

The State of Access to Information in South Africa

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Introduction

The political, social and economic edifice of the apartheid system in South Africa was built on the foundation of an institutionalised violation of basic human rights. Indeed, the entire struggle against apartheid was fundamentally, a struggle for the democratic reclamation of those human rights, whether civil and political, socio-economic and/or environmental, cultural and developmental rights. It was the popular strength and depth of this struggle that succeeded in bringing an end to the apartheid system and that ushered in the formal democratic victory in 1994.

Within this historical context then, it makes sense that one of the primary requirements of a post-apartheid South Africa would be to lay down a new foundation of an institutionalised affirmation of basic human rights. The adoption, in 1996, of *The Constitution of the Republic of South Africa* containing a specific 'Bill of Rights' represented the first layer of such an affirmation, the underlying rationale being that all the rights contained therein are, in and of themselves, basic human rights that are inherent, universal, inalienable and indivisible to every human being (in this case, as applied specifically to South Africa).

Most South Africans are justifiably proud of the 'Bill of Rights'. While there are serious disagreements and debates around the practical realisation of various rights, the 'Bill of Rights' is a classic example of the triumph of an institutionalised affirmation, as opposed to violation, of basic human rights. It is understandable that the central focus of both the government and the majority of South Africans - with varying degrees of legislative and 'civic' intensity and effect - has been on those rights whose potential realisation, historically, provided the greatest impetus to the struggle against apartheid (for example: equality before the law regardless of race, ethnic or social origin, culture and belief; freedom and security of the person, expression and association; the right to adequate housing, health care and basic education and so on¹). The indirect result however, has been that other constitutional rights such as the right of access to information (Section 32 of *The Constitution*), have taken a backseat and been generally viewed as secondary human rights, artificially detached from the realisation of the more 'central' rights.

The inclusion of a constitutional right of access to information was, no doubt, 'motivated by a desire not to repeat the mistakes of the past' (Currie, 2003, p.60). Indeed, if there is one right contained in *The Constitution* that symbiotically connects all other rights, it is the right of access to information. The control of information and enforced secrecy was at the heart of the anti-democratic character of the apartheid system (TRC, 1998a, Vol.2, Chp.2, paras.10-19), precisely because public access to information is the life-blood of any meaningful democratic participation. Without the right of access, the affirmation, and more concretely the realisation, of all other rights is fundamentally compromised.

¹ All of these, and many other, basic rights are to be found in Chapter 2 ('Bill of Rights'), *The Constitution of the Republic of South Africa* (Act 108 of 1996), pp.6-24.

It took another four years after the adoption of *The Constitution* for the South African government to pass enabling legislation in the form of the 'Promotion of Access to Information Act' - PAIA - (Act No.2 of 2000). While many 'civil society' activists and organisations, as well as the Truth and Reconciliation Commission (TRC), that had played an integral role in pushing for, and shaping, access to information legislation were disappointed at the omission of several key recommendations (TRC, 1998b, Vol.5, Chp.8, paras.106-107; Duncan, 2003)², the passage of PAIA signalled the next step forward in moving from affirmation to realisation. In his remarks to Parliament on the occasion of the passage of PAIA, Minister of Justice and Constitutional Development, Penuell Maduna, foreshadowed the expectations that accompanied the legislation: 'We are turning on the light to bring to an end the secrecy and silence that characterised decades of apartheid rule and administration' (SAPA, 25.1.2000). Not surprisingly then, PAIA was warmly welcomed by most South Africans³ (or at least those who knew about it), especially in light of the possibilities for using PAIA to access information around apartheid-era violations of human rights that had been kept from the South African people for so long.

It is now three years since PAIA became South African law, nine years since the end of apartheid. As this report will show, despite the generalised goodwill surrounding PAIA and the spirited activism of a select group of civil society organisations⁴, there are a host of serious problems with the concrete realisation of the right of access to information. More specifically, the much-hoped for, post-PAIA 'dividend' of access to information relating to both apartheid-era and more contemporary (if differentiated) human rights violations, has failed to materialise in any meaningful and systematic way. A prime example of this, as the report will detail, is the continued inaccessibility of the TRC archive and related security and military records held by the South African Police Services (SAPS) and the South African National Defence Force (SANDF). A range of new challenges, and opportunities, now present themselves and for these to be overcome and taken forward respectively, the role of civil society will be paramount.

If the role of civil society in realising the right of access to information is going to be effective in both the short and longer-term, it needs to be informed by a comprehensive overview of the 'state' of access to information in South Africa with particular focus on the implementation of PAIA. Given the centrality of the right of access to information in gaining knowledge of, and confronting, past (and ongoing) human rights violations, as was so clearly evident in the work of the TRC, it is also essential that the challenges around, and opportunities for, the preservation and accessibility of such information be an integral part of such an overview. This report seeks to provide the above.

² The specific recommendations of the TRC will be discussed later in this report. Duncan, one of the 'civil society' participants in shaping the Open Democracy Bill (later changed to PAIA), indicates that PAIA did not include the recommendations for 'information courts' or for regular and open meetings between civil society representatives and government departments, amongst others. For an outline of the drafting process of the Open Democracy Bill see: J. White (1998), 'Open Democracy: Has the window of opportunity closed?', *South African Journal on Human Rights*, 65.

³ Parliamentary representatives of the opposition Democratic Alliance voted against the passage of PAIA.

⁴ For example – the South African History Archive, the Open Democracy Advice Centre, The Centre for the Study of Violence and Reconciliation and the Freedom of Expression Institute. In the course of this report, selected activities of these organisations around access to information will be profiled.

Section One offers a critical synopsis of the legislative context within which the right of access to information in South Africa is framed, highlighting those specific areas of legislation that are particularly problematic. Section Two provides an evaluation of the implementation of PAIA with specific reference to the activities (or lack thereof) of government bodies. In Section Three, specific focus is given to issues around accessing the TRC archive and information related to human rights violations. Section Four highlights the broader challenges and opportunities presented by the contemporary 'state' of access to information. Section Five offers a series of recommendations linked to specific strategies and priorities that might be adopted by civil society organisations for the purposes of lobbying and advocacy work around realising the right of access to information in South Africa and more specifically, to preserving and accessing information relating to human rights violations.

The Legislative Context

Throughout its modern history, South Africa can justifiably claim that there are few countries that have matched its legislative output. Prior to 1994, the necessities of apartheid demanded a maze of discriminatory and oppressive legislation just to keep the system operable. Since 1994 there has been another round of legislative production, this time directed predominately at providing legal substance to the progressive democratic constitution of one of the youngest constitutional democracies in the world. There are numerous pieces of legislation that, to varying degrees, deal with issues of access to information.

The Promotion of Access to Information Act (PAIA)

One of the most far-reaching pieces of legislation recently passed is the Promotion of Access to Information Act 2 of 2000 (PAIA). The purpose of PAIA, in its own words, is: 'To give effect to the constitutional right of access to any information held by the state and any information that is held by another person and that is required for the exercise or protection of any rights'. PAIA, in recognition of the connection between the right of access to information and democratic accountability and transparency, makes a direct link between the 'secretive and unresponsive culture in public and private bodies' during the apartheid-era and the 'abuse of power and human rights violations' (Republic of South Africa, 2000, p.2).

PAIA is one of the few pieces of access to information legislation in the world to apply to both public and private bodies as well as to records, 'regardless of when the record came into existence' (Section 3, p.9). It also applies 'to the exclusion of any provision of other legislation that prohibits or restricts the disclosure of a record ... and is materially inconsistent with an object, or a specific provision of this Act' (Section 5, pp.9-10).

PAIA sets out a wide range of enabling provisions for information requesters, one of the most important being that a requester's right of access is not affected by 'any reasons the requester gives for requesting access' or by the relevant information officer's 'belief as to what the requester's reasons are ...' (Section 11, 3, p.12).

There is also an expansive list of the duties and responsibilities of public and private information holders, a key feature of which is the requirement to publish manuals containing comprehensive details of how to access information (Sections 14, p.12; and 51, p.29) as well as provide categories of records that are automatically available (Sections 15, p.13; and 52, pp.29-30). PAIA also provides for the Human Rights Commission to play a major role in assessing, monitoring and implementing various aspects of the legislation (Sections 83, 84, pp.41-42).

Since its passage, PAIA 'has become the principle legal instrument defining and delineating the scope and content of the right to access to information, establishing mechanisms and procedures for enforcement' as well as providing limitations of the right (Currie, 2003, p.66)⁵. Like South Africa's constitution, PAIA has been widely lauded both at home and abroad. It is, by international legislative standards, a fairly radical law, or as one archivist called it, 'the golden standard' (Harris, 2003b).

Despite its progressive and expansive content however, there are several aspects of PAIA that present serious barriers to the full realisation of the right of access to information:

- PAIA provides a limited right of access to information since it reduces access to records only, leaving out all other types of information that are not contained in a record. This is in direct contradiction to Section 32 of the right of access as contained in *The Constitution*, which states that, 'everyone has the right of access to any information' (held by either public or private bodies).
- According to Section 27 of PAIA, 'if an information officer fails to give the decision on a request for access' within the prescribed 30 day period, then such a request is deemed a refusal. This allows holders of information the option of simply ignoring certain requests and gives lie to one of the main objects of PAIA which is 'to promote transparency, accountability and effective governance of all public and private bodies ...' (Section 9, e, p.11).
- The effective carrying out of the crucial functions given to the Human Rights Commission (HRC) is wholly dependent on the fiscal goodwill of the government (Section 85, p.42). This has the potential to seriously undermine both the (envisioned) independent role of the HRC vis-à-vis the monitoring and protection of all human rights (and associated violations) as well as the efficacy of its evaluation and monitoring roles provided for in PAIA.
- PAIA sets out several grounds for the refusal of a request for access to records in both public and private bodies (Sections 33-45, pp.21-27; and 62-69, pp.33-35). One of those grounds for refusal prescribes the 'mandatory protection of commercial information of third party' (Sections 36 and 64). This provision has the potential to prevent access, on the grounds of 'commercial confidentiality', to information emanating from the privatisation and/or

⁵ There have been numerous papers written detailing the full content of PAIA and all the various processes for access contained in PAIA. See Currie (2003) as well as papers presented as part of the Freedom of Expression Institute's, The Promotion of Access to Information Act Workshop: Maximising Access to Information and Dissemination, held at the Parktonian Hotel, Johannesburg, 8-9 June 2001.

corporatisation initiatives of the government that fundamentally affect the realisation of certain socio-economic rights (for example, contract records setting out the operational requirements of public-private partnerships in the area of water provision)⁶.

- In relation to the various grounds for refusal, there are no specific guidelines contained in PAIA for an information officer to be able to make a distinction between those that are mandatory and those that are optional. This applies, most importantly, to the optional grounds for refusal associated with information that might 'cause prejudice' to the defence, security and international relations of the Republic of South Africa and that cover related records 'held for the purpose of intelligence' (Section 41, p.24). This leaves the field of interpretation wide open for refusing access to centrally important spheres of information, including information directly connected to human rights violations.
- Section 12(a) states that, 'this Act does not apply to a record of the Cabinet and its committees'. The exemption of Cabinet records effectively renders the right of access to major policy decisions and processes of government inaccessible to the public (for example, state policy on reparations). This is completely inconsistent with the constitutional right of access to 'any information' held by a public body. Human rights in general cannot be exercised fully when access to the key decisions and processes that provide the foundation for both legislation and administrative action by government is denied.
- While PAIA provides for the mandatory disclosure of information in the 'public interest' (Sections 46, p.27; and 70, p.35), the applicability of such a public interest override is incredibly narrow. The stated grounds for mandatory disclosure are only applied to records that would reveal evidence of illegal acts and/or 'serious public safety or environmental risk'. There is also no clear guide as to what the 'public interest' might actually be.

Other legislation impacting on access to information

Section 5 of PAIA states very clearly that PAIA overrides all provisions of other legislation 'that prohibits or restricts the disclosure of a record ... and is materially inconsistent with an object, or a specific provision of this Act'. On closer inspection of other, related pieces of legislation though, things are not so clear-cut. As is always

⁶ There is an ongoing case that is confronting this exact dilemma. Wits graduate student Ebrahim Harvey, in the course of research for a Masters degree, attempted to use PAIA to access contract records between the Johannesburg Water Company (majority owned by the City Council of Johannesburg) and Suez Lyonnaise, a private water corporation that entered into a business partnership with the Johannesburg Water Company for water management and provision. His request was refused on the grounds of 'commercial confidentiality' and a subsequent internal appeal was also turned down on the same grounds. Harvey, with the assistance of the Freedom of Expression Institute, has appealed the refusal in a court of law. PAIA makes provision for both internal appeals and appeals to a court of law in Sections 74-82, pp.37-41. The information above was garnered from several informal discussions that took place between the author and Ebrahim Harvey in the course of research for this report.

the case with potentially conflicting pieces of legislation, the real problem resides in the field of interpretation and practice.

