

## Developments in Access to Information Litigation and Enforcement in South Africa

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Now is a time of considerable ferment in implementing and enforcing the right of access to information in South Africa. Having taken a dip in the past couple of years, recent litigation regarding the statute enforcing the constitutional right to access to information, the Promotion of Access to Information Act (PAIA) has regained its steady albeit low levels of activity. Perhaps more significantly, a long-delayed step in the implementation of PAIA has expanded the jurisdictions in which requests for access to information made under the PAIA but refused (or ignored) by government may be enforced in a court of law. Important of course in its own right, attention to the state of access to information litigation and enforcement in South Africa may be heightened through attention to the role of the right in securing other rights to the long-denied majority of that population. For instance, writing not in respect of access to information generally but rather in respect of its utility in the achievement of socio-economic justice, the South African access to information scholar Mukelani Dimba has discussed the role of PAIA litigation.<sup>2</sup> Drawing on the argument of Saras Jagwanth that access to information primarily plays an instrumental role in the achievement of socio-economic rights, Dimba sees access to information as a necessary aid for either social mobilisation or for litigation in order to enforce socio-economic rights.<sup>3</sup>

### **PAIA and the Option for a Judicial Model of Enforcement**

Enforcement of access to information legislation may take any of several different models.<sup>4</sup> With respect to enforcement, a choice was initially made with PAIA to opt for enforcement through the judicial system rather than through an independent tribunal. To some extent, the South African Human Rights Commission – an independent state institutional supporting constitutional democracy -- has indeed played an enforcement role but it has never seen itself nor been seen as primarily charged with or executing that role. Instead, its role has been primarily one of promotion. Over the past several years, the NGO access to information community has increasingly called for a change to

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<sup>2</sup> M Dimba 'Access to Information as a Tool for Socio-Economic Justice' (unpublished paper presented in Atlanta, Georgia, USA, 26-29 February 2008).

<sup>3</sup> Dimba 6-7 (citing S Jagwanth 'The Right to Information as a Leverage Right' in Calland and Tilley (eds) *The Right to Know, the Right to Live* (ODAC, 2002). As Richard Calland has pointed out, international access to information advocates have now moved beyond this exclusively instrumental understanding of the value of the right of access to information. R Calland 'Illuminating the Politics and the Practice of Access to Information in South Africa' in K Allan (ed) *Paper Wars: Access to Information in South Africa* 8.

<sup>4</sup> See e.g. L Neuman 'Enforcement Models: Content and Context' World Bank Institute Working Paper Series (March 2009) (identifying three different models of access to information enforcement: judicial proceedings, information commission(er) or tribunal: order-making powers, and information commissioner or ombudsman: recommendation power).

the enforcement structure of PAIA, demanding an Information Commissioner. While seriously entertained both by the SAHRC and by the Asmal Parliamentary enquiry into Chapter 9 institutions, this demand appears to have fallen on deaf ears. The choice of government to continue with enforcement through the judicial system seems to be made clear by two events: the much-delayed extension of enforcement jurisdiction to the Magistrates' Courts (see below) and by the very limited jurisdiction granted to the Information Tribunal that is envisioned in the current draft of the Protection of Personal Information draft legislation developed by the South African Law Reform Commission and currently before Parliament.

As the enforcement through courts model plays itself out, one could say that there are two dimensions of PAIA-related court activity that emerge: the routine enforcement of PAIA in the courts and the strategic extension or elaboration of PAIA. Essentially, this is the difference between routine implementation on the one hand and, on the other, the elaboration of PAIA's procedures and substantive content through either strategic litigation or unintentional cases of first impression.

