



Centre for Environmental Rights

Advancing Environmental Rights in South Africa

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27 September 2016

Dear Mr Msiza

REQUEST TO INCLUDE CERTAIN RECORDS IN, AND TO REMOVE CERTAIN LIMITATIONS FROM, THE DEPARTMENT OF MINERAL RESOURCES' DECLARATION IN TERMS OF SECTION 15 OF THE PROMOTION OF ACCESS TO INFORMATION ACT, 2000

1. As civil society organisations working towards the achievement of greater transparency in environmental governance, and the advancement of environmental rights and environmental justice in our communities across South Africa, the signatories to this letter call on the information officer of the Department of Mineral Resources (DMR) to amend the DMR's declaration in terms of section 15 of the Promotion of Access to Information Act 2 of 2000 (PAIA).
2. In particular, we call on the information officer to remove all limitations relating to the categories of persons to whom the DMR makes listed records automatically available, and to include the following records in the DMR's section 15 declaration:
 - 2.1. mining and prospecting rights, including mine and prospecting works programmes;
 - 2.2. environmental authorisations;
 - 2.2. social and labour plans;
 - 2.4. environmental management programmes and environmental management plans;
 - 2.5 the full applications for all the rights and licences listed above; and
 - 2.6 compliance inspection reports, audit reports and monitoring data in respect of compliance with the conditions of these licences.

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3. Section 15 of PAIA imposes a duty on the information officer of a public body to make certain declarations in respect of records which it is able to grant automatic access to. Section 15 reads as follows -

“15 Voluntary disclosure and automatic availability of certain records

- (1) The information officer of a public body, referred to in paragraph (a) or (b)(i) of the definition of “public body” in section 1, must, on a periodic basis not less frequently than once each year, submit to the Minister [of Justice and Constitutional Development] a description of –*
- a. the categories of records of the public body that are automatically available without a person having to request access in terms of this Act, including such categories available –*
 - i. for inspection in terms of legislation other than this Act;*
 - ii. for purchase or copying from the body; and*
 - iii. from the body free of charge; and*
 - b. how to obtain access to such records.*
- (2) On a periodic basis not less frequently than once each year and at the cost of the relevant public body, the Minister must, by notice in the Gazette –*
- a. publish every description submitted in terms of subsection (1); or*
 - b. update every description so published, as the case may be.”*

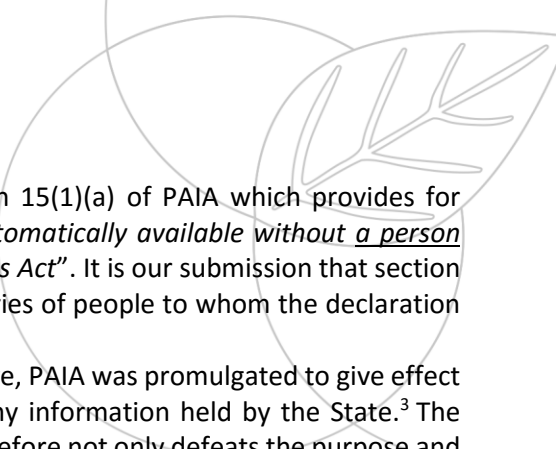
4. The most recent section 15 declaration made by the information officer of the DMR appears to be that which is included in the DMR’s most recent PAIA Manual, which was published in 2014 and is available for download on the DMR’s website.¹
5. Declarations in terms of section 15 of PAIA are aimed at promoting the purpose of PAIA, namely to “*foster a culture of transparency and accountability in public and private bodies*” and to “*actively promote a society in which the people of South Africa have effective access to information*”.² However, the 2014 DMR Declaration is in many respects contrary to the purposes of PAIA, environmental laws, international declarations and regional commitments towards improved access to information.

a. Categories of persons limited:

- i. The information officer has, in paragraph 5.1.3 of the 2014 PAIA Manual, attempted to limit the categories of people to whom it makes certain records “automatically available”.
- ii. Paragraph 5.1.3 of the PAIA Manual defines this group of persons as follows –
“The records as listed below in respect of applications for rights pending or finalized in terms of the Mineral and Petroleum Resources Development Act 28 of 2002 will be made available voluntary (sic) via the Regional Managers: Mineral Regulation as listed in paragraph 5.1.3.1 below. Voluntary access to these records is limited to the following categories of persons and further limited to the extent that confidential information in respect of applicants for rights in terms of the Mineral and Petroleum Resources Development Act disclosed in such applications will not be made available without prior consent of the applicant (our emphasis) concerned.
 - *Landowners of the land in respect of which an application for a right is pending or was granted*
 - *Lawful occupiers of the land in respect of which an application for rights is pending or granted*
 - *Other interested and affected parties as contemplated in the Minerals and Petroleum Resources Development Act 28 of 2002”*

¹ <http://www.dmr.gov.za/public-access-to-information-act.html>.