Protection of Information Act 84 of 1982 (PIA)

This apartheid piece of legislation remains on the statute books. As could be expected, the approach to the protection and dissemination of information contained in PIA is informed by the demands of an authoritarian and secretive apartheid state. As such, the provisions of PIA for classification and de-classification of government information run completely against the grain of the openness and transparency of such information that informs PAIA. As long as PIA remains law, there will be constant conflict between its 'regime' of information protection and PAIA's 'regime' for information disclosure and accessibility despite the stated intention of the override clause in PAIA. Such conflict is only made more difficult to deal with given that the main reasons informing classification/declassification in PIA rest on highly contested grounds such as 'national security' that are also contained in PAIA (as grounds for refusal) but under a wholly different information 'regime' informed by notions of democratic accountability and access.

The National Archives of South Africa Act of 1996 (NASA)

One of the areas of potential confusion between NASA and PAIA centres on the time periods prescribed for the automatic release of information. NASA provides that only archival information that is more than twenty years old should be made automatically available to the public, but provides the National Archivist with the power to identify records that might be made available sooner (with consideration for protection of privacy). The access provisions of PAIA provide for no such time limitation on access to information. In PAIA, it is left up to the public and private bodies that hold the information to decide, and then make publicly known through their respective information manuals, what information (regardless of when it was produced/recorded) is automatically available (Sections 14, 15). This contradiction presents problems in interpreting which access provisions are to be followed by holders of information and who is ultimately in charge of making decisions about the availability of 'sensitive' information. As the National Archivist, Dr. Graham Dominy, has pointed out: 'It's been quite difficult for us to actually match the two - the (interpretation of the) provisions of the two acts is a considerable challenge' (Dominy, 2002).

Another area of uncertainty relates to the delegated powers of public officials from specific departments in enforcing provisions of the two pieces of legislation. NASA provides wide-ranging powers to the National Archives (which is 'housed' under the Department of Arts and Culture, Science and Technology) to approve record-management systems of government bodies and authorise the disposal of records – Sections 11(2) and 13(2)(a). PAIA (which is 'housed' under the Department of Justice and Constitutional Development - DACST) privileges the role of DACST in overseeing South Africa's information 'regime'. This presents clear problems of inter-departmental cooperation in enforcing legal provisions relating to information access as well as respective accountability for decisions taken.

Minimum Information Security Standards of 1996 (MISS)

MISS is an official government policy document (approved by Cabinet) dealing with information security. According to MISS, the security standards set out must be maintained by all government institutions that handle sensitive and/or classified material as 'this will ensure that the national interests of the Republic are protected'

(Preface). MISS provides motivation for the application of its set of security standards by arguing that, 'the mere fact that information is exempted from disclosure (from PAIA in this case), does not provide it with sufficient protection' (Introduction, p.1). It then proceeds to list four categories of classification (restricted, confidential, secret and top secret) that must inform the handling of 'sensitive' information.

This raises the issue of serious conflict with the access intent of PAIA since the continued application of MISS to dealing with 'sensitive' information (much like PIA) effectively pre-empts, through a non-transparent and internalised process of decision-making⁷, access rights that are clearly set out under PAIA. In other words, it creates a 'double jeopardy' scenario in relation to 'sensitive' information, particularly as applied to accessing information dealing with human rights violations.

Further, it is unclear to what extent MISS policies and the work of the recently formed inter-departmental committee set up to deal with issues of classification/ declassification, will coincide or contradict each other. Without such clarity, decisions around classification and declassification will continue to remain in the hands of the National Intelligence Agency (NIA). This is all the more worrying for those seeking access to 'sensitive' documents dealing with human rights violations, given that the National Intelligence Agency (NIA) has just been granted a five-year exemption from the disclosure of information requirements of PAIA (Terreblanche and Bell, 2003).

Legal Deposit Bill of 1997 (LDB)

This Bill, similar to the National Archives Act, is housed under the Department of Arts and Culture, Science & Technology (DACST) and provides legislation governing deposits of all published materials in the Republic of South Africa with the relevant state institutions (for example, national archives and libraries). The one area of major concern is that LDB allows the 'head of a place of legal deposit' (on the recommendation of an inter-departmental Legal Deposit Committee) to, 'dispose of, omit from catalogues, inventories and a national bibliography or impose restrictions on access to certain categories of documents' - Section 7(5). This allows yet another layer of potential censorship over, and classification of, 'sensitive' information that is deposited with, for example, the National Archives or one of the state libraries. The access rights contained in PAIA are thus rendered less meaningful given that this clause in LDB can be potentially used to 'hide', and even dispose of, established records of information that are already in the national record-keeping system.

Protected Disclosures Act 26 of 2000 (PDA)

The basic thrust of PDA is to put in place legal protection for those employees (in both public and private sectors) who might disclose information regarding unlawful or irregular conduct by their employers or other employees of their employers. In relation to PAIA there are two areas of concern. Given the narrow applicability of the public interest override in PAIA (see relevant bullet point above on PAIA), the grounds for disclosing information around 'irregular conduct' are left, once again, in

⁷ MISS states that, 'all amendments to this policy will be issued by the National Intelligence Agency' (NIA) – (Introduction). The MISS has only recently been 'declassified' itself as a result of an access request, using PAIA, from the South African History Archive.

the netherworld of official interpretation. Thus, while a 'whistle blower' would be protected under PDA for internally disclosing such information, there is no legal imperative for that information to then be disclosed publicly under PAIA. Potentially crucial information on the conduct of officialdom could thus be 'contained' within the associated (public or private) body without any compunction for public disclosure.

Section 9(3)(d) of PDA provides an exception clause to protected disclosure by an employee, related to a 'breach of the duty of confidentiality of the employer towards any other person'. Combined with the 'commercial confidentiality' (grounds for refusal of access) clause in PAIA, this exception presents a double barrier to the right of access to information, under the rubric of 'confidentiality'. The potential implications for any disclosure of, and public access to, commercially 'sensitive' information are extremely negative.

Promotion of Equality and Unfair Discrimination Act 4 of 2000 (PEUDA)

PEUDA is designed to give effect to Section 9 of the 'Bill of Rights' – specifically, to prevent and prohibit unfair discrimination and harassment, to promote equality and eliminate unfair discrimination as well as to prevent and prohibit hate speech (PEUDA Preamble, p.2). Section 12 of PEUDA expressly prohibits the dissemination or publication of any information that 'could reasonably be construed or reasonably be understood to demonstrate a clear intention to unfairly discriminate against any person'. A clear contradiction with the provisions of PAIA arises though, if for example, someone researching discrimination disseminates such information. According to PEUDA, this person would be committing an offence but should that person not disclose the information, 'then PAIA is rendered useless' (PAIA paper, 2001, pp.8-9).

There is also a direct conflict between the general override clause in PAIA (Section 5) and the one contained in PEUDA - Section 5(2) - which states: 'If any conflict relating to a matter dealt with in this Act arises between this Act and the provisions of any other law, other than the Constitution or an Act of Parliament expressly amending this Act, the provisions of this Act must prevail' (p.6). Thus, the constitutional right of access is set against the constitutional right of equality in specific relation to associated information.

Promotion of Administrative Justice Act 3 of 2000 (PAJA)

PAJA gives effect to Section 33 of the 'Bill of Rights' – that is, 'the right to administrative action that is lawful, reasonable and procedurally fair'. A decision to grant or to refuse a request for information under PAIA is an administrative action and thus subject to the provision of PAJA. However, Section 1 of PAJA provides for exceptions to what is covered, as an administrative action, under its rubric. One of those exceptions is applied to, 'any decision taken, or failure to take a decision, in terms of any provision of the Promotion of Access to Information Act ...' – Section 1(i)(hh), p.3. This exception thus allows for the exemption, from the provisions of PAJA, of administrative decisions to grant or refuse a request for access to information under PAIA. Any accountability for the process behind, and content of, such decisions vanish. Once again, a key aspect of determining the process and scope of exercising the right of access to information is left to 'official' interpretive privilege.

PAIA: State of Implementation

After 1994, the majority of South Africans had huge expectations of radical societal change. When *The Constitution* was passed in 1996, those expectations soared even higher. South Africa's Constitution was rightly hailed as one of the most progressive in the world. The inclusion, in the 'Bill of Rights', of both socio-economic and developmental human rights (in addition to political and civil rights) was seen, by most, as a precursor to fundamental changes in the way in which public institutions would be managed as well as in the character and content of democratic representation and participation. As has most often been the case with transitions from dictatorship and authoritarian regimes to popular democracies though, the gap between expectations and the realities of practical change is a difficult one to bridge.

Nowhere more has this been the case in South Africa than as applied to the gap between the content of 'paper' legislation and the content of practical implementation of that legislation. PAIA stands out as a classic example of just how far South Africans must still travel to turn the corner from affirmation (of a human right) to realisation. It has now been over three years since the introduction of PAIA, two years since it came into operation. This might seem to be a relatively short period within which to transform the information 'regime' of a country still recovering from the disastrous legacy of apartheid. Nonetheless, it is enough time to be able to critically assess the 'state' of implementation of the main piece of legislation that carries with it the possibilities of such transformation. What follows is a critical assessment of a range of key factors directly related to implementation of PAIA.

Awareness and Education

South Africans 'have been shaped by generations of an absence of the right to information' (SAHA, 2002). This had made it all the more difficult to 'embed' widespread awareness of, and to pursue meaningful education about, a radical piece of legislation like PAIA. Even so, the track record on both fronts so far has been abysmal.

One of the major weaknesses that have surrounded the implementation of PAIA is the assumption that public and private officials would somehow, automatically, be aware of, and educated about, PAIA. Indeed, there are no provisions contained in PAIA for specific awareness raising and educational programmes directed towards either public or private officials. The only provision made in PAIA is for the Human Rights Commission (HRC) 'to encourage public and private bodies to participate in the development and conduct of programmes' that HRC is directed to undertake amongst the general public – Section 83(2)(b), p.41. It should therefore come as little surprise that two years on, the state of awareness and education around PAIA amongst 'officialdom' is extremely poor.

Confirmation of this is provided by the Open Democracy Advice Centre (ODAC) - one of the civil society organisations created to advance the right of access to

information. In 2002, ODAC conducted a survey of public officials to determine the extent of implementation of PAIA. Amongst other things, the survey found that almost fifty percent of all public officials had not even heard of PAIA (Tilley, 2003). Similarly, the experiences of organisations such as the South African History Archive (SAHA), which has been at the forefront of making access to information requests using PAIA, tell a sorry tale of generalised ignorance amongst public officials of some of the most basic provisions and requirements in PAIA (Harris, 2003b). The two exceptions to this have been the Department of Defence (DoD) and the South African Police Service (SAPS), both of who have instituted department-wide awareness and educational programmes on PAIA (Alexander, 2003; Geldenhuys and Crooks, 2003).

The track records of the two public institutions most responsible for overseeing the implementation of PAIA - the Department of Justice and Constitutional Development (DoJ), and HRC – in the field of awareness and education, do not inspire much confidence either. PAIA expressly mandates HRC to ‘develop and conduct educational programmes to advance the understanding of the public, in particular disadvantaged communities, of this Act and of how to exercise the rights contemplated in this Act’ – Section 83(2)(a), p.41. HRC is also given the responsibility of producing a ‘guide on how to use’ PAIA – Section 83(1)(a), p.41.

However, besides a few advertisements in the mainstream media, the holding of two workshops (mainly for those who already are familiar with PAIA) and some public training sessions at their offices in Johannesburg, HRC has failed even to partially fulfil that mandate.⁸ Likewise, DoJ undertook a very limited awareness programme during 2002, consisting of advertisements, pamphlets and radio slots but have made no assessment of its effectiveness, ostensibly due to ‘cost implications and time constraints’ (Porogo, 2002). There is little evidence to show that any kind of concerted attempt by either DoJ or HRC (nor any other public body) has been made to conduct relevant programmes at the level of provincial, and even less so local, government. It is a damning indictment, given that these are the levels of government that most ordinary South Africans are most likely to utilise in any attempt to exercise their right of access to information.