In respect of routine enforcement, it would be instructive to take a look at the number of PAIA applications made and enforced.<sup>5</sup> In 2003, 6000 PAIA applications were made.<sup>6</sup> However, this question is a difficult one to answer as there is not as yet comprehensive research on the number and variety of PAIA enforcement applications made, such as has recently been conducted in India. Such research could use the partial coverage provided in the required PAIA s 32 reports to the SAHRC as an initial basis but would need to go considerably beyond the information available there.<sup>7</sup>

In addition to some degree of routine enforcement, PAIA has also been the target of a fair amount of strategic litigation.<sup>8</sup> In some ways, this is hardly surprising since there are at least two civil society organizations and one public sector one with specific mandates and funding to engage in such litigation (ODAC, the South African History Archive (SAHA), and the South African Human Rights Commission (SAHRC)). Indeed, it might well have been more noteworthy if there were not such a pattern of strategic litigation. These cases of strategic litigation together with other reported cases – some of first impression, some consisting of significant decisions, some neither – constitute the body of reported PAIA cases. Extending from the current literature, the following section covers the most recent five years of these reported cases.<sup>9</sup>

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<sup>5</sup> PAIA requires information officers to annual submit reports to the SAHRC. PAIA section 32. On 26 January 2009, the SAHRC website was not available.

<sup>6</sup> ODAC 5-Year Review, p. 7.

<sup>7</sup> PAIA s 32 mandates the content of annual reports that the information officers of public bodies must submit to the SAHRC. Of the statutorily required information, only the item in PAIA s 32 (f) is of direct assistance. This provision mandates reporting on "the number of internal appeals lodged with the relevant authority and the number of cases in which, as a result of an internal appeal, access was given to a record." PAIA s 32 (h) does mandate reporting on applications made to court but only in relation to internal appeals dismissed on the grounds of deemed refusals (PAIA s 77(7)).

<sup>8</sup> For an analysis of strategic litigation in South Africa from an informed litigator's point of view, see G Marcus and S Budlender 'An evaluation of Strategic Public Interest Litigation in South Africa' unpublished report, Atlantic Philanthropies, June 2008).

<sup>9</sup> It seems reasonable to choose start 2005 since the existing literature (e.g. Currie chapter and the Makhalemele survey) is valid through 2005. On the Lexis/Nexis Butterworths database (accessed 26 January 2010), there are 18 separate citations of consideration of the PAIA in matters reported in 2005-2009: 5 in 2005, 6 in 2006, 3 in 2007, 3 in 2007, and 1 in 2009.

The use of PAIA in the courts is bound to increase. This is particularly likely since, in an important recent development, the courts in which PAIA may be used have been significantly expanded. A sigh of relief went up from access to information advocates across South Africa when, on 9 October, rules of procedure were promulgated that set down the standards by which PAIA requests could be enforced in the Magistrates' Courts.<sup>10</sup> These rules fulfilled the last of the conditions necessary to enable enforcement of PAIA in the courts far more accessible to the majority of the national population than the High Courts.<sup>11</sup> The rules came into operation on 16 November 2009.<sup>12</sup> This development was long overdue.<sup>13</sup> While the rules were acknowledged by all only to be adequate rather than particularly well-suited, at least there is now a set of rules for such expanded enforcement action in place. As the National Assembly Portfolio Committee noted upon approving the Rules, 'These Rules have been outstanding for some time and the Committee finds this regrettable, as the absence of these Rules impacts on the effective implementation of the Promotion of Access to Information Act[,] an Act which lies at the heart of our constitutional democracy.'<sup>14</sup> The still-outstanding PAJA Rules will also increase the opportunities for disclosure once they take effect.<sup>15</sup>

### **An Overview of PAIA Enforcement and Litigation, 2005-2009**

In 2005, five reported cases turned on PAIA. In *Minister for Provincial & Local Government v Unrecognised Traditional Leaders, Limpopo Province, Sekhukhune* 2005 (2) SA 110 (SCA), the Supreme Court of Appeal determined that provisions in the PAIA limiting access to information

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<sup>10</sup> Rules of Procedure for Application to Court in Terms of the Promotion of Access to Information Act 2 of 2000, Government Notice No. R. 965, Government Gazette No. 32622 (9 October 2009) ('The Promotion of Access to Information Rules').

<sup>11</sup> PAIA section 79 (requiring the Rules Board to make rules of procedure for PAIA section 78 enforcement applications); see also PAIA section 91A (providing for the designation and training of presiding officers).

<sup>12</sup> Promotion of Access to Information Rules, Rule 7.

