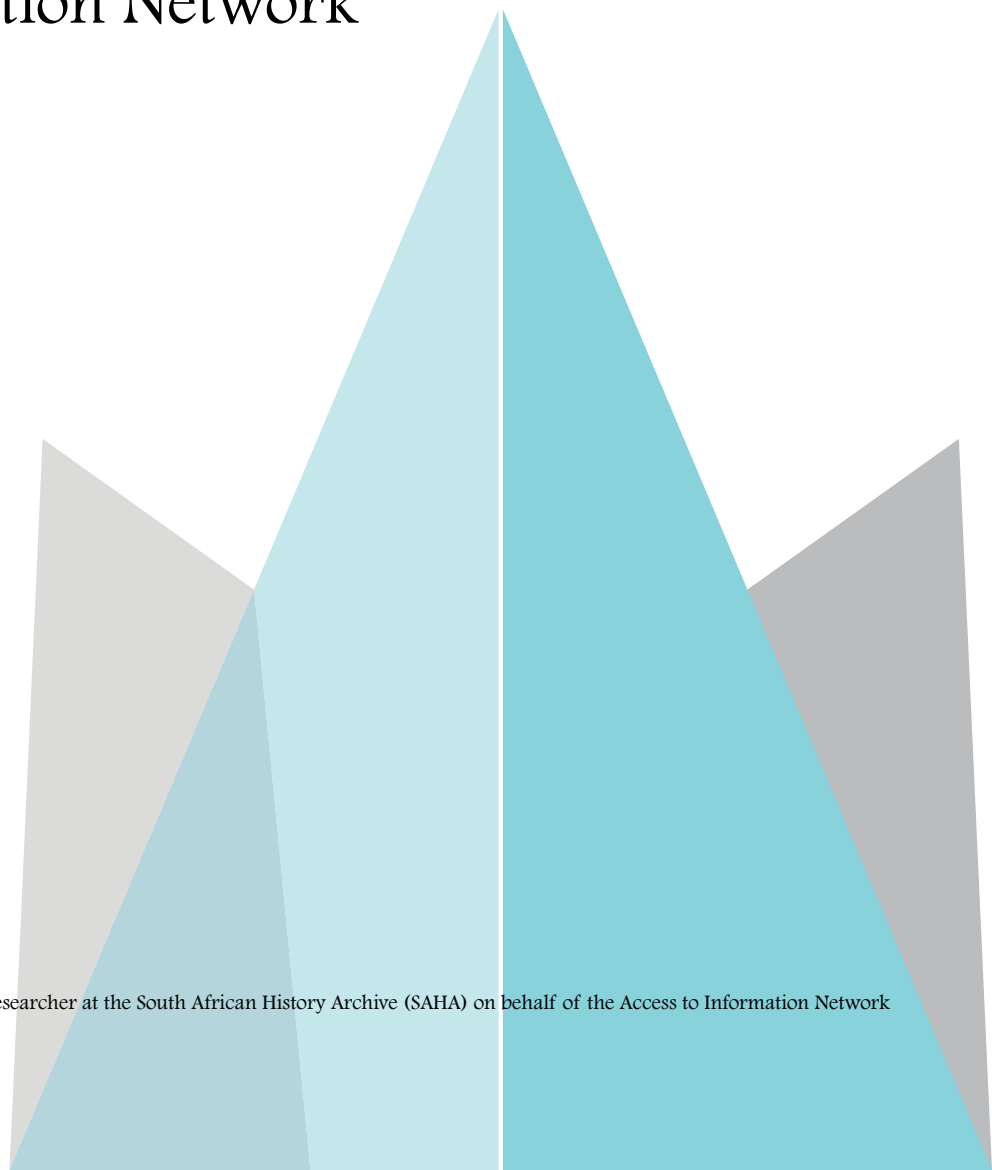
SHADOW REPORT 2017

Access to Information Network



This report has been compiled by Imraan Abdullah a researcher at the South African History Archive (SAHA) on behalf of the Access to Information Network (ATIN).

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Introduction

It has been 16 years since the Promotion of Access to Information Act, 2000 (PAIA) was enacted. The age of 16 is often associated with a coming of age. It is time to reflect on whether the coming of age of a piece of legislation that was enacted to give effect to the constitutionally enshrined right of access to information should be celebrated or castigated. The feeling on whether there should be some celebration is mixed as, while there has been some improvement with respect to some aspects of compliance with PAIA since its enactment, compliance in general remains poor to average. The Access to Information Network (ATI Network), a network of civil society organisations which cooperate to achieve the common objective of advancing the realisation of the right of access to information the public, and who have engaged passionately and consistently with PAIA over its 16 years of existence have noted with great detail poor compliance with PAIA in previous reports[2]. This report represents a similar sentiment due to the fact that, as transparency activists within civil society, members of the ATI Network still experience difficulties with respect to accessing information from public and private bodies. Yet, there have also been significant and encouraging moments during the reporting period that make members hopeful for the future of PAIA and proactive disclosure obligations within sector specific laws.

This report represents an amalgamation and narration of statistics derived from the submission of freedom of information requests submitted using PAIA (PAIA requests), by ATI Network members, during the period 1 August 2016 to 31 July 2017. Over this period, 408 PAIA requests were submitted by network members, the largest data-sample forming the basis of a Shadow Report to date. The key findings from this period were:

- The number of ignored requests and appeals is still far too high and shows apathy of requestee bodies (i.e. the holders of the information sought), in particular public bodies;
- The number of responses received outside the statutory timeframe is astronomical and needs immediate addressing; and
- Only 22 of the total 408 requests were submitted to private bodies, potentially a result of the complexity of the private body request process.

Requests to public bodies

Of the 408 PAIA requests submitted, 386 PAIA requests were submitted to public bodies. In other words 94.6 percent of the total number of requests submitted, were submitted to public bodies.

[2]Previous Shadow reports can be accessed by contacting any ATIN member, however for convenience this report will make reference to the reports found on SAHA's website at http://foip.saha.org.za/static/paia-reports-and-submissions.

Compliance with the statutory time frame

104 (27 percent) of the requests were responded to within the statutory time frame. Thirty (8 percent) of the PAIA requests submitted during the reporting period were pending at the close of the reporting period (meaning that while no decision had been received, the statutory time frame for a response had not yet run out). The remainder of the requests –252 (65 percent) - were not responded to within the statutory time frame. Sixty five percent represents the largest percentage of non-compliance with statutory time frames by public bodies reported on in recent years[3]. During this reporting period 216 requests submitted to public bodies were submitted to municipalities, the highest number yet, and of those 216 PAIA requests, only 171 requests were responded to within the statutory time frame. In other words, of the total requests not responded to within the statutory time frame (252 ((65 percent)), 171 (68 percent) were requests to local government. This suggests that the ever present need for better capacitation and training is particularly critical at local government level. The increase in non-compliance is also worrying for another reason, and that is because PAIA makes provision for public bodies to extend the statutory time frame by up to a maximum of 30 additional days, when there is a legitimate need for additional time. Yet one ATI Network member (SAHA) has experienced that many public bodies only provide a notice of extension, invalidly, after it has been communicated to them that they have failed to respond to a request within the statutory time frame. This demonstrates a laid back attitude, with the public body waiting for pressure from the requester before taking, legally invalid, steps to increase the time available to search for records and decide on access.

Outcomes of initial PAIA requests

Three hundred and fifty six out of 386 PAIA requests received responses or were deemed to have received responses (deemed refusals). One hundred and sixty nine (47.5 percent) of those requests were deemed to have been refused, meaning that no response was received to those requests at all[4] . Whilst this represents a reduction compared to the statistics reported on in the 2016 Shadow report, this figure is still extremely high. Out of the active refusals (i.e. where a decision to refuse the request was communicated), 24 of the requests (6.74 percent) were refused in full (i.e. none of the information requested could be provided). This percentage is lower than reported in 2016. The number of requests for which the decision was to grant access in full (that is, to every part of every requested record) amounted to 48 requests (13.5 percent), whereas the number of requests for which the decision was to grant access in part (that is, to only some of the requested records, or to only part of a requested record) amounted to 70 (19.65 percent)[5]. In total therefore 118 out of 386 requests (33.15 percent) were actively granted access (either in full or in part).