While civil society organisations have no legal mandate under PAIA to carry out awareness and educational initiatives, the few who have been active in the field of access to information have gone some way in filling the space ‘left’ by those who are mandated. ODAC has run educational programmes with the National Community Based Paralegal Association and has also assisted other community-based organisations with filing PAIA requests, particularly Khulamani. FXI has run several workshops on the PAIA and has provided some assistance to community activists for PAIA requests. SAHA, through its extensive and well-publicised programme of filing

⁸ In mitigation, the HRC points out that their inability to conduct widespread awareness and educational programmes has been severely hampered by the failure of public and private bodies to submit their information manuals to the HRC, without which the HRC has been unable to produce its PAIA Guide (as required by PAIA). The argument of the HRC (which is highly debatable) is that they must prioritise full compliance with the provisions of PAIA before they can launch into successful implementation. As will be discussed further in this Section, the lack of financial resources has also had a negative impact. Information derived from interview with Mothusi Lepheane (2003, 22 April), Manager, PAIA Unit of the HRC.

PAIA requests, especially around access to the TRC archive and information on human rights violations, has generated sizeable public awareness of both the PAIA and more general issues of access to information.

As for the private sector, there is scant information available to ascertain the extent of any awareness and education programmes undertaken. What evidence there is would strongly suggest that the main concern of the private sector has been associated with the cost and time implications of producing information manuals (Temkin, 2003).

Human Resource Development

For all of those South Africans who have dealt with the PAIA, in one way or another, it is clear that it is one of the more complex and technical pieces of legislation that has come into operation since 1994. Understanding the language used in PAIA is difficult enough, but getting to grips with its mountain of technical details and administrative processes, and knowing how to use/implement them effectively, is a herculean task that requires extensive knowledge and training. In other words, the successful implementation of PAIA, a process that necessarily must involve both 'officialdom' and the general public, requires the conscious and systematic development of human resources beyond awareness and education programmes.

Government departments have the greatest responsibility for human resource development to ensure the effective implementation of PAIA. Without knowledgeable and well-trained personnel throughout government departments, who understand both the content and processes of PAIA, the 'promise' of realising the right of access to information for ordinary South Africans will be stillborn. A critical synopsis of the state of human resource development within government since the operationalisation of PAIA reveals, for the most part, a public sector that remains wholly unprepared, under-equipped and under resourced.

The two government departments at the heart of successful implementation of PAIA –DACST and DoJ – do not appear to have put in place any systematic and sustained training programmes in place in the two years since PAIA came into operation. The approach adopted has rather been one of setting up institutional frameworks required under PAIA (for example, appointment of deputy information officers and intra-departmental 'information' units/committees) to deal with the procedural aspects of information requests that rely on the 'expertise' and commitment of existing personnel, most of whom are already overburdened with excessive responsibilities (SAHA, 2002, p.7). While this approach might qualify as adequate for the purposes of basic institutional requirements set out in PAIA, it does very little to capacitate a range of public officials across the department who are at the 'coalface' of dealing with the general public.

When asked what the DoJ had done over the last two years in terms of human resource development, the department's National Deputy Information Officer indicated that a special unit/office for dealing with requests for access to information had been formed and a workshop involving other public bodies had been held to assist in that process. Besides these measures, it was indicated that the DoJ had engaged the Justice College (during 2002) to conduct training for all government

departments in the implementation of PAIA. However, the training had ceased after a short period because the DoJ realised that the PAIA 'was not their (the Justice College) area of expertise' (Porogo, 2002). There is no indication that any other sustained training initiatives have been undertaken since then.

The generalised failure in the area of human resource development on the part of the DoJ is all the more worrying, given that judges and magistrates are relied upon, under PAIA, to interpret and adjudicate legal appeals of refused access requests. Since such legal appeals are, at present, the only avenue (after departmental refusal) for requesters to pursue their rights of access, it is imperative that the judiciary undergo comprehensive training on PAIA⁹. In the absence of an informed and capacitated judiciary, the right of access to information becomes extremely limited.

Both DoJ and DACST (National Archives) point out that a lack of financial resources (or what officials like to call working within 'existing budget constraints') has hampered their efforts to conduct systematic training and employ extra personnel dedicated to the implementation of PAIA (Porogo, 2002; Dominy, 2002). However, this only partially explains the lack of human resource development in these departments given that two other government departments – DoD and SAPS – appear to have successfully managed the challenge. While few would argue against the need for additional dedicated funding, evidence gathered as part of ODACs survey on PAIA implementation shows that most government departments have not even set aside a training budget (Tilley, 2003). This is obviously not the case with SAPS. In explaining its programme of implementation, SAPS noted that:

The provisions of the Act had a severe impact on the administrative functioning of the Service. It requires informed deputy information officers who are able to assist requesters and who understand the legal process provided for in terms of the Act. The only manner in which the implementation of the Act could be done effectively, was to provide training ... (South African Police Service, 2003, p.4)

Subsequently, SAPS has conducted comprehensive training programmes across the department and in every region/province that have included hundreds of deputy information officers and several thousand 'managers' - for example, station commissioners, unit commanders and so on (SAPS, 2003, pp.4-6). Although the training programmes of DoD have not been as extensive, it is clear that DoD personnel have been well trained and capacitated in relation to implementing PAIA (Department of Defence, 2003).¹⁰

The other public body central to effective implementation of PAIA – HRC – suffers from the same 'disease' that afflicts most government departments. While HRC has

⁹ An indication of the huge gap in communication and understanding around implementation of PAIA, amongst public bodies, is the contention by the PAIA Unit at HRC that the judiciary is well prepared for challenges around PAIA. The reason given is that 'the Justice College has been offering a lot of course to the DoJ'. Interview with Mothusi Lepheane (2003, 22 April), Manager, PAIA Unit of the HRC.

¹⁰ It should come as no surprise then, that the experiences of SAHA in dealing with DoD and SAPS in relation to access requests has been far more satisfactory than with the DoJ and DACST (National Archives). SAHA, 2002, pp.2-4.

run a limited number of training sessions from its home base in Johannesburg, it has neither the personnel nor the financial resources to carry out fully its implementation mandate in relation to human resource development¹¹. Nonetheless, there are those who argue that, despite being under-funded in direct relation to work around PAIA, the HRC has not utilised its resources well and has not employed the right people to do the job (Gunn, 2003).

When it comes to the private sector there is simply not enough information available to provide a serious assessment. It is obvious that larger businesses are adequately resourced and capacitated to carry out training programmes for their management but the degree to which such training on PAIA has taken place is impossible to gauge without a comprehensive survey. The same applies to civil society organisations given that only a handful have been, up until now, actively involved in campaign and advocacy work around PAIA. What is clear in relation to civil society organisations though, is that most – with the exception of a few well-resourced NGOs - have neither the human or financial resources (as individual organisations) to have dedicated human resource development programmes around PAIA.

Given the general failure on the government side though, it is already becoming apparent that progressive civil society is being ‘forced’ to take up the slack. A good example of this is related by Shirley Gunn from the Khulumani Support Group, who indicates that had it not been for the human and financial resource assistance provided by ODAC, Khulumani would never have even been able to begin the formal process of accessing key information around the issue of reparations (Gunn, 2003).

Management of Records

One of the most over-looked but most crucial elements in the effective implementation of PAIA is the management of records. As one public official put it: ‘The extent or the time and energy spent on finding pieces of information requested, is in exact correlation to the adequateness, the efficiency and the efficacy of your filing system ...’ (Geldenhuys and Crooks, 2003). Given that PAIA only covers information that is recorded, the realisation of the right of access to that information requires that people know what records are in the custody of public and private bodies, that the records are properly kept and that they are readily available. On all three fronts, there is a long way to go.

Section 14 of PAIA provides for the publication of information manuals by public bodies that contain, amongst other institutional information, ‘sufficient detail to facilitate a request for access to a record of the body, a description of the subjects on which the body holds records and the categories of records held on each subject’ – Section 14(1)(d), p.12. There is also a similar section directed to private bodies (Section 51). The production and availability of these manuals are central to exercising the right of access but so many extensions have been granted by the Minister of Justice and Constitutional Development (Penuell Maduna), that few are

¹¹ See the PAIA section on HRCs website <http://www.hrc.org.za/paia> for a description of the training sessions. Also, Section 85 (p.42) of PAIA directs HRC to finance its mandated functions from ‘moneys appropriated by Parliament to that Commission for that purpose’.

available¹². The latest extension gives bodies until August 2003 to submit their manuals.

A HRC discussion document presented at a PAIA workshop in late May 2003, indicated that by the original deadline of August 2002, only 14 public bodies and 134 private bodies had submitted their Section 14 manuals to HRC - the institution to which all manuals must be sent (HRC, 2003, p.5). The PAIA Unit of HRC has said that it expects over five hundred manuals from public bodies and up to one million from private bodies (Lepheane, 2003). Due to the delay in submission of manuals and the complete lack of any associated sanction, the mandated monitoring role of HRC is effectively rendered null and void

What this clearly indicates is that the management of records in most public bodies (and to a lesser extent, in private bodies) is in a general state of chaos. If records were properly kept and thus readily available, there would have been few problems with compiling Section 14 manuals and making them available over a period of two years. In turn, the 'knock on' effect of this chaotic state of records management impacts directly on the public's right to know what records are in the possession of public and private bodies and, of course, to access those records. This is particularly alarming in relation to 'sensitive' records on human rights violations. The longer the delay in implementing proper records management, the more chances there are that such records will become inaccessible or simply 'get lost'.

Besides the disastrous, longer-term effects on the availability and accessibility of crucial information that is accruing from inadequate records management, one of the more immediate effects are serious delays in responding to requests under PAIA. Almost every civil society organisation that has submitted requests over the last two years has a story to tell about the amount of time taken by public bodies to respond. While there certainly might be some requests that are particularly extensive and/or complex – thus requiring more time on the part of public bodies to deal with the request – the bottom line is with proper records management in place any request should be easily dealt with in the thirty day period prescribed by PAIA.

SAHA waited over six months for a response from the National Archives to fairly simple requests filed as part of their project to access the TRC archive and other security establishment records. A response to one request to DoJ took even longer, even though the DoJ National Deputy Information Officer has claimed that the entire request process takes only seven days (Porogo, 2002). In contrast, SAHA's requests to the South African National Defence Force (under DoD) were dealt with in a 'highly professional' manner (SAHA, 2002) – a clear confirmation of the importance of records management to effective implementation of PAIA and to the more general right of access to information. The little evidence that has been garnered so far – from the few requests made - would strongly suggest that the situation at the level of provincial and local government is even worse (SAHA, 2002b)¹³.

¹² The DoJ promised publicly in late 2002 that they would conduct a review of compliance with the PAIA, in specific relation to Section 14 manuals, to try and 'establish reasons for non-compliance' (Temkin, 2002). Nothing of the sort ever took place.

¹³ For example, SAHA put in seven requests to the Limpopo Provincial Government during 2002, all of which continue to be either pending or noted as an 'inadequate response' (SAHA, 2002b)

Decision Making and Accountability

Effective implementation of PAIA requires that the decision making of public officials responsible for the preservation, recording and dissemination of information, as well as the politicians who take ultimate political responsibility for realising the right of access, is accountable to the South African citizenry. In this regard, PAIA provides for a two-tiered appeals process – internal and court appeals – for requesters to pursue in the event of refusal of access (Sections 74-82). However, the experiences of those who have utilised this appeals process indicates that they are wholly inadequate as a means of ensuring accountability and thus meaningful implementation of the right of access to information.

Leaving aside the perennial problem of excessive time delays (that seem to apply in equal measure to the appeals process), the inadequacies of the prescribed internal appeals process centre around who is actually responsible for making decisions on requests and the inherent lack of objectivity in the process. PAIA states that a requester may lodge an internal appeal ‘against the decision of an information officer of a public body ... with the relevant authority’ – Section 74(1)(a)(b), p.37. What is not stated clearly though, is the identity of the ‘relevant authority’. The logical assumption is that the ‘relevant authority’ is the Minister in charge of the ‘relevant’ department, but confusion around this is evidently widespread enough for the head of the Parliamentary Portfolio Committee on Justice to have to aggressively remind a recent gathering of PAIA ‘experts’ that this is the case¹⁴. If those in the ‘know’ are not completely sure then how are ordinary citizens supposed to know who to hold accountable?