² Preamble, PAIA.

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- iii. This limitation is contrary to the intention of section 15(1)(a) of PAIA which provides for *“categories of records of the public body that are automatically available without a person (our emphasis) having to request access in terms of this Act”*. It is our submission that section 15(1)(a) does not permit the DMR to limit the categories of people to whom the declaration applies.
 - iv. In addition to the objectives listed in paragraph 5 above, PAIA was promulgated to give effect to every person’s Constitutional right of access to any information held by the State.³ The limitation contained in the 2014 DMR Declaration therefore not only defeats the purpose and effectiveness of such a declaration, but is also contrary to the right to access information enshrined in our Constitution.
 - v. We therefore respectfully request the DMR to remove any such limitation in its section 15 declaration.

b. Mining and prospecting rights

- i. While *“records on the existence of any rights granted in terms of the Mineral and Petroleum Resources Development Act on any specified land”* are available from the DMR’s Regional Offices *“automatically to any person”*, and the *“completed application form for rights”* and *“details on holders of prospecting, mining or other right”* are available to interested and affected parties contemplated in paragraph 5.1.3, copies of actual prospecting and mining rights are not included in the 2014 DMR Declaration as records which are automatically available from the DMR.
- ii. Paragraph 5.1.6 of the PAIA Manual stipulates that records of registered rights are available on request from the Mining Titles Registration Office, and that *“commercial and/or confidential information forming part of registered rights in terms of the Mineral and Petroleum Resources Development Act 28 of 2002 shall not be made available to any Requester”*.
- iii. Information contained in prospecting and mining rights, including works programmes, is vitally important for affected communities. These rights contain the very basic information required by communities to know and understand the scope of the rights granted, their duration, and restrictions placed in respect of the granting of those rights. Works programmes contain practical information particularly relevant for affected parties, such as exactly where drilling will take place. Inclusion of these records in the DMR’s section 15 declaration is required in order to meet the objectives of PAIA.
- iv. We therefore respectfully request the DMR to remove the limitation to applications to interested and affected parties, and to include full applications, rights and works programmes in its section 15 declaration.

c. Environmental authorisations

- i. Environmental authorisations are listed in the DMR’s PAIA Manual as *“documents which contain financial and or confidential information”* and *“must be requested in terms of the Act [PAIA]”*. This is at odds with the spirit and objectives of PAIA.
- ii. Environmental authorisations, like prospecting and mining rights, contain the basic conditions in terms of which environmentally harmful activities may lawfully take place.
- iii. The importance of public access to environmental authorisations has already been recognised by the inclusion of the legal requirement, in regulation 26(h) of the Environmental Impact Assessment Regulations, 2014 (EIA Regulations), for the authorisation holder to make available a copy of this authorisation on its website and to anyone on request. The DMR’s PAIA Manual is accordingly at odds with other South African legislation and contrary to the spirit and purport of the Constitution and PAIA.

³ Section 32, Constitution of the Republic of South Africa, 1996 (Constitution).