[3]See the Shadow Reports for 2016 (40% of requests not responded to within statutory time-frame), 2015 (30%), 2014 (37%) and 2013 (22%).
[4]Section 27 of PAIA provides that if a decision is not received on a PAIA request, within the prescribed time-frame, the body to which request was s ubmitted is deemed to have refused access to every part of every record forming part of the request.
[5]Section 28 of PAIA provides that, if access can be given to some of the information in a record, but other information in the record either may not or must not be disclosed, the information to which access cannot be given must be redacted (or severed or deleted) from the rest of the information; and access must be given to the remainder.

Unfortunately there was not a significant improvement in the number of decisions to grant access, either in full or in part, as compared to figures reported on in previous Shadow reports. This is at least in part due to the increase in transfers during this reporting period[6]. A total of 42 (11.8 percent) of the PAIA requests were transferred, either in full or in part. The remaining three (0.81 percent) of the PAIA requests were submitted to bodies that while private bodies, by definition[7], are deemed to be public bodies, in terms of section 8 of PAIA, in relation to the information requested of them. Section 8 of PAIA provides that if recorded information relates to the exercise of a public power or the performance of a public function by a private body, that body will in relation to those records be deemed to be a public body. Unfortunately all of those private bodies refused to acknowledge the applicability of section 8 to those three requests, something which clearly will need to be tested and challenged further in the future[8].

Grounds for refusal

Chapter 4 of PAIA sets out specific grounds for refusal; these grounds give detail about when access to recorded information may or must be denied. The relevant section in Chapter 4 relied on to justify the decision of a public body to refuse access to a record (whether access is denied in full or in part) must be cited in a decision letter to the requester, communicating the decision not to give access (or, not to give access in full). In terms of section 25(3) of PAIA the requester is entitled to receive not only notice of the section relied on to refuse access, but also adequate reasons for the refusal. The South African courts have determined that the duty to provide 'adequate reasons' requires more than just mere recital, verbatim, of the text in the section relied on. Instead, the public body must provide sufficient information to bring the record within the exemption claimed. In other words, the decision-maker must be specific, and must provide some details regarding the nature of the information in the requested record, and must describe the anticipated harm that would be caused by the release of the information[9]. Unfortunately many public bodies do not provide adequate reasons, nor do they cite with sufficient clarity the sections of PAIA that they are relying on to justify their refusal. Take for example responses to a PAIA request submitted by one of the ATI Network's members, the Equal Education Law Centre (EELC). The request was to a the Western Cape Department of Education and the EELC asked for copies of records containing statistics, agreements, contracts, as well as more information describing the methodologies used and processes followed by the Department as well as for copies of supporting documentation (used in the compilation of the records primarily requested) including any relevant reports. After receiving no substantive information to its request, and very few of the supporting documents, which contained scant and vague information about the WCDE's methodologies and processes used, the EELC sent follow up letters to retrieve more of the information it requested.

[6]Section 20 of PAIA provides for the transfer of a request from one public body to another, in certain circumstances (such as when the requested information is not held by the public body to which the request was first submitted, but is held by the body to which it is transferred).
[7]In terms of the definition provided for "private body" in section 1 of PAIA.
[8]SAHA submitted several requests in order to test the applicability section 8 of PAIA in relation to records emanating from a Public Private Partnership. A report is due to be published by SAHA on the outcomes of those requests shortly.
[9]President of the Republic of South African and Others v M & G Media Limited 2012 (2) SA (50) CC

By the end of this process, the Equal Education Law Centre had been provided with a so called "sanitised" records and an inadequate response to its request comprising of vague, thin explanations that failed to speak substantively to that which was requested. For example, when it requested information on the methodology used by the respective department, which warranted a detailed explanation, the Equal Education Law Centre was only provided with a single sentence response. Supporting documents referred to in the department's response, and which were referred to as being attached in the response, were, on occasion, not actually provided to the Equal Education Law Centre. Those documents that were provided were doneso in a piecemeal fashion and could not give an adequate reflection of the status of the matter that the Equal Education Law Centre required information on.

Some of the records to which access was granted in terms of the decision were also never provided to the EELC, which is an increasingly prevalent problem, and one for which PAIA itself gives no remedy. Supporting documents referred to in the department's response, and which were referred to as being attached in the response, were, on occasion, not actually provided to the EELC. Those documents that were provided were provided in a piecemeal fashion, and did not contain all of the information the EELC had requested.

In addition to the grounds for refusal set out in Chapter 4 of PAIA, section 23 of PAIA provides a mechanism for public bodies to refuse access to the records sought on the basis that either the record cannot be found or does not exist. This should be done by way of affidavit or affirmation or be accompanied by an affidavit or affirmation in order to put the requester at ease that the record cannot be found or does not exist. Unfortunately not all citations or inferences of section 23 are done correctly. This issue will be discussed further below.

We now turn to the number of times each ground for refusal was cited over the reporting period, before a deeper analysis can be done. Note however that the grounds cited here were on occasion cited interchangeably and collectively within a given decision, therefore the percentages may not neatly add up when combined (that is to say, the number of sections cited will not add up to the number of refusals, as a single refusal letter could cited multiple grounds). The percentages are worked out in relation to a sum total of all active refusals (a total of full refusals (24) as well as decisions to grant access in part (and therefore also to refuse access in part) (70) listed above).

Grounds cited at initial request stage	Number of times relied on (whether stated or implied including full refusals and partial refusals)	% of active refusals
S23	50	% 53.19
S34	4	% 4.26
S36	5	% 5.32
S37	7	% 7.45
S38	2	% 2.13
S39	0	0
S40	0	0
S41	2	% 2.13
S42	2	% 2.13
S43	2	% 2.13
S44	9	% 9.57
S45	3	% 3.19
No reason could be ascertained for the refusal	27	% 28.72

Internal appeals

A grand total of 164 internal appeals were submitted to the public bodies against both active refusals and deemed refusals. Apart from the five internal appeals that were still pending decisions, only 23 internal appeals were responded to within the statutory time frame (30 days) leaving 136 internal appeals that were not responded to within the statutory time frame. As happens at the initial stage of a request, a failure to respond to an appeal within the statutory time frame is deemed to be a dismissal of the appeal (section 77(7) of PAIA). In some instances however active decision are later provided, outside of the prescribed timeframe, that was the case with 10 out of the 136 internal appeals (6.29 percent of the total of appeals on which decisions were due) that were not responded to within statutory time frame. That leaves 126 internal appeals (79.25 percent) that remain recorded as deemed to have been dismissed by public bodies. These figures are simply embarrassing as they show wanton disregard by public bodies of requesters' constitutional right of access to information. Of the active decisions received, only seven (4.4 percent) were decision to substitute with decisions to grant full access to the requested records, and 16 (10.08 percent) were decisions to substitute with decisions to grant partial access. Two (1.25 percent) internal appeals received decisions that confirmed the original decision and two (1.25 percent) were active dismissals of the appeals (that is to say that they confirmed the decisions at the initial stage to deny access to the requested records). A further six requests (3.77 percent) were transferred at appeal stage, despite PAIA making no provision for transfer at this late stage.

Requests to private bodies

Unfortunately civil society has not been able to fully test this aspect of PAIA throughout the 16 years of engagement. One reason is perhaps that it is often difficult for civil society to meet the threshold requirement PAIA (and the Constitution) sets for the submission of requests to private bodies. The threshold requirement is a demonstration that the record requested is needed for the protection or exercise of a right. Although the definition of a right is not limited to a constitutional right but, more broadly, includes any right, it still remains a challenge for civil society. In addition civil society is more reluctant to litigate due to the fact that, while there is some protection against a costs order when the state is litigated against in furtherance of a constitutional right, the same is not true in relation to litigation against a private person or entity. The *Biowatch* judgement, offers some protection against a costs order when the state is litigated against[10]. The *Biowatch* judgement in a nutshell held that the courts should not grant a costs order against litigants who have brought to court, in good faith, matters relating to constitutional issues that are in the public interest. This means that there are currently greater risks in litigating against private bodies, as the courts have not yet had an opportunity of extending the *Biowatch* principle.