Coupled to this ‘grey’ area of internal departmental accountability is the reality that the internal appeals process involves exactly the same officials and politicians that made the decision to refuse a request in the first place. It is akin to a priest confessing to him/herself. The end result is as predictable as it is unfair – that is, there is no effective internal accountability for decisions taken¹⁵. The possibilities of securing accountability through the second tier appeals process that the PAIA provides for – a court of law – then becomes wholly dependent on the requester’s ability to either access organisational assistance or to pay what will inevitably amount to sizeable legal fees. Like most everything else in our society, the right of access to information then becomes a commodity. In the appropriately ironic words of one access to information activist: ‘It’s not about the cost of information, it’s about the cost of justice and the cost of access to that’ (Tilley, 2003).

There are two other ‘implementation’ areas related to decision-making and accountability that have seriously impacted on the right of access to information, especially when applied to accessing information on human rights violations: classification procedures and exemptions from the provisions of PAIA. As alluded to in the section on legislation, current decision-making around the classification/

¹⁴ Remarks by Advocate Johnny de Lange (Head of the Parliamentary Portfolio Committee on Justice) at HRC PAIA Indaba, Parktonian Hotel, Johannesburg, 22-23 May 2003.

¹⁵ Nowhere has this been more appropriately experienced than with Khulumani’s long-suffering attempts to access the government’s policy on reparations. After waiting three months for a response (that did not come) to their initial request, Khulumani launched an internal appeal. Two months later they had received no response to the appeal and were thus forced to institute a court appeal. Almost a year later and Khulumani is still waiting for justice (Gunn, 2003).

declassification of 'sensitive' information is cocooned from any meaningful public accountability, regardless of the 'openness and transparency' intent of PAIA. The government can effectively 'cut us off at the pass' irrespective of an appeals process that 'might provide possible access to some things' (Pigou, 2003).

The experiences of SAHA in attempting to access the 'missing' TRC files (which will be dealt with in the next section) continue to show that there can be no meaningful talk about moving towards the 'implementation' of PAIA until the issue of classification/declassification is confronted head-on. Indeed, the 'talk' in government circles is of a move to allow the transfer of 'sensitive' documents to the NIA for review and classification (Terreblanche and Bell, 2003). If this is allowed to happen then the possibility exists that decisions relating to virtually all 'sensitive' information on human rights violations and security, military and intelligence matters would be taken outside the purview of any kind of public accountability and access for the foreseeable future.

Section 12 of PAIA allows for exemptions (from the provisions of the PAIA) for, 'the Cabinet and its committees ... the judicial functions of a court, special tribunal, judicial officer ... (and) an individual member of Parliament or of a provincial legislature'. While debate continues to rage around the potential unconstitutionality of exempting the 'Cabinet and its committees', unilateral decisions are either being taken or contemplated on further exemptions for other public bodies. Just recently, DoJ Minister, Penuell Maduna announced that the NIA had been given an exemption, until 2008, from disclosing what information it holds (op.cit.). The partially government owned parastatals – ESKOM, TELKOM and ISCOR – have all intimated over the past year that they would be seeking exemptions as well¹⁶. Even the Reserve Bank recently made public noises about seeking an exemption so as to prevent the public from gaining access to 'confidential' information about banks (Loxton, 2003).

Without some degree of accountability, decisions granting further exemptions will no doubt gather pace. Huge amounts of information would simply disappear from the PAIA radar screen and make a mockery of the constitutional right of access to 'any' information. If this is allowed to happen then South Africa would be moving directly back into the apartheid days of an information laager where a right of access is turned into a right of refusal.

Accessing the TRC Archive and related information

When looking back at the late 1980s and early 1990s South African 'transition' from apartheid to democracy, it becomes clear that one of the main 'prices' that was paid in the final push for political freedom was the systematic destruction of the majority of

¹⁶ ESKOM, in a recent dispute with the National Union of Mineworkers, responded to a Labour Court order for it to disclose information on the salaries of its executives by publicly announcing that it would only hand over the information if the details would be 'treated in strict confidence' ('Eskom wants...', 2003).

apartheid-era information on human rights violations. Chapter 5 of the TRCs 'Report' summarises what took place and the 'price' paid:

The former government deliberately and systematically destroyed state documentation over a number of years. This process began in 1978, when classified records were routinely destroyed, supposedly in order to safeguard state security. By the 1990s the process of destruction of records and documents had become a co-ordinated endeavour, sanctioned by the Cabinet, with the aim of denying a new government access to incriminating evidence and sanitising the history of the apartheid era (TRC, 1998b, para.106, p.226)

Despite this officially sanctioned information 'genocide', it became obvious during the work of the TRC that substantial amounts of apartheid-era information had not been destroyed. For example, investigators working for the Goldstone Commission in 1992 inadvertently stumbled into the offices of the Directorate of Covert Collection (a body that no one seemed to know even existed up until then) and found themselves surrounded by loads of information that had survived the information bloodletting (Bell, 2003). To his discredit though (and those liberation movement politicians who knew), Judge Richard Goldstone instructed his investigators not to remove the information. To this day, there is no trace of what; in all probability was the largest concentration of surviving apartheid-era information related to human rights violations.

There were also other serious failures by the TRC itself, to allow its own investigators to independently search for surviving military records. In what can only be described as a politically motivated deal of convenience, TRC agreed with SANDF that all military records would be sifted through a 'nodal point' controlled by senior SANDF officers, something that obviously pleased SANDF Generals to no end¹⁷. This 'deal' alone probably resulted in the further destruction of massive amounts of information on the activities of the apartheid military and their specific role in the systematic violation of human rights.

Nonetheless, the work of TRC was invaluable in gathering a mountain of information on the activities of the apartheid security establishment and specific human rights violations that occurred during the apartheid years. When TRC publicly released its 'Report' in 1998, it made the following key recommendations (Sections 103-108, pp. 344-346):

On the TRC archive:

- All TRC records be transferred to the National Archives when the codicil to the Final Report is made public;
- All records should be accessible to the public unless compelling reasons exist for denying such access;

¹⁷ An undated recording of a 'panel discussion' between SADF General George Meiring and TRC Commissioners details the agreement around the 'nodal point' - 'Panel Discussion between Gen. G. Meiring of SANDF and TRC Panel' (<http://www.doj.gov.za/trc/special/forces/sandfpan.htm>)

- DoJ should make a public statement of intent to transfer archive and issue guidelines for basic access to records;
- National Archivist to refer requests for information requiring protection to DoJ – otherwise, unrestricted access be given;
- Information already in public domain (e.g. hearing transcripts, reasons for amnesty decisions, and all material available on website) be made available as soon as possible;
- Government must give the National Archives (NA) adequate resources to preserve and maintain TRC archive - NA should prepare a budget plan in this regard;
- Government should give 'special support' to NA to facilitate the creation of decentralised, nation-wide 'centres of memory' – for the benefit of those who have no access to computers.

On the destruction of documents:

- Government must provide the necessary resources to NA to implement the National Archives Act – that is, the power to inspect records of public bodies;
- NA should become an independent body so that it can function as the auditor of government record keeping;
- The Security establishment should not be allowed to bypass the operation of the National Archives Act;

On retrieving and archiving state documents:

- Minister of Safety & Security should transfer all surviving Security Branch records to NA;
- NIA and SA Secret Service should finalise securing of all documentation pre-dating 1995 in their custody – and such documentation should be subjected to appraisal by NA;
- SANDF should compile comprehensive inventory of all National Security Management System records in its custody for submission to NA;
- Transfer to NA of documentation on the Security Legislation Directorate of DoJ, security detainees, political prisoners and prisoners sentenced to death to be negotiated between NA and appropriate ministries

On responsibility:

- The responsibility for developing and implementing these recommendations, and monitoring their implementation rests primarily with DACST, DoJ and DoD (particularly the SANDF).

In the immediate years that followed the publication of TRC recommendations, the entire terrain of South Africa's information 'regime' went through a process of transformation. First, through the consultation processes around the Open Democracy Bill in the late 1990s and then through legal codification with the adoption of PAIA in 2000. The indirect effect of this transformation process, coupled to the ongoing battle between the Inkhata Freedom Party (IFP) and TRC over the TRC Final Report, was that the TRC recommendations were held in abeyance (more cynically, ignored), thus allowing for: a) the status and 'ownership' of the TRC archive to become a political football between the various government departments, particularly DoJ, NA and NIA; and b) the holders of what 'sensitive' information still remained – for example, SANDF, SAPS, NIA – to stall on the securing, assessment and transfer of such information (as outlined in the TRC recommendations) and thus have the time and space to possibly further embed and/or hide and destroy such information.

As a result of all this post-TRC political and institutional jockeying, access to the TRC archive and other information related to human rights violations (during and after the fall of the apartheid regime) has become a procedural nightmare. The right of access contained in PAIA has been turned into the pursuit of a highly contested and selective privilege, and even then only partially 'open' to those with the expertise, time, energy and resources.

Locating the TRC archive

After TRC had wrapped up its formal work, the job of transferring the archive to the National Archives (NA) should have been a fairly straightforward task. According to TRC's own recommendations, such a transfer would take place once the codicil to the Final Report had been made public. However, what should have been a matter of weeks or, at worst, months, turned into years as a result of the legal battle launched by the IFP against TRC being used as an excuse by government for delaying transfer and public accessibility to the archive. It was only in early 2003 that this matter was finalised and the codicil to the Final Report made public. The five-year delay (1998-2003) provided the space and time for the balkanisation and various 're-locations' of the TRC archive.

The first 'act' of balkanisation took place in April 1999 when the TRC Chief Executive Officer, Dr. Biki Minyuku decided unilaterally, to hand over thirty four boxes (and two folders) of 'sensitive' information to the then Minister of Justice, Dr. Dullah Omar. The boxes contained a range of information that included documents (amongst many others) on apartheid regime informers, the Civil Cooperation Bureau, the Dulcie September case, Project Coast and confidential military intelligence submissions by the African National Congress (Letter from Dr. Biki Minyuku..., 1999). While TRC insiders knew about this matter at the time, it took over three years before South Africans were able to find out what had happened to these 'missing' files, as a result of persistent access requests from SAHA, using PAIA.

In early 2001, SAHA submitted a PAIA request to DoJ - as the department that is legally responsible for the TRC archive - for a list of the 'missing' files in order to confirm exactly what records were involved (SAHA already had knowledge that the files had been 'transferred' to DoJ in 1999 and had seen a list of the files). DoJ responded - after two months - by denying that any TRC records were in their possession. When SAHA informed DoJ that they knew about the 1999 transfer, DoJ responded by saying that NIA would have to be consulted before a full response could be given. Eventually, after another seven-month delay, DoJ informed SAHA that it did not have the files (SAHA, 2002, p.4).

As was to only become clear in early 2003 - after the publication of the TRC Final Report - the files, all along, had been in the custody of NIA (at the time of the handover of the files Omar was also Minister of Intelligence)¹⁸. Yet, in a letter that the NIA Director-General, Vusi Mavimbela had written to the National Archivist in October 2000 (at the same time that the SAHA request was being processed), he denied that the files were in the custody of NIA (Letter from Vusi Mavimbela, 2000). Subsequent letters between NIA, NA and DoJ confirmed that the files were in the possession of NIA even though NA and DoJ continued to deny publicly, right up until the release of the TRC Final Report, that they knew of the whereabouts of the files (Bell, 2003b). Even worse, DoJ had refused the appeal by SAHA for access to the information on the 'missing' files, using the 'national security' grounds for refusal in PAIA but 'only because they are in the possession of the NIA' (Letter from J.N. Labuschagne..., 2002).

This 'story' of the 'missing' TRC files reveals the extent to which government departments are willing to go in order to hide the location of what they consider to be 'sensitive' information involving human rights violations. This was only further confirmed when a SAHA PAIA access request to SANDF in 2001 for apartheid security establishment records revealed that Military Intelligence had hidden thirty-eight series of files from TRC investigators (Ngobeni, 2001). What this 'story' also shows the limitations of the access provisions and procedures contained in PAIA when confronted with government officials and politicians intent on keeping such information from the South African public. Even though the location of the 'missing' files has finally been uncovered the fact remains that full access to those files continues to be frustrated. In other words, the challenge of locating 'sensitive' information is only the first step of a broader challenge of seeking the right of access - the one cannot be divorced from the other.