d. Social and Labour Plans

- i. Whilst Social and Labour Plans (SLPs) are listed as being automatically available, “*confidential commercial and financial information*” contained in such SLPs are intended to be excluded.
- ii. The SLPs are also only available to “*interested and affected persons....as contemplated in paragraph 5.1.3*” of the DMR’s PAIA Manual.
- iii. Compliance reports or monitoring results in relation to SLPs are not included at all in the 2014 DMR Declaration.
- iv. SLPs are vital documents for affected communities. The information contained in SLPs sets out the obligations of mining companies towards the communities living in and around their operations.
- v. These social obligations of mining companies towards affected communities form part of their licence to operate, and are required because of an acknowledgement that mining has multiple negative impacts which are born by the communities living in these areas of operation.
- vi. Without access to SLPs, community members cannot ensure that mining companies are held to their social obligations. This, in the absence of appropriate monitoring and enforcement action from the state, renders the obligations contained in these documents meaningless.
- vii. As you will be aware, on 13 September 2016, before the South African Human Rights Commission (SAHRC), DMR Deputy Director-General Raphela gave evidence under oath at the National Hearing on the underlying socio-economic challenges facing mining-affected communities and stated that access to SLPs will be given to communities and “those who should benefit”. The DDG told the Commission that the DMR was finalising a mechanism for providing updates on compliance to stakeholders. However, the panel overseeing the hearings criticised that submission, because 18 months previously, the previous Director-General of the DMR had told the SAHRC that SLPs would be made available on a website, and yet this has not yet materialised. We therefore call upon the DMR to cease delaying public access to SLPs.

e. Environmental Management Plans (EMPs) / Environmental Management Programmes (EMPRs):

- i. EMPs or EMPRs are not included in the 2014 DMR Declaration. Compliance reports or monitoring results required in terms of such EMPs/EMPRs are also not included in the 2014 DMR Declaration.
- ii. Information contained in EMPs/EMPRs is important for affected communities as it enables them to better understand the obligations of mining companies in respect of environmental compliance. These reports also provide the public with some level of comfort that mining companies are in fact complying with the conditions of their EMPs/EMPRs. Without having access to these reports or records, it remains a challenge for impacted communities and civil society to determine a company’s level of compliance with environmental and mining laws, and to hold companies accountable when compliance is absent or inadequate.
- iii. The right to an environment that is not harmful to one’s health or well-being is enshrined in section 24 of the Constitution. The National Environmental Management Act, 1998 (NEMA) was enacted to realise this environmental right. It is clear from NEMA’s preamble and principles, that the law should “*establish procedures and institutions to facilitate and promote public participation in environmental governance*”⁴ and that the principle of participation of all interested and affected parties in environmental governance should be promoted.⁵ It is therefore important for the DMR to take these principles into account when compiling its declarations in terms of section 15 of PAIA, and to ensure that such declarations assist civil

⁴ Preamble, NEMA.

⁵ Section 2(4)(f), NEMA.

society in exercising their environmental rights and to participate meaningful in environmental governance.

- iv. As discussed above, EMPs/EMPRs are one such vital tool which would assist in promoting participation in environmental governance and should therefore be automatically available to everyone in terms of section 15 of PAIA. The inclusion of these records in the DMR's declaration in terms of section 15 of PAIA would also be aligned with PAIA's purpose of promoting a culture of transparency and accountability, and to ensure that a company's compliance (or lack thereof) does not continue to remain a matter of secrecy in South Africa.

f. Declaration incorrectly subject to exclusion of certain information

- i. While SLPs are included in the 2014 DMR Declaration, "*confidential commercial and financial information*" has been excluded. This is misaligned with and not permitted by section 15 of PAIA which specifically provides for the automatic access of such records "*without (our emphasis) a person having to request access in terms of this Act*".
- ii. The very purpose of voluntarily disclosure is to promote efficient and speedy access to records held by an entity. By declaring SLPs as being automatically available - only to exclude portions thereof based on reasons not provided for in PAIA – the DMR is not only acting *ultra vires*, but is also hindering the promotion of access to information in the mining sector in South Africa.
- iii. As the mining sector is often responsible for significant environmental pollution and degradation and curtailment of the development prospects of affected communities, we would urge the DMR to re-consider excluding any information – such as allegedly "*confidential commercial and financial information*" - from records declared under section 15 of PAIA.
- iv. We also reiterate the undertaking by the Director General to the SAHRC 18 months ago and the recent submission by the Deputy Director-General to the SAHRC on 13 September 2016, about developing a mechanism for access and updates on compliance.

g. Declaration does not include compliance inspection reports, audit reports and monitoring data in respect of compliance with conditions of licences