Nevertheless 22 PAIA requests were submitted by network members to private bodies, over the reporting period. This accounts for approximately five percent of the total number of PAIA requests submitted during the reporting period. Of these 22 PAIA requests, nine (40 percent of the total) were deemed to have been refused due to a failure to provide a decision within the prescribed statutory time frame. Seven requests (31.8 percent) were responded to with decisions to grant access to the records requested, either in part or in full, and six (27.3 percent) were met with active refusals. Strangely, in response to requests submitted by ATI Network member Right2Know Campaign (R2K) to the telecommunications companies Telkom, Cell C and MTN, refusals were based not on grounds for refusal in terms of PAIA, but on section 42 of the Regulation of Interception of Communications and Provision of Communication-related Information Act 2002 (RICA)[11]. This is in blatant opposition to the supremacy of PAIA provided for in section 5 of PAIA[12]. R2K will be launching litigation in this matter towards the end of 2017, the outcome of which will be reported on in the next Shadow report.

[10] Biowatch Trust v Registrar Genetic Resources and Others 2009 (6) SA 232 (CC)
[11] Section 42 of RICA encapsulates the general prohibition against the disclosure of information in terms of the Act by any person/s. This is a general feature of certain Acts and is contrary to the openness and supremacy of the Constitutional right of access to information and the central legislation (PAIA) enacted to give effect to that right.
[12] For more information about the supremacy of PAIA see the 2014 shadow report accessible online at: http://foip.saha.org.za/uploads/images/PCSN_ShadowRep2014_final_20150202.pdf pg 10 - 11.

Broad analysis of the trends in all the data

Transfers

In the 2014 Shadow report, transferring of requests was highlighted as an emerging trend whereby officials seemed to be seeking to shift the responsibility of responding to a PAIA request to another body[13]. Although that perception was at the time based on an assumption, the increase in the amount of transfers more than two years later has added a degree of realness to the initial assumption. The growing trend of transferring requests is particularly concerning because there is no appeal mechanism provided for when a public body transfers a request in error, nor a requirement that sufficient proof be provided by the transferring institution that they have in fact transferred the request. This despite the fact that civil society has repeatedly called for an amendment to the appeal provisions to extend the appeal provisions to these kinds of situations. The ATI Network believes that this increasing use of transfers might be attributable, at least in part, to the fact that it is a lot easier to transfer requests than to provide a sworn affidavit explaining the steps taken to ascertain whether the records do or do not exist, as is required by the law in those instances, (or to do the work of searching for the record in the first place). Furthermore there have been six transfers at the internal appeal stage which technically should not be possible, as PAIA does not make provision for transfers to take place at the internal appeal stage. This is problematic for the requester from the point of view of the time taken to realise their right of access to information. In particular, at this stage, a requester would have already waited for a period of time of at least 30 days to 90 days only to be told at this late stage that the request has been transferred. This could result in an additional 30 to 60 day wait for the requester, and if the transferee body's decision needs to be appealed, another 30 days. Worse still, the request could be transferred again by the transferee body to another body as one ATI Network member (SAHA) experienced in one particular request[15].

[13]Page 10 2014 Shadow report http://foip.saha.org.za/uploads/images/PCSN_ShadowRep2014_final_20150202.pdf
[14]Section 23 of PAIA.
[15]See the South African History Archives request SAH-2016-NPA-0004 which was submitted during the previous reporting period yet the transfers continued through the present reporting period (see SAH-2016-DOJ-0008 and SAH-2016-SAP-0014). The request was ultimately denied in full some seven months after it was initially submitted.

Deemed refusals

As already noted above, requests that are not responded to (at the initial request stage) within the prescribed statutory time frame are deemed, by operation of law, to have been refused (similarly at internal appeal stage, a failure to provide a timely decision is deemed to be a dismissal of the appeal). Looking back at statistics from the previous Shadow reports, it appears that the figure relating to requests that have been deemed to have been refused, at the initial request stage, by operation of the law, i.e. the statutory time frame within which a requestee body must provide a decision, has always been below 50 percent of the total requests. The trend over the years has been a steady, albeit incremental, downward trend, with deemed refusals getting fewer over the years, the only exception was the jump seen in 2016[16]. Thankfully this year has not seen the percentage of deemed refusals go beyond the 58 percent seen in last year's 2016 Shadow report. However 47.5 percent of requests to public bodies and 40 percent of requests to private bodies were deemed to have been refused at the initial stage over the current reporting period. This remains alarmingly high given that PAIA has been in effect now for 16 years. This, coupled with an astonishing 76.8 percent deemed dismissal rate by public bodies at the internal appeal stage, shows that there is large portion of both public and private bodies that display little interest in respecting the constitutional right of access to information. Furthermore it is the deemed refusal / dismissal percentage found in the ATI Network's Shadow reports for both the initial request and the internal appeal, that can truly act as an instrument in measuring the health of PAIA 16 years on. Owing to the fact that it is the one unique aspect that can only be found in the ATI Network's Shadow reports and not in any of the SAHRC reports to Parliament, which are only able to report on this aspect if the deemed refusals are appealed by the requester. Finally the disgust, with

public bodies in particular, that simply ignore PAIA requests, that was recently noted by the High Court in a costs order judgment, in favour of ATI Network member amaBhungane Centre for Investigative Journalism (amaB), warrants mentioned here. Makgoka J said that a "…delay of eight months to simply acknowledge a simple request is unpardonable. A delay of more [than] eighteen months before a decision is made, is unconscionable."[17] Thus it is of great importance that this percentage continues to decrease – but at a more significant rate than we have seen thus far – in the coming years.

[16]See the 2016 Shadow report: http://foip.saha.org.za/uploads/images/CERShadowReport2016Final%20(1).pdf
[17]Par 13 MandG Centre for Investigative Journalism NPC and Another v Minister of Defence and Military Veterans and Another found at https://cdn.mg.co.za/content/documents/2017/05/18/judgmentoncosts.pdf. This case is elaborated on further under Litigation bellow.

Section 23 of PAIA

Where records cannot be found by a public body or they do not exist, the information officer of the applicable body must, by way of an affidavit or affirmation, notify the requester that access to the particular record will not be possible. In addition, the mere statement of the fact that the record/s cannot be found is not enough, the information officer must also provide details about all the steps taken to ascertain whether the records exist or to search for them, whichever the case may be. This would include detailing any communication with other departments and officials. The primary reason for this requirement is to safeguard requesters from being lied to by information officers who may not have actually conducted a search for the records. Information officers are theoretically forced to conduct searches in good faith and the inclusion of the affidavit / affirmation requirement ensures that the requesters' constitutional right is taken seriously, as their statement under oath can be scrutinised for potential perjury, should the record turn out to exist or be found. This section can only truly be validly relied on if the decision is accompanied by an affidavit or affirmation as described here. Unfortunately this important requirement gets ignored almost as much as public bodies ignore requests (i.e. deemed refusals). Of the 53 times this section was cited or inferred by public bodies, in only 15 (28 percent) instances was an affidavit / affirmation provided at all (compliant affidavits that outline searches undertaken are even harder to come by). This shocking statistic suggests that requesters generally have no way of knowing for certain that officials, within the public body claiming that records do not exist or cannot be found, actually searched for the records before coming to that conclusion. The likening to a deemed refusal then becomes more convincing as they both are blatant disregards of the requester's rights under PAIA.

Sanitisation under the guise of redaction

Section 28 of PAIA provides in summary that when a record consists of information that can be released as well as information that cannot be released under PAIA, the information that cannot be released must be severed (or redacted) from the record, and access must be granted to the remainder of the record. But section 28 goes further, and requires that if there is such a redaction of part of a record, full, adequate, reasons must be given for every redaction, which reasons must include a reference to a section in Chapter 4 of PAIA relied on in refusing access to the redacted information.

In practice what we see is that when records are released which do contain redactions, there is usually no substantiation for the redaction beyond the mere citation of grounds for refusal in Chapter 4 of PAIA. This leads to an inevitable assumption that redaction is not being properly applied and may in fact, in some instances, be an attempt at sanitising records in order to insure what is released is in no way incriminating or even just uncomfortable for some people.