The saga of what has happened to the rest of the TRC archive is another 'story'. Once again, as a result of SAHA requests submitted to DoJ and NA to test the accessibility of the TRC archive using PAIA, correspondence was finally released early this year that paints a partial picture of the 'journey' of the archive since the closing down of the main work of TRC. In May 2001, officials from NA visited TRC offices in Cape Town to 'assist staff to prepare records for transfer' to NA. The officials noted at the time that large numbers of documents were being returned to the departments from which they had been originally accessed and noted that, 'they could be destroyed' (NA Report, 2001). Thus, the first indication of the process of

¹⁸ It was only in early 2003, after the publication of the TRC Final Report, that SAHA finally managed to secure the full list of the 'missing' TRC files as well as related correspondence. From SAHA's initial PAIA request, it took over two years to access this information.

transferral of the archive already reveals that (potentially) large amounts of TRC information was being 'lost', with no subsequent way of finding out the exact location of the documents, what they contained or whether they were simply being destroyed.

In August 2001, a meeting between DoJ and NIA took place to deal with the direct transfer of the TRC archive to NA. While the DoJ was tasked with handling all assets pertaining to the archive, NIA recommended that DoJ establish an inter-departmental committee to decide on disclosure of information requested under PAIA (Minutes of meeting between NIA and DoJ..., 2001). In April 2002, minutes of this 'TRC' committee – attended by representatives from DoJ, NIA and NA - reveal that although the bulk of the TRC archive resides with DoJ the 'electronic textual records are of great concern because all electronic records have not been collected and could be lost'. Other 'points of concern' included: personal computers of former TRC staff having been 'transferred to regional offices'; and 'important information could disappear' due to TRC employees not handing over all documents (Minutes of the TRC Meeting, 2002a). There is no subsequent indication of successful measures to locate and recover the various parts of the TRC archive not already in the possession of DoJ, NA or NIA.

What emerges from this 'journey' is a picture of gross mismanagement of the TRC archive involving administrative incompetence, inter-departmental 'competition' and political interference. While it is now fairly clear that most of the TRC archive is located at both DoJ and NA, there still remains serious questions as to the location and even existence of other parts of the original archive. SAHA has shown that using PAIA access requests can be partially successful in uncovering the location of some of the existing archive. But, it has also shown the extremely limited nature of realising the right of access to a body of information that rightfully belongs to the people of South Africa but that has been effectively hijacked by government officials and politicians for their own purposes and reasons.

The problem of non-disclosure and classification

'Public officials by their very nature are loathe to disclose information, so if that person is uncertain whether he [sic] may disclose the information, he [sic] would look for loopholes not to disclose the information ...' (Geldenhuys and Crooks, 2003). That is the candid view of a senior public official in SAPS describing the reality of 'officialdom's' approach to disclosing 'sensitive' information. In respect of the TRC archive and other information related to human rights violations, it is this kind of approach to disclosure that has been the rule. Thus, in addition to the serious barriers that have been erected in simply locating the archive and related information, those who want to exercise their right of access to such information are faced with a generally 'hostile' officialdom that tends to treat provisions for non-disclosure (in PAIA) 'as a shopping list for reasons to refuse information...' (Tilley, 2003).

Concrete evidence of this can be found by taking a look at the request statistics of SAHA for the period 2001-2002. Of eighty-three requests submitted to the departments that hold large amounts of 'sensitive' information (DoJ, NA, DoD, NIA, SAPS), there were twenty-nine outright refusals and thirty 'pending or inadequate responses' (SAHA, 2002b). The vast majority of these requests were either for

access to information from the TRC archive or other, related human rights violations. Likewise, the case of Khulumani attempting to access the government's policy on reparations and CSVRs access requests on political prisoners, amnesty provisions and the indemnity process have been met with refusals and/or continuing delays in response (Gunn, 2003; Pigou, 2003).

Besides the pat response that refusal and/or long-term delay is the result of the information being 'security related', in the case of the TRC archive another basis for refusal has been that the information requested is still 'administratively active'. NA has argued in this regard, that the 'incompleteness' of the TRC process has hampered access because departments 'have not received final instructions from Cabinet' (Dominy, 2003). However, there is simply no way for a requester to judge – without having to go to the High Court - whether such a rationale for refusal is grounded in genuine concern (for example, because disclosure might endanger a life), or is simply an excuse for keeping particularly embarrassing and/or damning information about certain powerful individuals or organisations out of the public's reach. Likewise, since PAIA expressly exempts Cabinet from its provisions, how can that requester even find out the real nature of the Cabinet 'instructions'?

Right from the very beginning of the TRC process there has been a systematic trend of non-disclosure by government departments and this did not change simply because PAIA came into being. Indeed, one could make a strong argument that, in the case of grounds for non-disclosure, PAIA 'actually limits the constitutional right (of access to information) rather than enabling it' (Duncan, 2003). The grounds for refusal in PAIA are open to extremely wide interpretation. Even the National Archivist admits to not being sure what the notion of 'the security interests of the state' would mean in relation to accessing information (Dominy, 2002).

Further, when it comes to making decisions on disclosure of 'sensitive' information within departments such as DoD, SAPS and DoJ, it is clear that there is a heavy reliance on intelligence officials for 'advice'. In both DoD and DoJ, NIA officials sit on the 'teams' that make the decisions on access requests under PAIA and throughout the 'journey' of the TRC archive NIA officials have been central in ensuring the lack of accessibility to the archive. While the role of NIA is defended as necessary to ensure the 'protection' of information that might undermine 'national security' or any other possible threat to the state and its 'interests', the reality is that NIA is arguably the least accountable and transparent government department and rarely has to defend its positions or decisions to anyone, least of all a requester of 'sensitive' information under PAIA.

Indeed, the role of NIA and intelligence officials in other government departments (DoD, SAPS) in policing the TRC archive and information related to human rights violations is most crucial when it comes to the process of classification. When SAHA unintentionally found out that SANDF had held back thirty-eight series of files on apartheid-era security establishment records, they also found out that those records were all classified as 'top secret' and thus inaccessible unless re-classified (Ngobeni, 2001). Similarly, in their attempts to locate and confirm the contents of the 'missing' TRC files, the (eventual) reason given for refusal by DoJ was on the grounds of 'security classification' simply because the files were in the possession of NIA (Harris, 2002).

It is obvious then, that the inception of PAIA and its associated provisions on the right of access did not fundamentally change the way in which classification procedures and decisions were being pursued and made, respectively. The ease with which NIA insinuated itself into the 'management' of the TRC archive in particular was indirectly related to the failure of TRC Commissioners to undertake a 'comprehensive assessment of all hearings held in camera to determine what material can be released for public scrutiny' (CSV, 2002). The space for flexible interpretation over what can/cannot be released was filled by NIA as the evidence already presented in the previous section clearly shows.

When DoJ Minister Maduna announced earlier this year that he had granted an exemption (until 2008) for NIA compliance with the information disclosure provisions of PAIA, there was a parallel announcement by the DoJ spokesperson that the 'missing' TRC documents would still be subject to classification by the recently established classification 'review committee', via NIA (Terreblanche and Bell, 2003). In one, quick, double-barrelled burst the chances of any shorter-term access (up to five years) to both the 'sensitive' documents in the TRC archive and other 'sensitive' information related to human right violations was potentially shot to hell. While Maduna's decision is outrageous, there is a clause in PAIA that Maduna used to grant the NIA exemption.¹⁹ The decision will remain unless a concerted and collective challenge is launched. Whether or not the decision to allow NIA to (re) classify TRC documents is actually illegal – which is the considered opinion of many PAIA 'experts' as well as former TRC Commissioners – does not appear to matter much to government either (Bell, 2003b).

There might be valid reasons for the establishment of a classification 'review committee' that includes legal and academic representatives from outside government and makes provision for 'civil society' submissions. However, given the effects of the more recent history of abuse and secrecy surrounding classification procedures and decisions as well as the more general tendency of government-appointed bodies to not 'rock the boat', the initial signals surrounding the committee's role and functions are not encouraging. As a seasoned access to information campaigner put it: 'There needs to be not only transparency in the process, but transparency about the process' (Pigou, 2003).

Classification of politically and economically controversial and/or 'sensitive' information – which is how much of the TRC archive and apartheid-era records on human rights violations is predominately seen by government – is a slippery slope. This is even more the case in relation to the same kind of information in the post-apartheid period. Legitimate grounds for non-disclosure in PAIA are more than sufficient, if genuinely and consistently applied, to protect information that deserves to be protected. If PAIA is going to be taken seriously and implemented effectively, then the constitutional right of access to information cannot be held hostage to the

¹⁹ According to Terreblanche and Bell (2003), 'lawyers have described this as a "generous interpretation" of a clause in the PAIA'. The clause referred to (Section 14(5), p.13) states: 'for security, administrative or financial reasons, the Minister may, on request or of his or her own accord ...exempt any public body or category of bodies from any provision of this section (requirement to produce information manual) for such period as the Minister thinks fit'.

fears and insecurities of public officials and politicians under the guise of 'security' classification.

Whither Access?

In the two years since PAIA came into operation, the vast majority of requests for access to both the TRC archive and related information on human rights violations have been submitted by one organisation – SAHA. The remaining requests have come from no more than four to five other 'civil society' organisations (ODAC, CSV, FXI, Khulumani). Although there might be some individuals and journalists that have made requests, all evidence gathered indicates that the 'field' of access requests in specific relation to the TRC archive and human rights violations has been an extremely elite one.

There are myriad reasons for why this is the case, most of which have already been touched on in previous sections. However, because the information 'regime' around the TRC archive and related information is particularly contested and secretive, the necessity of possessing a detailed knowledge of both PAIA and the ins and outs of government record keeping becomes paramount. By their own admission, SAHAs ability to file so many access requests for 'sensitive' information is a direct function of SAHAs 'expert knowledge of government record keeping'²⁰ (SAHA, 2002, p.4). SAHAs relative access success is also a function of its strategic approach to accessing information, where PAIA requests are coupled to specific 'campaigns' and/or programmes that have been identified and prioritised within the organisation to achieve a particular goal (for example, the targeting of SANDF to access records related to the apartheid military's programme for homosexuals). Most other organisations, let alone individuals, suffer from a generalised knowledge deficit around PAIA and simply do not possess the necessary expertise or strategic approach.

It is a sad indictment, that even with a potentially transformative tool like PAIA, realising the right of access more generally, but also as specifically applied to 'sensitive' information on human rights violations, is predominately dependent on the 'possession' of expertise and material resources. As things stand at the moment, the 'demands' associated with TRC/human rights violations access requests are not going to get any easier. This does not bode well for both continued truth and justice-seeking activities/programmes or for the more general realisation of the right of access to information for ordinary South Africans.

Even though progress has been made in determining the location of small amounts of information on apartheid-era human rights violations as well as parts of the TRC archive, the reality is that access is being seriously curtailed by the continued delay in publication of departmental information manuals. Without even the most basic information on what 'subjects and categories' of records can be requested, what records are automatically available and the specific departmental procedures and systems set up to deal with requests, the right of access is a pipe dream. Khulumani's endlessly frustrating experience in trying to access the government's

²⁰ Both the Director (Verne Harris) and Deputy Director (Sello Hatang) of SAHA were former employees of the National Archives. Harris was also a former employee of the TRC.

policy on reparations led one of its leading members to exclaim in exasperation: 'There's a double standard at work ... we are expected to adhere to the letter of the law but government itself doesn't seem to care ... we are shooting in the dark' (Gunn, 2003).

Both government departments – DoJ and NA – responsible for the TRC archive are guilty as charged. The departments might have set out internal procedures and systems for preserving and maintaining the archive, but the lack of a publicly available manual that provides a clear breakdown of what TRC information is automatically available severely constricts the right of access. What DoJ has done is set up 'Guidelines on Access to TRC Records' (no date). These are:

- DoJ is the official custodian of all TRC records;
- Only requests received by the Deputy Information Officer (DIO) of DoJ will be considered and dealt with;
- Any request (received by another department) must be forwarded to DIO;
- DIO will acknowledge receipt of request in writing and indicate what fees are payable;
- A register of all requests for access shall be kept at DIOs office at DOJ;
- A register of all requests, transfers and consents granted and records perused at NA to be kept by NA;
- The DIO will make use of Access Committee to assist and advise;
- Access Committee and DOJ DIO shall use PAIA as basis to consider requests for access

It should be immediately obvious that the effect of these guidelines on access to the TRC archive is to make such access dependent on the use of PAIA. Whereas, the starting point of the TRC itself was to ensure that the vast majority of the archive (with legitimate exceptions for privacy) would be open and publicly available to anyone, DoJs guidelines ensure the exact opposite. Under the guidelines (and in the absence of full information disclosure through a manual), virtually all access to the TRC archive will have to be through the formal request procedures of PAIA – with associated costs and time considerations having to be factored in. This is a classic example of the complete abuse of PAIA, turning it into a constraining rather than an enabling tool. While the perpetrators of gross human rights violations under apartheid must be laughing, the victims should be crying.