- i. As you will be aware, in the 2014 case of *ArcelorMittal South Africa v Vaal Environmental Justice Alliance*, the Supreme Court of Appeal confirmed the right of civil society to monitor industrial operations and their impacts on the environment. The preamble to NEMA itself records that:
 - 1. "*the law should establish procedures and institutions to facilitate and promote public participation in environmental governance*"; and
 - 2. "*the law should be enforced by the State and that the law should facilitate the enforcement of environmental laws by civil society.*"
- ii. Without compliance records, civil society is not empowered to participate, to monitor or to enforce environmental laws. Moreover, the greater public scrutiny facilitated by making such compliance records automatically available will encourage mines to comply with the law, thereby reducing the burden on the state and affected communities.
- iii. We would argue that these arguments also apply to the governance of the social impacts of mining, as regulated through SLPs.
- iv. We therefore respectfully request the DMR to include compliance records as described in its section 15 declaration.

h. South African and international law promoting proactive release of information

- i. The Mineral and Petroleum Resources Development Act, 2002 (MPRDA) recognises "*the State's obligation to protect the environment for the benefit of present and future*

generations".⁶ Environmental authorisations, EMPRs, environmental audit reports and all compliance monitoring reports are already required to be available (for inspection and copying) to anyone on request in terms of regulation 26(h) of the EIA Regulations. Since these environmental records now need to be made readily available on the authorisation holder's website and to anyone on request to the holder, there is no reason for the DMR not to align its declarations with the provisions of the EIA Regulations and to declare such records as being automatically available under section 15 of PAIA.

- ii. Several regional instruments and developments have also sought to promote active disclosure of information of significant public interest, such as the **Declaration of Principles of Freedom of Expression in Africa** ("*public bodies shall be required, even in the absence of a request, actively to publish important information of significant public interest*") and the **African Platform on Access to Information Declaration** ("*[p]ublic...bodies shall be obliged to proactively release information in a timely manner about their...decisions...and other information...that is of public interest...*").
 - iii. In South Africa's National Development Plan, the National Planning Commission acknowledged that, despite the right of access to information being enshrined in the Constitution, "*[i]n practice, requests for information are routinely ignored*" and proposed that "*[m]ore 'open data' should be available*". This need for more 'open data' is becoming increasingly more relevant, as is evidenced by the Open Government Partnership's commitment to developing an integrated and publicly accessible portal of environmental management information which "*would strengthen compliance with environmental regulation while at the same time providing citizens with access to comprehensive information on environment*".
 - iv. This development, both regionally and internationally, towards open data, more transparency and better access to information, should be considered seriously by the DMR. The voluntary disclosure of environmental compliance records by the DMR would certainly improve environmental compliance by mining companies and also assist affected communities and civil society organisations in exercising their environmental rights.
- i. Commitments made by other government departments charged with environmental decision-making functions
- i. Both the Department of Environmental Affairs and the Department of Water and Sanitation have considerably increased the number of records which they make automatically available under section 15 of PAIA.
 - ii. In April 2016, DEA announced that it would make environmental licences (including environmental authorisations, waste management licences and atmospheric emission licences) available to the public automatically without requiring the submission of a PAIA request.⁷
 - iii. Shortly thereafter, the Department of Water and Sanitation (DWS) committed to making copies of water use licence applications, water use licences, and audit and compliance reports available to the public automatically.⁸
 - iv. We see no reason, in light of the submissions made in this letter, why the DMR should not make similar commitments to openness and transparency.

6. Based on applicable legislation and the principles listed above, we formally request you - as the information officer of the DMR – to remove all limitations relating to the categories of persons to whom the DMR makes

⁶ Preamble, MPRDA.

⁷ <http://cer.org.za/news/victory-for-environmental-rights-department-of-environmental-affairs-makes-environmental-licences-automatically-available>.

⁸ <http://cer.org.za/news/another-victory-for-environmental-rights-department-of-water-sanitation-makes-water-licences-automatically-available>.

listed records automatically available, and to exercise your discretion to include the following documents in the DMR's declaration in terms of section 15 of PAIA, and to urgently notify us of your intention to do so:

- 6.1. mining and prospecting rights, including mine and prospecting works programmes;
- 6.2. environmental authorisations;
- 6.3. social and labour plans;
- 6.4. environmental management programmes and environmental management plans;
- 6.5. the full applications for all the rights and licences listed above; and
- 6.6. compliance inspection reports, audit reports and monitoring data in respect of compliance with conditions of these licences.

Signed by:



CENTRE FOR ENVIRONMENTAL RIGHTS

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