A prime example of this is what transpired when amaB submitted a PAIA request to Eskom for the Dentons Report. A report on an investigation into major issues at the power utility, including load shedding, financial challenges, the high cost of primary energy, and delays at the Medupi and Kusile power stations. The investigation was supposed to last 12 months, but after barely two months Eskom's board pulled the plug, claiming Dentons had given enough to start implementing the necessary changes.The report, which cost Eskom R20-million, was then locked in a safe. In September 2015, amaB submitted a PAIA request for a copy of the report. Eskom refused, relying in their reasons for refusal on section 37 of PAIA which states that a public body:

"must refuse a request for access to a record of the body if the disclosure of the record would constitute an action for breach of a duty of confidence owed to a third party in terms of an agreement; or (b) may refuse a request for access to a record of the body if the record consists of information that was supplied in confidence by a third party—(i) the disclosure of which could reasonably be expected to prejudice the future supply of similar information, or information from the same source".

Eskom further relied on section 44 of PAIA, arguing that disclosure of the report would frustrate the deliberative process of the public body. Then nearly two years later, Eskom did an about-turn in February 2017, saying it would release a redacted version to all PAIA applicants that had requested the report. This included another ATI Network member, SAHA. Notably the redaction was based on almost every section listed under the grounds for refusal and was not substantiated even when the lack of substantiation was challenged by SAHA on appeal. Nevertheless, sometimes sanitised versions of records do reveal damning evidence of mismanagement, corruption and incompetence, as the Eskom release did.

Released records

Throughout the years, the ATI Network has noticed a trend that sometimes decisions to grant access are never implemented, leaving members of the network in an awkward position where a decision to grant access has been given, but no records are ever received. This forces unnecessary litigation on members who already have strained resources in order to get the courts to force the release of the records. Other times members receive decisions to release in full but the records that they do receive (and pay for) do not contain the information requested. Still other times records are created with information requested, instead of access being granted to the original records requested, the result being that the information is 'sanitised' of its context. This means that without the original context, a lot of the meaning is lost. These tactics are particularly worrisome as they masquerade as compliance when in fact they are efforts to block the public's access to the information required. It speaks of an ongoing culture of secrecy instead of the transparency that the Constitution and PAIA aim to move us towards. Take for example SAHA's PAIA request for the Truth and Reconciliation Commission's records which was granted in full, but the information was only released after SAHA took the Department of Justice to court, after which a settlement was negotiated and the 7 year battle was concluded.

Technology, access to information and open data

As technology (specifically information technology) evolves, the public increasingly expect communication between government and themselves to be facilitated by programmes or software. Unfortunately, there has not been much progress by government in this regard with respect to access to information. Unlike the centralised access to information web portal that the Indian government has created in terms of their Right to Information Act, 2005, South Africa seems to be far off from anything similar The creation of software to assist public bodies could improve compliance with PAIA which as the statistics above have shown basic compliance with PAIA by public bodies is poor. This poor trend has been reported on consecutively in each of the ATI Network's previous reports. Nevertheless, ATI Network members have taken it upon themselves to close the gap between government and the public by developing technology that further facilitates the right of access to information.

Take for example the requestee page of SAHA which is an extension to the online information management system dubbed the "Request Tracker", a system designed to manage and track PAIA requests[18]. Basically the requestee page is an amalgamation of both open source data as well as data gathered throughout the years by SAHA and ATI Network members by submitting thousands of PAIA requests.[19] The requestee page contains information about every public and private body to which a PAIA request has been submitted through the Request Tracker. .It has an individual page for every public and private body which lists not only contact details for the submission of PAIA requests to that body, but also details about requests SAHA has recently made and records that SAHA has recently received from that requestee. The requestee page is a response to the decentralised approach to access to information in South Africa in terms of which every requestee is responsible for the creation of their own PAIA manuals, which in terms of sections 14 and 51, needs to include all the details necessary for the submission of a PAIA request. Unfortunately these manuals do not always exist and even when they do they are not always up to date, or accessible; the requestee page makes available the up to date contact details for information and deputy officers that the ordinary member of the public would not easily, otherwise, have been able to access online. The data on the page is invaluable as it results from hours of extensive correspondence with the requestee bodies, both public and private, by members of the ATI Network. The aim is that the centralisation of this crucial information will allow for more people to submit their PAIA requests to the correct persons as well as be aware of previous compliance levels by the relevant requestee body.

Whilst the requestee page is specifically PAIA related, the open data movements throughout the globe have inspired some ATI Network members to use the records they have gathered through PAIA and other sectoral access to information laws, for anyone to use as a means of advocacy and awareness. The objective is transparency and the sharing of information, which public bodies and private bodies alike can learn a lesson from. One ATI Network member, the Public Service Accountability Monitor (PSAM), has become a steward of the Global Initiative for Fiscal Transparency (GIFT),[20] and has undertaken to advance fiscal transparency within its areas of operation. In 2012, GIFT succeeded in having its High Level Principles on Fiscal Transparency endorsed by the United Nations General Assembly. The UN resolution encourages member states to "intensify efforts to enhance transparency, participation and accountability in fiscal policies, including through the consideration of the principles set out by GIFT". GIFT has also developed Principles of Public Participation on Fiscal Policy which are designed to promote improved access to information and public participation in the fiscal affairs of governments. During this reporting period, PSAM has been collecting data and completing a comprehensive survey questionnaire that will ultimately result in the release later this year of the 2017 Open Budget Survey of South Africa.[21] PSAM, in collaboration with Code4SA/OpenUp, will be developing and launching a Budget Portal for national treasury that will feed into their open data transparency work.

[18]http://foip.saha.org.za/request_tracker/search
[19]http://foip.saha.org.za/requestee/search
[20]http://www.fiscaltransparency.net/
[21]For further details, please consult: http://www.internationalbudget.org/opening-budgets/.

Another excellent example is the ATI Network member, Oxpeckers', #MineAlert project; a data- and geo-journalism project launched by Oxpeckers in April 2016[22]. #Minealert makes use of innovative online platforms that combine traditional investigative reporting with data analysis and geo-mapping tools to expose eco-offences and track organised criminal syndicates in Southern Africa. Oxpeckers used their platform to compliment several of their PAIA requests, which resulted in great investigative work exposing, for example, that R60-billion held for the rehabilitation of mines has never been touched, because mines technically never really close down completely[23]. Oxpeckers used the liberated data and documents on financial provisions for mines across SA – with the exception of the Western Cape who said they were working on it but ultimately were deemed to have refused the request – in a number of ways. The information has been used to campaign for changes in regulation governing the environmental management of mines including how mine closure trust funds can be used, the tax implications of transferring funds among different types of financial provisions, and clarifying environmental liability. Furthermore these regulations, have implications for everything from how mine closure trust funds can be used, to the tax implications of transferring funds among different types of financial provisions, all the way to clarifying environmental liability.

SAHA is also in the process of developing software that will allow for public access to the data it finally received from the Department of Justice, in response to its PAIA request for the Truth and Reconciliation Commission's Victims Database. Persons, sources, acts, perpetrators, witnesses and events were the core categories used in the database which provides a wealth of information that could be used to analyse, for example, patterns of abuse under apartheid. This database is likely to be made fully accessible during the course of the next reporting period.There are however downsides to open data and the most pertinent is when open data infringes on personal information, as illustrated in the PAIA requests of R2K below.

Are the Spooks watching you??

After a series of PAIA requests were submitted by R2K to MTN, Vodacom, Cell C and Telkom, records were released that show that government accesses tens of thousands of people's sensitive communications information every year using a lacuna in South Africa's surveillance laws. The released records show that, at a minimum, law enforcement agencies are spying on the communications of at least 70,000 phone numbers each year. However, according to our analysis below, the actual number could be much higher.