Government will, no doubt, argue that, once the manuals are published (the latest 'deadline' is August 2003) many of the present problems in trying to access the TRC archive et al., will gradually disappear. However, Section 14 of PAIA, which outlines the necessary content of the manual, is extremely vague when it comes to information about records (as opposed to contextual information that must be included in the manual). The key references are to 'subjects' and categories', both

of which are open to wide interpretation and there is no mention of an index that would greatly facilitate requests for access to a record. The flexibility of the manual guidelines in PAIA virtually ensures that the 'subjects' and 'categories' of information provided will also have little connection to the records management systems in the relevant department (SAHA, 2002, pp.5-6). Thus, even though the publication of PAIA manuals will go some way in addressing the problems of the present state of access, there is every reason to believe that this will not be adequate to address the specific challenges of access to 'sensitive' information that historically has remained hidden in the shadows.

Besides the procedural and institutional barriers, there is also a more subjective concern when it comes to accessing information dealing with human rights violations and the TRC archive. There is a wide divergence of opinion, this time on the side of potential requesters in 'civil society', on exactly what information should remain confidential. The TRCs own 'test' of access is that 'all records' should be made publicly available 'unless compelling reasons exist for denying such access' (TRC, 1998b, p.344). That 'test' has obviously not been applied genuinely as evidenced by the 'journey' of the TRC archive over the last several years. While everyone seems to agree that there are legitimate concerns around privacy and the personal safety of people in accessing the TRC archive, there is disagreement on how far those concerns should be taken in determining what should/should not be available.

There are those who are in complete agreement with the recommendations of the TRC 'Report' and are adamant that there should be no need to put in formal PAIA requests (Hatang, 2002). Others suggest the need to adopt a 'case-by-case' access approach that will be able to establish precedents in relation to what records are legitimately confidential (Curry, 2002). Another approach argues for applying the confidentiality 'rule' only to testimonies of those TRC hearings held 'in camera', pointing to the fact that 'the majority' of those testimonies were made 'in confidence' (Gunn, 2003). As long as significant degrees of commonality in approach and purpose do not exist amongst those (few) who seek access - so too will access remain that much more elusive and that much less effective.

Broader Challenges and Opportunities

Like many other human rights contained in *The Constitution*, the right of access to information and the parallel struggle to concretely realise that right in post-apartheid South Africa is, in relation to the experiences of many other countries, relatively adolescent. Regardless, there has been a historical tendency for South African civil society (in particular, NGOs) to develop a 'silo mentality' (Pigou, 2003) in engaging those struggles. Such a mentality has most often translated into the practice of taking on very narrow areas of expertise. This most often results in the development of a 'tunnel vision' that privileges an individualist approach as opposed to one that recognises the interconnectedness and collective nature of the struggle to realise various human rights (Duncan, 2003). It is the latter 'type' of struggle that needs to systematically inform the way in which South African civil society (in all its 'forms') tackles the challenges and opportunities around realising the right of access to information

Confronting Commodification

In the 'Bill of Rights' there are a wide range of socio-economic human rights that are fundamental to any meaningful human dignity and development. Sections 26 and 27 (pp.12-13) contain rights of access to 'adequate housing ... sufficient food and water ... health care services and social security'. The potential realisation of these rights, just like the right of access to information, is in direct proportion to their accessibility and affordability. As has become clear over the last several years, the struggle for housing, water, health care *et al.* has been made ever more difficult by the adoption of government policies that practically treat these rights as commodities (that is, 'market' goods to be bought and sold). The predictable result is that increasing numbers of poor South Africans – who make up the majority of the population – can neither access or afford to realise these rights.

Unfortunately, the same approach of commodification has been applied to the right of access to information. PAIA (in sections 22 and 54) provides for the charging of access fees. These sections were brought into operation by the issuing of specific regulations (R187) in February 2002 that laid out prescribed fees - applied to both public and private bodies - for a request, for access to a record, for reproduction of any information (including manuals and the HRC Guide) and for searches for information²¹ (Government Gazette, 2002). While there is provision in Section 92 of PAIA for the Minister to issue any regulation on fee structures, it is indicative of government priorities that the only regulations issued (as described above) have made no added provision for exemptions for the poor. There is also provision in PAIA - Section 22(8) – for the Minister to exempt 'any person or category of persons from paying any fee' by notice in the *Government Gazette*. Since PAIA came into operation there has been absolutely no sign of intention to invoke this provision. Besides the prescribed fees though, there are far greater potential costs that would have to be met if a requester decided to appeal a refusal in a court of law (a course of action much more likely when requests for 'sensitive' information on human rights violations are lodged).

The challenge here is very clear. Unless the right of access to information is de-commodified, the vast majority of South Africans will simply be unable to exercise this right. In the case of those who might have connections to organisational resources, the problem then becomes one of involuntary dependency that, in the longer-term, does nothing to tackle the reality of commodification or the practical denigration of the right itself.

²¹ The fees are as follows: a) request fee – R35 (public body), R50 (private body); b) reproduction of manual fee – 60c per A4 page (public body), R1,10 per A4 page (private body); c) search fee – R15 per hour (public body), R30 per hour (private body); d) reproduction of HRC Guide – 60c per A4 page. There are other specific fees attached to the reproduction of, for example, visual images (R60) and other forms of non-print information as well as access fees attached to each category of record – Annexure A. Also, PAIA provides for 'personal requesters' to be fully exempt from paying any fees - Section 22(1).

Infrastructural Access

Realising the constitutional right of access to information must not be approached simply as a matter of realising procedural rights contained in PAIA and/or as a means towards developing a more democratically open and transparent society. In a country like South Africa there is the need for a more expansive approach that addresses the most basic level at which access to information begins to have meaning in the lives all citizens - infrastructural access²².

The reality is that the majority of South Africans are unable to access basic telecommunications infrastructure. This raises the crucial question of access to information within the context of a different kind of human rights violation – namely, the unavailability and inaccessibility of information at the level of physical infrastructure. Without such availability and accessibility, access becomes divorced from the most basic requirements for participation in the information ‘world’ and thus devolves into an arena in which only socio-economic elites can effectively participate. Access to information must therefore be considered as a socio-economic right in itself. In other words, it is not merely a matter of post-hoc access - that is, realising the right through the processes and provisions as set out in PAIA - but of realising the right through ensuring access to the infrastructure needed to participate in the ‘process’ itself.

Such an approach is crucial in respect of preserving and protecting human rights since those unable to access infrastructure cannot get the information needed to realise their most basic human rights - this could range from access to information on water provision, housing subsidies, labour standards, education policy or healthcare programmes. A comprehensive approach to the right of access to information has to confront the reality of infrastructural injustice and inequality. Otherwise, activities and projects pursued will end up reinforcing inequalities and be unable to tackle the challenges at the most basic level of the right to access.

Non-Compliance

Previous sections in this report have detailed the generalised problem of non-compliance of public bodies with key provisions in PAIA.²³ A good example of the lack of seriousness with which government has approached non-compliance is the case of NIA and the ‘missing’ TRC files. The NIAs consistent obfuscation as to the location of the files and the deliberate (and continuing) decision to deny access by not releasing relevant information was initially met with silent government approval. This was soon followed however, by an explicit condoning of such behaviour through granting NIA a five-year exemption from disclosure of information in its possession.

According to Section 90 (p.43) of PAIA: ‘a person who with intent to deny a right of access in terms of this Act ... destroys, damages or alters a record ... conceals a record or falsifies a record, commits an offence and is liable to conviction to a fine or

²² In a paper presented at the FXI PAIA Workshop entitled, ‘Engaging “New Media” to deepen a people’s dialogue with power’, Mark Weinberg raised a range of issues around the privatisation of telecommunications and the resultant lack of access and affordability in relation to the majority of South Africans. The paper provided the impetus to for this sub-section.

²³ Since most work around access to information has focused on public bodies there is presently no conclusive evidence to critically evaluate the degree of compliance by the private sector.

to imprisonment for a period not exceeding two years'. The actions of the NIA (and possibly those of DoJ and NA as well) certainly would constitute 'intent' to conceal. And yet, the contempt shown to PAIA, not to mention for the principles that inform the constitutional right of access, have gone completely unpunished. Rather, they seem to be embraced and celebrated. Failure to confront the wilful violation of the intent and purpose of PAIA will only contribute to catalysing further acts of impunity. It is no good having a wonderful law if it cannot be enforced.

There is also the challenge of dealing with the abuse of the grounds for refusing access (as contained in PAIA) that has the potential to make a mockery of the constitutional right of access to 'any' information but more specifically as applied to accessing 'sensitive' information. PAIA might be considered to be the 'golden standard' by many access to information 'experts' internationally. Nonetheless, there is nothing unique or fundamentally different about South African government officials; politicians or corporate capitalists who, like their counterparts in various other countries, hold sway over large amounts of information that they would prefer not to be accessible to the public. An analysis of New Zealand's 'Official Information Act' - which has been in operation for over twenty years - shows that, over time, the main bases for refusing requests have been:

- Commercial 'sensitivity' - used by both private and public bodies to refuse access to large amounts of information;
- International and security issues - international relations 'secrecy' is being used increasingly to exclude information on domestic matters as well;
- Government decision-making - increased use of clauses on exclusions for Cabinet information are being used (Hager, 2002, p.3).

All three of these 'exclusionary' rationales have already been put to use in South Africa in service of the denial of information directly related to human rights violations - whether those rights be political/civil, socio-economic or environmental/developmental. What is doubly ironic and contradictory about this though, is that there is no parallel 'right', contained in the South African 'Bill of Rights', to 'secrecy' or to be exempted from Section 32. If constitutional rights are allowed to be treated with convenient disdain simply because those in positions of power don't like the implications that accompany their realisation, the rights are not even worth the paper on which they are written.

Enforcement/Dispute Resolution

Since the introduction of PAIA the level of access requests for information (using PAIA) related to human rights violations has been low - by all counts less than one hundred and fifty requests have been filed. The majority of these requests have been refused, faced lengthy delays in response time or have been inadequately answered. Not surprisingly then, the quantity and scope of overall access to such information has been more of a trickle rather than the flow that many expected when PAIA was passed. Giving meaningful effect to the right of access in South Africa, especially in relation to apartheid-era information on human rights violations, has quickly become a procedural 'nightmare' (Hatang, 2003).

One of the main reasons why requesters have been unable to consistently and effectively contest the refusals, delays and inadequate responses is that the two-tiered appeals process (internal and through a court of law) provided for in PAIA is both unfair and unaffordable. Ample proof of this has already been provided in this report through references to the experiences of access to information requests made by various civil society organisations. Consequently, representatives from virtually all of these organisations (including HRC) have called for the establishment of an enforcement/dispute resolution 'mechanism', variously referred to as an 'Information Ombudsman' or 'Information Commissioner' et al. (Tilley, 2003; Pigou, 2003; Harris, 2003b; Lepheane, 2003).

The motivation for this approach is clearly the result of the debilitating and demoralising effects of the procedural and financial barriers that the present appeals process contains as well as the high levels of non-compliance by the holders of information. Specific reference has also been made to the existence and effectiveness of these mechanisms in other countries as another reason why South Africa should move in the same direction. Some organisations have suggested that without such an enforcement/dispute resolution mechanism, PAIA 'is really never going to get off the ground' (Tilley, 2003).

As logical as this approach might appear, it is instructive to gauge the potential effectiveness of such a mechanism by reference to the experiences in countries where it has been in operation for many years. A good example is New Zealand's Information Ombudsman. The experiences of Nicky Hager, a New Zealand researcher who has made hundreds of information requests in his home country as well as in other countries, reveal:

- Complaints to the Ombudsman about time delays in responding to requests often take longer to deal with than the delay itself. This has raised the need to address existing timeframes for response;
- Regular experiences of months of fighting through the Ombudsman to obtain information that should have been released immediately and/or contesting decisions where information has only been partially released. This has raised the need for directed sanctions against bodies that intentionally withhold and/or conceal information;
- Appeals to the Ombudsman against the explicit refusal of information most often take months to be reviewed. This has raised the need for adequate resources to be provided to the Ombudsman (Hager, 2002, pp.1-2).