[22]http://mine-alert.oxpeckers.org/#/home
[23]http://bit.ly/2pT2wdc

Backround to the requests

In May 2017, R2K asked, through PAIA requests, MTN, Telkom, Vodacom and Cell C how many warrants for customers' call records and metadata they received in terms of section 205 of the Criminal Procedures Act, 1977 (CPA), in 2015, 2016 and 2017[24]. The requests were aimed at understanding how surveillance operations take place using the CPA, rather than the Regulation of Interception of Communications and Provision of Communication-Related Information Act, 2002 (RICA).

RICA is meant to be South Africa's primary surveillance law. It requires law enforcement and intelligence agencies to obtain the permission of a special judge, appointed by the President, to intercept the content of a person's communication (interception warrant). In order to apply for an interception warrant, they need to provide strong reasons to the judge for the interception. This is because interception of communication very seriously threatens the privacy rights of people and organisations. However there appears to be a *lacuna* in our surveillance laws: section 205 of the CPA allows law enforcement officials to bypass the RICA judge to get access to your phone records (to see for example who you have communicated with, when, and where). According to section 205 of the CPA, any magistrate can issue a warrant that forces telecommunication companies to hand over a customer's call records and metadata. It is dangerous to assume this information is less sensitive or private than the contents of the communication. Metadata can reveal as much, if not more, about a person's contacts, interests and habits than what they actually say over the phone or in a text message. When a person's call records and metadata are handed over under the CPA, that person is never notified, even if the investigation is dropped, or if they are found to be innocent of the crime of which they were suspected. The danger created by this lacuna is highlighted in a recent court case. In this case the former SAPS Crime In

telligence officer, Paul Scheepers, faces charges in the Western Cape for allegedly using this CPA lacuna to spy on the communications of various people who were not under legitimate investigations.[25]

[24]http://www.r2k.org.za/2017/05/30/mtn-vodacom-telkom-and-cell-c-30-days-to-provide-surveillance-stats/
[25]http://www.r2k.org.za/2017/04/20/case-studies-communications-surveil-
lance-abuse/

What the data from Vodacom, MTN, Cell C and Telkom revealed

All four companies granted R2K's information requests, either in full or in part. The released records show that law enforcement agencies obtain the call records of a minimum of 70,960 phone numbers every year. However due to the partial release (only Vodacom and Telkom said how many phone numbers were contained in the warrants it received) the actual number is estimated to be much higher. Extrapolating from the data, Daily Maverick journalist Heidi Swart pointed out the estimated total could be as high as 194,820 phone numbers each year.[26]

In 2016, MTN received 23,762 warrants for customers' call records, while Vodacom got 18,594 warrants. Cell C got 6455 warrants and Telkom got 1,271. Due to the fact that in some cases, the same warrant will be sent to several service providers, it is not possible to add these numbers together to get the total number of warrants issued across all service providers, as this would result in 'double counting' of some warrants. The most recent statistics from the RICA judge's office show that in 2014/2015, the RICA judge issued 760 warrants for interception. At a minimum, in the same year, magistrates issued 25,808 warrants in terms of section 205 of the CPA. The comparison of the figures tell a staggering story about surveillance practices in South Africa and confirms for the first time that the vast majority of 'authorised' surveillance operations are happening outside of the RICA judge's oversight, with no transparency or accountability.

Why is this information important?

Apart from showing that the vast majority of surveillance operations are happening outside of the RICA judge's oversight (whose statistics are reported to Parliament) there appears to be no alternate oversight by the Department of Justice, or any government agency, over what appears to be the signing off of hundreds of warrants by magistrates each week.Secondly, every owner of a mobile device with a registered sim card needs to assess whether they are open to the possibility that their telecommunication provider has acceded at some stage to a request to release their metadata. This data is telling someone a lot about their individual habits, and creating a significant risk that someone can use the data to further violate other rights that the person holds. Take for example the metadata of a journalist, which could reveal which officials blow the whistle on corruption, which could in turn jeopardise future incidences being brought to the public's eye – not to mention the grave risk to the physical safety of those whistle-blowers.Therefore this information is important as it sheds light on severe infringements on personal information that occurs every day without prior permission or notification, which is reminiscent of an Orwellian Dystopia.

[26]https://www.dailymaverick.co.za/article/2017-08-23-cell-phone-privacy-law-enforcement-pulls-70000-subscribers-call-records-each-year-and-thats-a-minimum-estimate/

Environmental concerns, PAIA and ATI

Historically Shadow reports have presented interesting case studies and anecdotes from ATI Network members relating to pertinent environmental concerns. Interestingly, where reference is made to environmental concerns and requests for access to information – the Department of Mineral Resources (DMR) and its poor performance tends to crop up. The DMR has performed poorly in terms of PAIA compliance generally, as well as in terms of compliance with proactive disclosure duties.[27] This year is no different, as illustrated in the second anecdotes bellow. However the DMR's failures should always be weighed against victories for proactive disclosure within the sector as these tend to be of the more encouraging signs of the health of ATI and transparency in South Africa. In addition several other anecdotes relating to the environment have been reported in previous years and this year follows suit in the first of the following two anecdotes.

King IV: Stricter requirements for environmental disclosure

Companies listed on the Johannesburg Stock Exchange (JSE) are required to comply with the King Report on Corporate Governance™ (the King Report), and its King Code of Corporate Governance. The King Report is often described as a "ground-breaking" set of guidelines for the governance structure and operation of companies in South Africa.

The findings of ATI Network member, the Centre for Environmental Rights (CER), in its 2015 report *Full Disclosure: the Truth about Corporate Environmental Compliance in South Africa*[28] showed that in many cases companies are claiming full compliance with the good governance requirements of the King Report, when in fact they are committing serious breaches of environmental laws, and failing to disclose these non-compliances to their shareholders.

The CER's *Full Disclosure* work, amongst other projects, has highlighted the inherent flaw in the way that most governance codes and sustainability initiatives work: they rely on a company's own assessment of its performance, and conduct no verification of the company's claims.[29] The CER also highlighted the fact that, in relation to environmental compliance, the requirements of these governance codes and sustainability initiatives were completely out of step with the legal regime in South Africa.

[27]See for example pg 6-11 of the 2016 Shadow report http://foip.saha.org.za/uploads/images/CERShadowReport2016Final%20(1).pdf; pg 7 and 15 of the 2015 Shadow report http://foip.saha.org.za/uploads/images/PAIA%20Civil%20Society%20Network%202015%20Shadow%20Report.pdf; pg 14 of the 2014 Shadow report http://foip.saha.org.za/uploads/images/PCSN_ShadowRep2014_final_20150202.pdf; pg 11 of the 2013 Shadow report http://foip.saha.org.za/uploads/images/PCSN_ShadowRep2013_final_20131029.pdf; pg 3 of the 2011 Shadow report http://foip.saha.org.za/uploads/images/PAIAShadowReport2011.pdf

[28]http://fulldisclosure.cer.org.za/2015/.

[29]http://fulldisclosure.cer.org.za/2015/governance-codes-sustainability-initiatives.

The CER identified the public commenting process on the draft King IV Report as an opportunity to submit evidence-based research to the King Committee on Corporate Governance, motivating for stricter and more relevant requirements for environmental disclosure. The CER critiqued the fact that King III, and the draft King IV circulated for comment, left the determination of materiality in relation to environmental disclosures in the discretion of company directors. Relying on evidence from *Full Disclosure*, the CER demonstrated that if company directors are not explicitly required to disclose information about breaches of environmental laws, they will almost never do so.[30]

The CER explained that the requirement in the draft King IV (and previous King Codes) to only disclose "material or repeated regulatory penalties, sanctions or fines for contraventions of, or non-compliance with, statutory obligations" is not sufficient to ensure that companies operating in South Africa disclose violations of environmental laws.

The South African environmental regulatory regime does not use a system of administrative penalties in terms of which a regulator can impose a large fine on a company for breaches of environmental laws. Environmental management inspectors conduct inspections of company operations in order to identify violations. These violations are then dealt with by way of compliance notices and directives, and as a last resort, using criminal prosecution, an extremely cumbersome process with relatively small maximum fines available. In South Africa, therefore, a company will hardly ever receive a large fine for breaking environmental laws, regardless of the gravity of its offences. As a result, using financial penalties as an indication of materiality in this context is entirely ineffective.

The CER accordingly recommended to the King Committee that King IV should include a requirement that companies disclose not only penalties and fines in their annual reports, but also non-compliance findings, pursuant to compliance monitoring inspections by environmental regulators. The new King IV Report was launched on 1 November 2016, and incorporates the proposal made by the CER in relation to environmental disclosures. This change represents a significant step towards improving environmental compliance reporting in South Africa, and will provide stakeholders with a much more useful body of information with which to assess and compare environmental risks.

Opening Pandora's Box: analysing the layered nature of engagements around certain information

Communities and civil society typically seek access to information not for its own sake but because that information will assist them in realising other rights. This often means that once one document is obtained, a need for additional information to make sense of that document arises. For example, accessing mining rights, social and labour plans and environmental authorisations is useful, but you really need the relevant inspection or compliance monitoring reports to understand whether companies are delivering on their commitments and complying with the law.

[30]The CER's comments can be accessed here: http://cer.org.za/news/king-iv-cer-calls-for-stricter-requirements-for-environmental-disclosure.

While licences set out the conditions under which facilities may operate, it is often impossible to know whether these conditions are being met. When the regulatory authorities inspect facilities, they produce inspection reports, which detail the findings of their inspections. It is only with reference to these inspection reports that requesters can ascertain whether or not the conditions of licences are being met.

In the experience of ATI Network members, the CER and the Centre for Applied Legal Studies (CALS), it is not always easy to gain access to compliance monitoring or inspection reports. The CER has requested this kind of information from the three national departments it deals with most frequently – the Department of Environmental Affairs (DEA), the Department of Water and Sanitation (DWS), and the DMR. The DEA and the DWS routinely grant such requests and the DWS has gone one important step further in recognising theimportance of these records by making provision for automatic access, in terms of section 15 of PAIA.[31] DMR on the other hand routinely refuses requests for inspection reports and the like, although CALS has observed some encouraging movement in relation to social and labour plan compliance reports. DMR has started to provide access to these, albeit sometimes not providing complete records.

The failure of the DMR to make this information completely available undermines civil society's ability to participate in the monitoring and enforcement of environmental laws. This is a critical role, the importance of which was confirmed in the recent Supreme Court of Appeal decision in *VEJA v AMSA*.[32] The greater public scrutiny that would be facilitated by making such records available would also serve to encourage mines to comply with the law, thereby reducing the burden on the state and affected communities.

Litigation

ATI Network members have been involved in several litigious matters either as applicants or as *amici curiae* (friends of the court) throughout PAIA's existence. Being the last resort for a requester, in light of the serious cost implications, the decision to take a requestee body to court is no easy one. Therefore when an ATI Network member has launched litigation it deserves special attention. This is even more so because, as time has proven, judgements obtained in many matters that have been brought before the court by ATI Network members have had a positive impact on the application and interpretation of PAIA.[33] The following represents the litigious efforts of ATI Network members during the present reporting period and their impact on PAIA and access to information in South Africa.

[31]https://cer.org.za/news/another-victory-for-environmental-rights-department-of-water-sanitation-makes-water-licences-automatically-available.
[32]*Company Secretary of Arcelormittal South Africa and Another v Vaal Environmental Justice Alliance*, 2015 (1) SA 515 (SCA).
[33]See previous Shadow reports.

Public-private partnerships, access to information and the role of a state Information Regulator

In *Black Sash Trust v Minister of Social Development & Others*, [34] CALS on behalf of the Black Sash Trust, launched litigation against the Minister of Social Development and the South African Social Security Agency ("SASSA") in an attempt to ensure the continued payment of social grants to grant beneficiaries. This threat to the right of access to social assistance arose as a result of SASSA failing to conclude a new or interim contract with Cash Paymaster Services ("CPS"),[35] the private entity procured for the nation-wide administration of social grants, and due to SASSA not being in a position to itself take over the payment of social grants. Black Sash sought relief to the effect that any interim contract ordered between the parties contain adequate safeguards for the protection of grant beneficiaries' personal data to ensure that beneficiaries are not subject to unwanted directed marketing of goods and services by CPS and its affiliates that have, in Black Sash's experience, resulted in amounts being deducted from grants. The Information Regulator (IR) was joined to exercise its enforcement and monitoring powers under the Protection of Personal Information Act ("POPI") to prevent contractual provisions undermining beneficiaries' rights under POPI. The Black Sash matter has secured the following important developments in relation to the ATI Network's work:

- Fostering a working relationship between the IR and members of the ATI Network. The IR has welcomed a further meeting with CALS and Black Sash to develop a civic education strategy on the meaning and import of 'consent' under POPI and has sought insight from CALS on questions that the IR should pose to CPS during engagements with them;
- Advancing a regulatory approach by the IR that equitably balances concerns of access to information with the protection of information where appropriate;
- Highlighting the importance of facilitating effective access to information in ensuring public and private sector accountability and for whistleblowing purposes. The Black Sash matter has prompted investor accountability and engagement, with CPS investors like Allan Gray and the International Finance Corporation being forced to account to grant beneficiaries;
- Indicating the value of understanding private law through the lens of the Constitution; and
- Stimulating discussions on the relationship between PAIA and POPI.

[34] [2017] ZACC 8.

[35] In *All Pay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency and Others* (2014) 1 SA 604 CC, the award of the tender to CPS was declared constitutionally invalid and the declaration of invalidity was suspended pending the determination of a just and equitable remedy. In the follow-up case of *All Pay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency and Others* (2014) 4 SA 179 CC the court held that a just and equitable remedy would be that the tender be set aside and a new tender be issued, however, the existing contract was to remain in place until a new tender was awarded. As there was no successful bidder for the rerun tender, the contract with CPS would remain in place until the contract period terminated, namely 31 April 2017.

Automatic access to records in terms of sector-specific legislation[36]

In January 2016, the Mgugundlovu community launched a case in the Pretoria High Court for a declaratory order to the effect that, as affected persons, they had an automatic right of access to a mining right application made under sections 10 and 22(4) of the Mineral Resources and Petroleum Resources Development Act, 2002 ("MPRDA"). The dispute arose when representatives from Transworld Energy Mineral Resources PTY LTD ("TEM") approached the Mgugundlovu community about the mine they intended to establish in the community. The community's legal representatives attempted to obtain a copy of the mining right application from the DMR and TEM with any sensitive commercial information redacted. This was refused and they were instructed to apply for access through PAIA.

The Mgugundlovu community contends in its papers that to require communities to use PAIA to access mining right applications would be to deny communities their rights under sections 10 and 22(4) of the MPRDA. This was because the MPRDA provides a 30 day consultation period which, assuming that the application for access under PAIA is not refused or delayed, would be the same period that the community would have to wait to access the record. As communities require access to the mining right application to be able to comment on it, they would functionally be deprived of their right to provide comment on the mining right application. TEM did eventually provide the Mgugundlovu community with copies of the mining right application but remains opposed to the declaratory order, continuing to submit that the community had to use PAIA.

CALS entered the case as *amicus curiae* and submitted that automatic access to mining right applications was central because it was necessary in order to fulfil the obligations placed by s24(b)(iii) of the Constitution (the environmental right) to secure sustainable development. This was because the community has particular knowledge with regards to the development of their community and thus they have to have input on what constitutes such development. CALS also submitted reports by another ATI Network member, the CER, detailing the low success rates of PAIA applications in amplification of the position that requiring deference to the PAIA application process in order to access the reports could functionally deny the applicants their rights under sections 10 and 22(4) of the MPRDA. CALS also submitted that mining right applications ought to be automatically available in terms of section 15 of PAIA and the DMR's PAIA manual. TEM has taken a narrow interpretation, contending that the mining right application does not form part of the documents that are listed in the DMR's PAIA manual and as such, it ought not to be automatically available. At the time of writing, the matter had not yet been heard but it will be an important test case for the use of PAIA in in the context of community mobilisation in the mining sector.

[36] In the 2015/16 Shadow report we highlighted a similar Supreme Court of Appeal case (Moneyweb) which also had to do with automatic access to records in terms of sector-specific legislation.