What these experiences show is that (the obviously necessary) calls/campaigns for finding an appropriate enforcement/dispute resolution mechanism as part of South Africa's information 'regime' will have to be accompanied by serious consideration of the institutional and legal powers granted as well as financial resources provided. Even then, the question remains as to whether any such 'Ombudsman/Commissioner' will simply add another level of red tape to an already cumbersome information access process. This concern has given rise to the argument that existing Chapter 9 institutions such as the Public Protector's Office and/or the

Human Rights Commission should first be 'looked at' to gauge the possibilities of their role in enforcement/dispute resolution. If these structures cannot be transformed to play an effective role in enforcement/dispute resolution how will the creation of yet another institution deal with the challenge? (Duncan, 2003).

The need for a procedural (information) 'regime change' is apparent. Facing up to the challenges of meeting the need and grasping the associated opportunities for meaningful enforcement of a just and equal right of access however, is going to require a collective approach that so far has been sorely lacking.

Information Management

The generally disorganised state of institutional record keeping/information management in South Africa (as previously documented earlier in this report) presents fundamental challenges to timely and comprehensive access to information. This is not unique to South Africa. Earlier this year, Canada's Information Commissioner launched an unprecedented verbal assault on the state of information management by government bodies in that country. He claimed that 'poor record keeping has put the flow of information to the public in grave jeopardy (and that) ... the most significant threat to open and accountable government is a crisis in information management'. More specifically though, the Commissioner pointed to the fact that government officials in Canada are being encouraged to give oral presentations or to use email (that can then be deleted) so as to avoid creating permanent, written records. He went on to charge that even when written records are kept, they are seldom entered into the departmental system of records (Bureaucratic secrecy..., 2003)

Given that Canada's Access to Information Act (like South Africa's PAIA) only covers access to recorded information, the purpose of this strategy becomes obvious – to prevent public access to inter and intra-government communications, policy discussions/debates and decision-making et al., as well as to 'hide' what recorded information is kept. In another example of the way in which government officials can 'hide' information, Canada's Cabinet was 'caught' attempting to transfer information that should have been open to access (but that it did not want released) into a classified category of information. Canada's Federal Court of Appeal subsequently ruled that such actions were in violation of that country's Access to Information Act (Court lifts lid ..., 2003). At present, there is no similar 'official' evidence to confirm that the former tactic is being pursued by the South African government (or the private sector), but there is certainly evidence that government bodies have tried to 'hide' information related to the TRC archive and apartheid-era security establishment records under the guise of 'security' classification (SAHA, 2002; Harris, 2003b).

The possibilities for these kinds of manipulations of information management becoming an integral part of the practice of public and private bodies in South Africa raise serious challenges for ongoing and future access to information. The specific role and responsibility of the National Archives (under NASA) in carrying out its legal mandate for implementing and monitoring information management in public bodies is one area that needs particular attention. Similarly, the ability of Cabinet (which is exempted from the provisions of PAIA) to interfere in, and manipulate information

management through administrative action (that is exempt from PAJA) will need to be pro-actively monitored.

The Private Sector

One of the most unique and potentially powerful features of PAIA is the provision for access to information held by private bodies. Somewhat understandably, civil society organisations have, since the inception of PAIA, concentrated most of their attention and energies on accessing the TRC archive and information on human rights violations during the apartheid era. Very few access requests have been directed at private bodies, although SAHA made eleven PAIA requests to four different private bodies during 2001-2002, the majority of those being directed at the Health Professions Council of South Africa (SAHA, 2002b). SAHA has also just unveiled a new 'HIV/AIDS Access to Information Project' that is designed to 'test the Promotion of Access to Information Act (PAIA) in relation to (HIV/AIDS-related) records held by private bodies' (SAHA, 2003, p.1)²⁴.

South African corporations played a major role in supporting and sustaining apartheid through their institutional, intellectual and financial power and resources and they benefited handsomely as a result. Some of these corporations such as Anglo-American and De Beers were also responsible for gross human rights violations through, for example, the conceptualisation and shaping of apartheid legislation, apartheid labour practices and maintenance of the horrendous migrant labour system. In the more contemporary period, there are also serious questions that need to be answered about corporate environmental, fiscal and labour practice (Sooka, 2003).

And yet, such corporations have escaped the 'clutches' of PAIA. If conceptualised and targeted strategically, access requests could well yield a wealth of information from a sector of society that continues to evade answering to the people of South Africa for its role, both past, and present, in human rights violations. In the opinion of former TRC Commissioner Yasmin Sooka, PAIA should be seen as a weapon to try and bring some accountability to bear on South African corporations because, as of yet, there is very little that 'controls' them (op.cit.).

Recommendations

The struggle to realise a full and sustainable right of access to information in South Africa is still in its early stages. While the 'battle' for access to information legislation, in the form of PAIA, has been won, the longer term 'war' to ensure that South Africa's information 'regime' becomes a meaningful tool, for all South Africans, to enjoy their constitutional right of access to any information has only just begun. It should be clear from the evidence contained, and evaluation/analysis offered, in this

²⁴ This briefing document serves as a first class example of how a specific project/campaign around access to information, using PAIA, should be conceptualised and implemented. The document outlines the rationale for requesting records, what records to request, organisations/companies to approach, possible problems/further issues and avenues and issues to consider for further projects.

report that the role of civil society organisations has been and will continue to be absolutely crucial. In order for that role to remain relevant and effective though, civil society organisations will need to move beyond the generally narrow organisational and tactical boundaries that have so far framed the struggle for access to information, towards a broader, and collectively ‘owned’ strategy of engagement.

The recommendations offered below should be seen as part of what can hopefully become an integrated tactical and strategic framework for the realisation of the right of access to information²⁵. The intellectual and practical efforts and resources to pursue the recommendations should not be seen predominately as an individual organisational challenge or as something that can be dealt with in another workshop. Rather, there must be commitment to an approach that brings together the widest possible coalition of civil society forces (for example, NGOs, social movements and community based organisations) in order to establish both collective ownership and social weight.

The importance of committing considerable energy and resources towards achieving this should not be underestimated – access to information is a human right that is, in one way or another, symbiotically linked to the realisation of all other human rights. South Africans will not be able to fundamentally confront and deal with both past and present violations of their human rights if the struggle for access to information itself remains in the shadows.

On specific sections in PAIA

- Call for section 3 of PAIA – which provides that PAIA only applies to a ‘record’ of a public or private body – to be expanded to include ‘any’ information held by a public or private body. Although such a recommendation will, no doubt, be met with howls of incredulous disapproval from government and the private sector it should be seen as a tactical move to open public debate around access to non-recorded information. Motivation should point to inconsistency of section 3 of PAIA with section 32 of *The Constitution* and the lack of any legislation that speaks directly to non-recorded information, which forms a sizeable component of information in a country like South Africa. Also, point to the negative effect on access to non-recorded information from the apartheid era (for example, oral history that can be provided by former security establishment operatives) - see recommendation below on PIA.
- A much narrower definition of what constitutes a record exempted from PAIA in Sections 12a and 12c (Cabinet & Parliaments) needs to be added. Specific motivation should be made to make a distinction between pre and post-1994 Cabinet records, with the former records (which are held in the National Archives) to be immediately declared open to the public. Also, for a

²⁵ Many of the recommendations contained in this section have been, at one time or another, put forward by various civil society organisations either individually or as part of access to information workshops. However, they have never all been brought together in an ‘integrated package’. Other recommendations stem from suggestions made by various individuals interviewed or from documents/papers consulted as part of the research work for this report. (*NOTE - the recommendations are not individually referenced).

distinction to be made between those records that are and are not administratively active, with the latter (for example, discussion documents et al.) being declared open to public access. Further motivation should point to the possibility of a constitutional challenge to this provision as it now stands since Section 32 of *The Constitution* provides no privilege for exemption from the right of access.

- Call for section 14(5) – that allows the Minister to exempt any public body or category of public bodies, for an unspecified period, from the need to publish a manual – to be scrapped. Motivation should point to the fact that general extensions have already been provided (on two occasions) and that such exemptions effectively violates both Section 32 of *The Constitution* as well as Section 9(d) of PAIA which states that an object of PAIA is to give effect to the right of access ‘in a manner which enables persons ... to access records as swiftly ... and effortlessly as reasonably possible’.
- Sections 15 and 52 (provisions for voluntary disclosure) should be expanded to include a provision expressly stating that existing provisions do not prevent informal and routine access requests to public or private bodies from being processed without having to abide by all PAIA request procedures. Motivation should point to avoiding excessive complexity and burdensome nature of request provisions in PAIA for both the requester and holder of information. Section 9(d) should be referred to in this regard with particular reference to time and cost considerations.
- Call should be made for regulations to be published in respect of section 22(8) – empowering Minister to exempt any person or category of persons from paying fees or determining that a category of records is not subject to fee – that provide for the exemption of all unemployed people and pensioners. Regulations should waive fees for requesters who can show that information will be used for public interest purposes. Additionally, a provision for a tariff structure of fees should be included – that is, a reasonable tariff to be set for each category of information. Requesters only obliged to pay if the total cost of information requested is more than the set tariff. Motivation should point to general unaffordability of present fee structure for ‘everyone’ (Section 32 of *The Constitution*) and punitive nature of present fee structure for reproduction of information (for example, the R60 charge for a visual image is far too much for a single photo).
- The ‘deemed refusal’ clause in sections 27 and 58 (which allows for failure to respond to a request to be deemed a refusal of access) should be changed to a ‘deemed approval’ rule. Motivation should point to administrative unfairness of present provision (see recommendation on section 5(2) of PAJA) and complete lack of accountability.
- Call for an addition to section 37 - the mandatory refusal of access to records on basis of confidentiality of third party – that provides an explicit time limit to this restriction (no more than two years). Motivation should point to fact that present provision allows all such information to be inaccessible to the public

indefinitely (example can be made of records like the transcripts of in camera TRC hearings – see recommendation on audit).

- Call for section 45(a) – refusal of request that is manifestly frivolous or vexatious – to be scrapped. Motivation should point to direct contradiction with section 11(1)(a) – provides that access must be given if procedures followed – and the potential unconstitutionality of present clause.
- The public interest override provision (sections 46 and 70) should be expanded to apply to all grounds for refusal and the term ‘public interest’ should be given an explicit and comprehensive definition. Motivation should point to constitutional right of access to ‘any’ information, the fact that present provision for selected override has no explanatory context and that onus of non-disclosure always rests with holder of information.
- The 30-day provision in section 78(2) – providing maximum timeframe within which an application to a court of law can be made after failure of internal appeal - should be changed to 60 days. This should be coupled with a call for regulations that provide for the active enforcement of the prescribed timeframe - sections 25 and 26 - for responses to access requests (presently 30 days extendable to 60 days). Motivation should point to: a) potentially inadequate time of present provision for proper preparation of appeal case, especially in relation to those requesters who would need to seek legal aid; and b) the fact that there is presently no provision for sanctions against bodies that do not adhere to time provisions for responses to requests violates the requesters right to receive information as ‘swiftly as possible’ as contained in section 9 (d) of PAIA.

On related legislation

- Call for the 1982 Protection of Information Act (PIA) to be scrapped immediately and to begin a process of drafting new protection legislation that will actively involve organisations of civil society. Motivation should point to PIA as a piece of outdated apartheid-era legislation that is completely at odds with South Africa’s new information ‘regime’ as framed by PAIA as well as the possibilities of launching constitutional challenges to PIA if not replaced. Also, that continued existence of PIA results in complete inaccessibility of apartheid-era information from former security establishment operatives (as per the secrecy undertaking of such operatives vis-à-vis PIA).
- Call for a transparent legal review process to harmonise the National Archives Act of South Africa (NASA) and PAIA. As part of this process, particular consideration must be given to additional information management provisions to NASA around measures for increased record documentation, accountability for records and specific security measures to prevent destruction of records. Motivation should point specifically to serious problems in the differing access, decision-making and monitoring provisions around ‘sensitive’ information of the two pieces of legislation.