Uncovering apartheid era corruption in order to expose the impact of its legacy on current corruption

Why, after more than two decades of democracy in South Africa, is the apartheid archive still kept under lock and key? Secrecy is a key ingredient in the abuse of power and its legacy needs to be challenged. For these reasons, ATI Network member, SAHA, approached the High Court in August 2017 to compel the South African Reserve Bank (SARB) to release records of suspected apartheid-era financial crimes.[37] The matter was heard in the High Court of South Africa (Johannesburg division). The case followed a request for documents held by the SARB, made under PAIA. Specifically included in this request was information about fraud through manipulation of the financial rand dual currency, foreign exchange or the forging of Eskom bonds. It is believed that these activities are linked to high profile individuals such as Johann Philip Derk (Jan) Blaauw, Vito Roberto Palazzolo, and Robert Oliver Hill.

Given the current public outcry over alleged widespread state capture in South Africa, untangling the extensive networks that enable corruption is more pressing than ever. Private interests remain central to the abuse of state power. For this reason, it is essential to hold those responsible to account and access to information is a key instrument in these efforts. The constitutional right to access information applies equally to all public institutions and SARB cannot claim special privilege. During the oral submissions counsel for SAHA, Adv. Geoff Budlender, confirmed SAHA's position that it has followed procedure to the tee and that SARB has incorrectly applied provisions of PAIA (and other legislation un-related to PAIA) to refuse access to the records. Accordingly SAHA is entitled to the information requested. Counsel for SARB, in his oral submissions, set out to discredit SAHA's application by making averments that largely ignored the papers of both parties. SAHA's legal representatives in the matter, Lawyers for Human Rights, have since filed SAHA's reply with the court, which refute the averments made during oral submissions by the SARB. Some of the highlights of the written submissions in reply were:

- It is clear that the SARB is not willing to release any records to SAHA and their refusal is based on the application of blanket objections where the harmful consequences of disclosure are not substantiated or proven.
- SARB's belief that the wording of SAHA's initial request is too vague and therefore that they are unable to assist is incorrect as an application for access to information in terms of PAIA is not a pleading, therefore it is not to be scrutinised as though it was. This is contrary to the acceptable interpretation of PAIA requests found in existing jurisprudence and in PAIA itself.ments regarding why and how the application is in the public interest and at no stage were these averments denied by the SARB in its replying papers.
- SARB's contention that there are too many requests submitted is incorrect as SAHA submitted six fresh requests in response to a first set of requests that were refused on the grounds that insufficient particulars were provided. Despite the fresh requests being submitted, SARB still found that it will not grant access to the records. A culture of repetitive stonewalling, it would appear.
- Third parties that are affected by this litigation have sufficient notice of the litigation through compliance with PAIA and PAIA specific court rules. It is therefore unnecessary for SAHA to take further steps to notify third parties again of the litigation.
- The SARB's submission that SAHA should pay the costs of the application should they lose, as the *Biowatch* judgement does not apply, is incorrect as SAHA at numerous places in its founding affidavit made averments regarding how the application is in the public interest and at no stage were these averments denied by the SARB in its replying papers.

At the time of writing this report judgement has not yet been handed down and will likely be reported on in the next Shadow report.

This litigation relates to a large number of requests submitted by SAHA since 2013 in support of the work of Open Secrets (an independent non-profit with a mission to promote private sector accountability for economic crime and related human rights violations in Southern Africa) and Hennie van Vuuren. Many records released in terms of these requests have informed significant parts of the recently released book Apartheid Guns and Money: A tail of profit, authored by Hennie van Vuuren who along with his colleague Michael Marchant expressed the following:

"We relied on the heavy lifting by SAHA and Lawyers for Human Rights to open the door to many of the apartheid archives. Armed with PAIA, determination and goodwill they ensured our access to hundreds of thousands of documents that form much of the evidence presented in Apartheid Guns and Money: A tale of profit. Despite this they were met with stiff resistance by conservative bureaucrats and politicians who continue to block access to key records. The courts should not have to settle these challenges. The public interest should not be undermined by gatekeepers who want to control the flow of secrets of our past and present"

[37] http://foip.saha.org.za/request_tracker/entry/sah-2014-srb-0007

The Gupta Waterkloof Landing, Cronyism and the Right to Information

ATI Network member, amaB, in May 2017 won a punitive costs order against the Department of Defence (DOD) – mentioned above in the discussion about deemed refusals - in an access to information battle that has spanned over four years. amaB submitted a PAIA request for records of all private landings at the Waterkloof air force base for the 24 months preceding the infamous April 2013 incident where the Gupta family landed an airliner there, bearing their wedding guests from India. The DOD capitulated on the merits just days before the case was due to be argued, but offered no reasons for the about-face – after years of maintaining the documents could not be released. amaB continued with the application for punitive costs, given that the DOD's behaviour was unjustified and had used up valuable time and money. The judge agreed. In awarding the punitive costs order, Makgoka J, setting out the four-year history of amaB's efforts to engage with the DOD, said the objectives of PAIA should be borne in mind: "[a]mong those, is to afford the public a simple and inexpensive mechanism of obtaining information held by public bodies. Clearly, that objective has been frustrated in this case."
Makgoka J wrote further:

"The request, it must be borne in mind, was made approximately thirteen days after the landing of the Gupta chartered airline at the Waterkloof Airforce Base. That matter, a very controversial one indeed, had generated considerable public interest – the landing itself, and how government, in particular the Ministry of Defence, responded to it. Therefore, when the information was sought at that time, the controversy generated by it was still very much in the public space. Now, four years later, as Adv Budlender, counsel for the applicants put it, 'the delay means that the information has lost a considerable amount of currency'."

Makgoka J lambasted the department for its tardiness.

"I gain a distinct view thatthe respondents were unresponsive at best, and obstructionist, at worst. I accept that some latitude should be given to state departments given the obvious and inevitable bureaucratic bottle-necks. Having said that, a delay of eight months to simply acknowledge a simple request is unpardonable. Given all the above considerations, and in particular the conduct of the respondents, and the fact that the applicants conduct investigative journalism, which is pivotal to a vibrant democracy, a punitive costs order is warranted."

amaB and the ATI Network regard this as a victory important both for journalistic purposes and to strengthen transparency and accountability in the defence sector. This judgement is also likely to serve as a curb to unnecessary litigation in PAIA matters.

Recommendation

Based on the experience of ATI Network members highlighted specifically in this report as well as more broadly based on the years of experience in ATI, the following recommendations are put forward:

Sanctions for statutory non-compliance

It is high time that section 90 of PAIA (the section dealing with offences) be amended to included tougher sanctions for non-compliance by information and deputy information officers who do not respond to PAIA requests within the statutory time frame. The courts have clearly expressed distaste in the modus operandi of public bodies who ignore requests, as is evident from the costs order judgement in favour of amaB highlighted above. Parliament cannot be unaware of the issue, as they have, year in and year out, been briefed by the SAHRC on the state of non-compliance with PAIA. Furthermore, every single Shadow report, published by the ATI Network, has clearly expressed concern that there are extreme levels of non-compliance with the statutorily prescribed timeframes in PAIA. Thus we recommend that the legislature does justice to access to information and amends PAIA (section 90) to include sanctions for not responding to PAIA requests. South Africa would not be breaking new ground in enacting such a provision. Section 28(3) of the newly enacted Kenyan Access to Information Act 31 of 2016 (mentioned above) provides:

"An information access officer who—

(a) refuses to assist a requester who is unable to write to reduce the oral request to writing in the prescribed form and provide a copy to the applicant in accordance with section 8(2);

(b) refuses to accept a request for information;

(c) fails to respond to a request for information within the prescribed time; or

(d) fails to comply with the duty to take reasonable steps to make information available in a form that is capable of being read, viewed or heard by a requester with disability in accordance with section 11(3), commits an offence and is liable, on conviction, to a fine not exceeding fifty thousand shillings, or to imprisonment for a term not exceeding three months, or both." (own emphasis)

It used to be that South Africa had the most progressive ATI law on the continent, yet it appears as though other states are now displaying greater commitment to respecting the right of access to information. Thus we recommend that South Africa acts to at least match the standard set out in the Kenyan Access to Information Act.[38]

Deformalise the PAIA request process

The statement made in relation to SAHA's case against SARB mentioned above relating to the fact that a PAIA request is not a pleading and should not be scrutinised as such leads to the recommendation that perhaps the PAIA request process needs to be deformalized in order to cut out the rigid perception of some requestee bodies. Thus the process by which PAIA requests are submitted needs to amended in order to be allow the public to access records more informally.

[38]See the Indian Right to Information Act which also criminalises failure to respond to a request within the statutory time frame.

As it currently stands a requester must complete a prescribed form in order for the request to be valid. Whilst the current process has its benefits, particularly when distinguishing between public versus private body requests (as the private body requests have more stringent requirements i.e. the need to demonstrate that the information requested is required to protect or advance a right), a great n umber of South Africans do not have access to the prescribed forms. Thus we recommend that PAIA be amended in order to provide that any written request for information that substantially complies with section 18 or 55 of PAIA (the sections which lay out what information must be contained within a request form) must be processed as if submitted on the prescribed form, irrespective of the manner in which it is submitted, provided it is legible.

An emergency access provision and proactive disclosure

Every year the ATI Network has reported on the need to educate requestee bodies on the need to broaden the scope of the information they make automatically available (proactively available). This requires extensive education of requestee bodies on the positive effects proactive disclosure has on transparency. Resources must be allocated to ensure adequate workshops are run promoting the benefits of transparency and proactive disclosure. Whilst the best way to ensure that the public get the information they need timeously is through proactive disclosure, there are unfortunately instances where a body may not proactively disclose information which would require the use of PAIA to get access to that information. Ordinarily this would be acceptable, however there are specific instances such as medical or enviromental emergencies that require access to information on an urgent basis. In those emergency situations in which information will be required more urgently there are no options available save to submit a PAIA request and go through the time consuming motions. In order to counter this PAIA should be amended to ensure that there is a mechanism for individuals and communities that legitimately need access to information on an urgent basis, are assisted on an urgent basis. A failure to do so might well mean that time provisions in PAIA, at least in this respect, could be held to be an unconstitutional limitation on the right of access to information of such individuals or communities.

Provision of sufficient empowering resources by government for ATI

The National Archives and the newly established Information Regulator must be sufficiently resourced and records management measures strengthened at national, provincial and local levels, in order to ensure the records necessary to hold government to account are being created and managed in line with legal requirements. In addition government must make resources available for both PAIA processing and the attendance of the training with the Information Regulator, with particular emphasis on local government, as information held by municipalities can have the biggest impact on communities. Finally the staffing of the Information Regulator's office needs to occur as soon as possible as the public cannot afford to wait for another two years until the Information Regulator is fully functional as has been indicated by the Commissioners of the Information Regulator.

Appendix: Members of the ATI Network

Equal Education Law Centre

Founded in 2012, the Equal Education Law Centre (EELC) is registered as a law clinic with the Cape Law Society and its staff of social justice lawyers specialise in education policy, legal advocacy, community lawyering and public interest litigation. The EELC engages in strategic litigation regarding major issues surrounding long-term educational reform, as well as working on individual cases arising from experiences of learners, parents and teachers, such as expulsions, disciplinary matters and access to schools. The EELC provides legal services and representation free of charge to persons who would not otherwise be able to afford them. The legal processes pursued by the EELC seek to create systemic change in the education sector.
www.eelawcentre.org.za

Centre for Environmental Rights

The Centre for Environmental Rights (CER) is a non-profit organisation of activist lawyers who help communities and civil society organisations in South Africa realise our constitutional right to a healthy environment by advocating and litigating for environmental justice.
www.cer.org.za

amaBhungane Centre for Investigative Journalism

amaBhungane is a non-profit company founded to develop investigative journalism in the public interest. They are mandated to do so through:

- The best practice of investigations;
- Transferring investigative skills to other journalists; and
- Advocating for the information rights investigative journalists need to do their work.

Through these activities, they hope to promote a free and worthy media, and open, accountable and just democracy. amaBhungane is isiZulu for the Dung Beetles.
www.amabhungane.co.za

Corruption Watch

Corruption Watch is a non-profit organisation launched in January 2012. It aims to ensure that the custodians of public resources act responsibly to advance the interests of the public. By shining a light on corruption and those who act corruptly, Corruption Watch promotes transparency and accountability and protects the beneficiaries of public goods and services.
www.corruptionwatch.org.za

Khulumani Support Group

The Khulumani Support Group is a non-profit membership-based organisation formed in 1995 by survivors and families of victims of the political conflict of South Africa's apartheid past. Khulumani has an extensive community outreach programme, which includes PAIA education, and has used PAIA internally to inform its work regarding issues arising from the Truth and Reconciliation Commission.
www.khulumani.net

Centre for Applied Legal Studies

Founded in 1978, the Centre for Applied Legal Studies (CALS) is a registered law clinic and human rights centre housed within the School of Law at the University of the Witwatersrand. CALS' vision is a socially, economically and politically just society where repositories of power, including the state and the private sector, uphold human rights. CALS focuses on five intersecting programmatic areas, namely basic services, business and human rights, environmental justice, gender, and the rule of law. It does so in a way which makes creative use of the tools of research, advocacy and litigation, adopts an intersectional and gendered understanding of human rights violations, incorporates other disciplines and is conscious of the transformation agenda in South Africa.
www.wits.ac.za/cals/

Oxpeckers Investigative Environmental Journalism

Oxpeckers is Africa's first journalistic investigation unit focusing on environmental issues. The centre combines traditional investigative reporting with data analysis and geo-mapping tools to expose eco-offences and track organised criminal syndicates in southern Africa.
www.oxpeckers.org

Open Democracy Advice Centre

The Open Democracy Advice Centre is a NGO which promotes openness and transparency in South Africa's developing democracy. Its primary aims are to foster a culture of accountability in the public and private sector and to assist people in South Africa to realise their human rights. It offers support and advice on two key pieces of legislation: PAIA and the Protected Disclosures Act.
www.opendemocracy.org.za

Public Service Accountability Monitor

Public Service Accountability Monitor (PSAM) is a monitoring and research institute based at Rhodes University in Grahamstown which aims to improve public service delivery and the progressive realisation of constitutional rights by using various social accountability monitoring tools to monitor the public resource management cycle. PSAM has utilised PAIA to access numerous documents of government to assist in its monitoring work.

Right2Know

The Right2Know Campaign is a national coalition of non-government organisations and individuals working to improve the right to know in South Africa. Initially formed in opposition to the Protection of State Information Bill, the campaign has subsequently broadened its mandate to include promoting the right to information more generally.
www.right2know.org.za

South African History Archive

The South African History Archive (SAHA) is an independent human rights archive dedicated to documenting and providing access to archival holdings that relate to past and contemporary struggles for justice in South Africa.
SAHA's Freedom of Information Programme (FOIP) is dedicated to using 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.
www.foip.saha.org.za

Wits Justice Project

The Wits Justice Project is housed in the Journalism Department in the University of the Witwatersrand, Johannesburg (WITS). The Wits Justice Project investigates miscarriages of justice and raises awareness of issues within the criminal justice system with an aim to advocate for change, strengthen procedures and build on reform efforts. This is achieved through investigative journalism, advocacy, research and education.
www.witsjusticeproject.co.za

Centre *for*
Environmental Rights
Advancing Environmental Rights in South Africa

amaBhungane
Centre for Investigative Journalism

WITS JUSTICE PROJECT
Free the innocent

CALS
Centre for Applied Legal Studies

EELC
EQUAL EDUCATION LAW CENTRE

corruption watch

RIGHT2KNOW

OXPECKERS
Investigative Environmental Journalism

SAHA
ARCHIVE FOR JUSTICE
South African History Archive - Since 1988

OPEN DEMOCRACY ADVICE CENTRE
TRANSPARENCY IN ACTION

KHULUMANI
Support Group

PSAM
Public Service Accountability Monitor
ADVANCING YOUR RIGHT TO SOCIAL ACCOUNTABILITY