- Section 1(i)(hh) of the Promotion of Administrative Justice Act (PAJA) – providing for the exemption, from the provisions of PAJA, of an administrative decision related to PAIA – should be removed. Motivation should point to the existing provision's denial of any meaningful accountability for administrative actions taken under PAIA as well as contradiction with intent and purpose of PAIA.
- A complete review of the Minimum Security Standards (MISS) policy should be undertaken by the newly created classification review committee with the specific intent of making recommendations towards the drafting of new protection legislation that would replace both the PIA (see first bullet above) as well as MISS. Motivation should point to 'double jeopardy' effect of MISS and consequent negative effects on access to 'sensitive' information.
- Call for section 9(3)(d) of the Protected Disclosures Act (PDA) – that provides an exception clause to protected disclosure by an employee, related to a 'breach of the duty of confidentiality of the employer – to be harmonised with the recommendation on time limitation of provisions on confidentiality in PAIA. Motivation should point to need for protected public disclosure of such information within a reasonable timeframe.
- There must be a harmonisation of the respective override clauses in the Promotion of Equality and Unfair Discrimination Act (PEUDA -Section 5) and in PAIA - Section 5. Motivation should point to contradiction in respective rights of access and equality as directly related to information.
- Call for the process undertaken by the South African Law Commission (SALC) to develop a Privacy and Data Protection Act to adhere to promise of meaningful public participation - through widespread publicising of intended plans in this regard. Motivation should point to SALCs announcement of intent to organise regional workshops but illogical reliance on 'interested parties' to make contact in order to participate.

On role of National Archives (NA) and Department of Justice (DoJ)

- Call for NA to immediately be given the status of an independent public body, accompanied by the provision of additional human and financial resources. Motivation should point to the inappropriate present status of NA (under DACST) that effectively enforces reliance on a departmental allocation of resources to carry out legislated mandates and the potentially negative effects of 'extra' departmental administrative and political oversight. Particular reference should be made to the effectiveness of an independent NA in relation to its function as the auditor of government record keeping.
- Call for the carrying out of a comprehensive national audit, conducted by NA, with the assistance of the Public Protector, of compliance with PAIA by all public bodies. This should commence no later than September 2003 (after the expiration of the latest extension for publication of information manuals). Such an audit must specifically include information manuals, internal

information management structures and processes as well as record keeping systems. Motivation should point to widespread support for such a call (for example, from the Parliamentary Portfolio Committee on Justice), the public promises of DoJ to institute an audit and to the negative impact of continued non-compliance for realising the right of access to information.

- DoJ must, by the end of 2003 at the latest, put in place the necessary human and financial resources to carry out a comprehensive national training programme on the provisions of PAIA for all public bodies. This programme should not be outsourced but rather should be conceptualised and implemented with the active assistance and involvement of NA, HRC and civil society organisations active in the field of access to information. Particular 'targets' of such a programme should be political heads of all departments judicial officers and deputy information officers. Designated deputy information officers of private bodies should be invited to participate. Motivation should point to the general lack of training programmes that have taken place so far within the public sector, the necessity of such programmes to the effective implementation of PAIA and the wider benefits accruing to an open/transparent public sector.
- A call should be made for DoJ and NA to convene, as urgently as possible (but at least within three months) a meeting to openly discuss/debate the form and character of a dispute resolution mechanism in relation to PAIA. Participants at this meeting should include all relevant government departments and institutions (for example the Public Protector, HRC, SAPS, SANDF), as well as organisations of civil society that have been at the forefront of access to information activity/work. The outcome of the meeting should be explicitly defined in terms of a majority and a minority position that can be put forward to national government for assessment and implementation. The motivation should point to: the general consensus that exists around the need for such a mechanism; the differing perspectives as to the form, location and delegated powers; and the benefits of having a participatory process as opposed to simply handing over unilateral 'control' to one public body.

On the TRC archive, apartheid-era security establishment records and Classification Committee

- A renewed call to be made to ensure that there must be unrestricted public access to all TRC records (with the exception of in-camera hearings). The newly created classification committee should immediately be mandated to direct a comprehensive audit and assessment of the records of these hearings, using the TRC 'Report' and PAIA as a guide. This audit/assessment must be completed by no later than the end of October 2003. Records determined to be available for public access must be integrated into the special TRC information manual (see recommendation below). Motivation should point to relevant recommendations of TRC, the suitability of the classification committee to oversee such a task and the long-overdue necessity of 'processing' the TRC archive.

- DoJ, as the legal custodian of the TRC archive, must finalise the transferral of all TRC records to the National Archives (NA) by the end of September 2003 and make a public announcement to this effect at that time. Motivation should point to the specific recommendation of the TRC 'Report' in this regard and the serious delays that have bedevilled this process.
- DoJ, together with NA, must by no later than the end of 2003, make publicly available a special TRC information manual that provides a comprehensive index of all records, what records require PAIA access and a detailed guide to how records can be accessed. The publication must be accompanied by widespread publicity using all forms of media communication. Motivation should point to the special 'status' of the TRC archive as a crucial component of South Africa's public history and 'memory' and the adequate time allowance given the recommendations above as well as the August 2003 deadline for publication of all information manuals of public bodies.
- NA must immediately draw-up and submit to national government a 'special' TRC budget for the preservation and maintenance of the TRC archive. National government should assess this budget and finalise the allocation of appropriate funds by no later than the end of the fiscal year 2002-2003. Motivation should be linked to recommendation for independent status of NA and should also point to 'special' status of TRC archive.
- A call made for the classification committee (with specific assistance and involvement of NA) to undertake, with immediate effect, an archival audit of surviving apartheid-era security establishment records. The timeframe for completion of this should be no later than the end of 2003 and should be accompanied by a comprehensive index of all records audited which should be housed at NA and made available for access requests under PAIA. Such an audit should be seen as a precursor to further audits of apartheid-era prison records, nuclear weapons documentation and international/foreign relations documents. Motivation should point to years of delay in carrying out such audits, the potential for continued loss and/or destruction of surviving records and the necessity of bringing all existing records under access provisions of PAIA.
- The audit on security establishment records must inform subsequent implementation of voluntary disclosure by relevant public bodies (in particular, SANDF, SAPS, NIA and SA Secret Service) holding such information, using section 15 of PAIA. Voluntary disclosure should start immediately upon completion of the audit and NA should undertake a publicly announced assessment/evaluation of such disclosure after a period of six months from the completion of the audit. Motivation should point to necessity of compliance with voluntary disclosure provisions of PAIA.
- A concerted campaign should be launched to oppose any attempt by the classification committee to transfer 'sensitive' records to NIA for review and classification, particularly as applied to TRC files. Motivation should link to recommendations above and point to possibility of any such transferred records being kept from public access for another five years (due to

exemption from disclosure granted to NIA until 2008). Also make the point that classification procedures should not be abused so as to allow the prolonged removal of large amounts of information from the realm of public access.

- The classification committee's promise of facilitating public participation (through 'public meetings') in their activities/work should be taken up at face value. Immediate efforts should be made to find out the exact character, place and timing of such public meetings and if adequate responses are not forthcoming then concerted and collective pressure should be brought to bear. Motivation should point to classification committee's own undertakings in this regard and necessity of having public participation in a process that has far-reaching implication for access rights, particularly around 'sensitive' information dealing with human rights violations.

On the Human Rights Commission (HRC)

- Concerted pressure should be placed on HRC to exercise fully its mandate and power (as provided under the HRC Act) to hold government to account for continued failure to meet obligations under PAIA. Specific calls should be made for HRC to convene public hearings on 'access to information as a fundamental human right' thus enabling organisations of civil society and the general public to join with it in a campaign to pressurise government to exercise the necessary political will to fulfil its constitutional and legal mandates. Motivation should point to weak role of HRC in focusing energy and resources on access to information as a crucial human right linked to the realisation of all other human rights and failure to make substantive impact on government in this regard.
- Place concerted pressure on HRC to secure and commit adequate financial resources for building human resource capacity to meet its own educational and dissemination of information obligations under PAIA (as contained in section 83). Linked to this should be a call on HRC to actively seek the assistance and involvement of organisations of civil society in the conceptualisation and implementation of associated educational and dissemination programmes. Motivation should point to serious failure of HRC in relation to the above and continued negative impact that this has on extending the knowledge and exercising of the right of access to information by ordinary South Africans.

On the strategy and tactics of civil society organisations

- A key priority should be a nationwide audit of all existing civil society organisations that are active in the struggle for human (and associated) rights. The audit 'net' should be cast as wide as possible and would necessarily include NGOs, social movements, community based organisations and independent media. Information gathered through such an audit should include; the main focus of activity/work and location; character of membership

and/or constituency/ target groups; key campaigns and projects; services provided; core categories of information held; knowledge and use (if any) of PAIA; and, general administrative information. The audit should be undertaken as a joint/ collective project involving those organisations that are presently active in the 'field' of access to information. The main purposes would be: to establish a comprehensive database/directory that could then be disseminated to all organisations as a first step towards developing a sizeable network of contacts/support outside of the few NGOs that presently dominate the 'access terrain'; and to identify organisations and/or areas of associated activity/work that could be specifically targeted for assistance and/or co-operation with, in identifying areas of information 'need'.

- After the completion of the audit serious consideration should be given to organising a national meeting of representatives from each organisation to put together a 'people's charter' on access to information. The main content of such a meeting should not be around educational activities on PAIA, speeches/ presentations by 'experts' et al. but simply to facilitate the widest possible participation in order to share views, experiences and ideas involving all aspects of access to information. These could then be collected and synthesised into a draft 'people's charter' that would then inform subsequent collective struggles and campaigns. Prior to this though, the organising collective should put together a straightforward and brief 'how-to guide' on PAIA to be distributed to all representative organisations at the national meeting.
- Since the arena of human rights is one of those areas where important and lasting precedents can be set, those organisations with the necessary human and financial resources (or ready access to them) – at present this would mainly apply to NGOs – should embark on the task of working out processes and mechanisms of access around genres and types of information that could be of specific use to their own activity/work. Taking CSVr as the example – this would involve identifying, in each of the main programmes/areas of activity, the relevant access to information 'issues'. The next step would then be to engage in the practical work of finding out what kind of information public and private bodies holds in each 'sector' – to be done by consulting the relevant information manuals and through targeted access requests using PAIA. PAIA requests should also be complemented by targeted attempts to access information through voluntary disclosure requests. This should be followed by the putting together a concise report (from each programme/area) of the experiences of trying to get that information and then to disseminate these to relevant organisations ('service providers') on the ground. The reports should also be used to inform further, more dedicated, access requests for ongoing research work.
- There needs to be a comprehensive evaluation and analysis of the reasons behind all refusals of requests that have been submitted so far by civil society organisations. This task could be taken up by one (or a combination) of relevant NGOs with research capacity. The purpose of this endeavour would be to provide a clear indication of any kind of pattern or propensity for refusal that could then be used as a tool for lobbying around prejudice, non-

compliance et al. It could also be used as a tool for the strategic identification of opportunities to test each ground for refusal through follow-up access requests as well as basis for enforcement of sanctions (see recommendation below on criminal proceedings).

- Flowing out of the above recommendation, there could be the distinct possibility of embarking on a campaign to force the Public Protector to conduct a criminal investigation (referenced to section 90 of PAIA) against those identified 'persons' who have deliberately concealed information that should have been released under the access provisions of PAIA. The purpose of this would be twofold: a) to create public awareness and pressure on government (and possibly private bodies) to take their responsibilities under PAIA more seriously; and b) to 'push the envelope' on inaccessible and non-transparent security classification systems that are being used to hide 'sensitive' information, especially around human rights violations.
- Consideration should be given to instituting a collective constitutional ('test case') challenge to section 12(a) and (c) of PAIA – providing for the exemption of Cabinet and individual members of Parliament and provincial legislatures from the provisions of PAIA. The purpose of this would be to enforce Section 32(1) of *The Constitution* where there is no privilege given and to set a precedent in relation to the precise boundaries of legislative exemptions.
- A dedicated and highly publicised project, using PAIA access requests, should be instituted to target relevant government departments to release information that they publicly refer to when making policy claims (for example, on reparations, on socio-economic rights progress or on HIV/AIDS programmes). The purpose of this would be to: force government into being more open and transparent on key areas of ongoing human rights programmes and claims to progress; and to focus government's attention on the potential power to raise publicity around the importance of access to information as well as the potential of the strategic use of PAIA (by civil society).
- Consideration should be given to initiating a concerted and collective 'civil society' campaign for the collection of non-public records and the promotion of oral history projects focused on 'completing' the 'unfinished business' of the Truth and Reconciliation Commission. Relevant academic research institutions should be specifically targeted to become part of this campaign as well as former TRC investigators. The purpose of such a campaign would be to re-focus the country's attention on the importance of seeking the truth about the apartheid past, allowing the voices of those who were never able to 'tell' their story to be heard and to provide further reference points for accessing recorded information that continues to evade public access.

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