<sup>13</sup> The Rules and the Committee Report on the Rules were adopted in the Portfolio Committee on Justice and Constitutional Development of the National Assembly on 19 November 2008.

<sup>14</sup> Report of the Portfolio Committee on Justice and Constitutional Development on the Draft Rules of Procedure for Applications to Court in terms of the Promotion of Access to Information Act, 2000 (Act No 2 of 2000), dated 19 November 2009. Although this is not mentioned in the minutes, according to the Report of the Committee, the Committee required the Rules Board to consider four submissions made to the Committee (by ODAC, by the South African Human Rights Commission, by ESKOM, and by the South African History Archive), review the content and implementation of the Rules and report back to the Committee within 6 months of the new term of Parliament in 2009. It may be the case that the Committee intended to place this condition on its approval thinking that the Rules would be implemented within the first 6 months of 2009. It does not appear that the Rules Board reported back to the Portfolio Committee on this matter in 2009. On 17 February 2009, the Committee approved its Committee Report of the same date on the PAJA Rules, 'request[ing] that the Minister reviews the implementation of these [PAJA] Rules within 24 months of their approval by Parliament and reports-back to this House on their implementation and any amendments that may be necessary. Report of the Portfolio Committee on Justice and Constitutional Development dated 17 February 2009, comment 2. The model of reporting back referred to in 2009 with respect to the PAJA Rules appears to be discretionary in contrast to the mandatory phrasing of the model of reporting back referred to in 2008 with respect to the PAIA Rules.

<sup>15</sup> Rule 4 of the PAJA Rules considered and approved by the Portfolio Committee in February 2009 will introduce a new disclosure mechanism into the rules for judicial review, providing citizens with an opportunity to access documents held by an administrator in order to determine whether the administrative decision was properly taken.

should be construed in light of the Constitution. Thus, on a proper and purposive interpretation of PAIA s 44(1)(a), the relevant document, a report held by the particular office not for the purpose of formulating policy, needed to be disclosed. This case thus reached and narrowly construed one of the substantive exemptions. In *Clutcho v Davis* 2005 (3) SA 486 (SCA), the Supreme Court of Appeal also laid down an important rule with respect to the relationship of PAIA and company law. Considering a PAIA request for access to financial records of a private body by a member of the body, the Court held that the evidence advanced in this case failed to lay a foundation for request for accounting books. The mere whiff of impropriety was not enough. In principle and on appropriate facts, such a request could be granted according to a test of “substantial advantage or element of need”. In *IDASA v ANC* 2005 (5) SA 39 (C), the Cape High Court considered a test case requesting access to records of donations from private persons to political parties. Here, the High Court judge held that PAIA the exclusive mechanism for access to information and that there was no parallel mechanism under s 32 even for exceptional cases outside of coverage of PAIA. Further, since political parties were not exercising public functions when receiving donations, the request should be judged in terms of a request to a private body. Since there was no foundation laid for the generalized request (para 47) – that is no evidence showed that the requests were unable to exercise the rights on which they depended such as freedom of expression -- access was refused to records of donations. This case was not taken on appeal. In *Trustees, Biowatch Trust v Registrar: Genetic Resources & Others* 2005 (4) SA 111 (T), a NGO applying for access to information in a campaign to monitor the risks of genetically modified organisms (GMOs) was ordered to pay hefty courts costs. This case was appealed to a full bench of the High Court and to the SCA and eventually made its way to the CC, where judgment was delivered on 3 June 2009.<sup>16</sup> In *Treatment Action Campaign v Minister of Health* 2005 (6) SA 363 (W), the issue of costs was also addressed, where the respondent department’s conduct was the fundamental reason for the bringing of the action. Costs were awarded to the applicant who had applied for an order compelling access to documents regarding the timeline of the government HIV/AIDS plan for response.

In 2006, another five cases were reported that turned on PAIA. In *Unitas v van Wyk* 2006 (4) SA 436 (SCA), the facts concerned a request by a widow for access to information from a private hospital concerning the care given to her now-deceased husband. In a split decision affirming the *Clutcho v Davis* standard of “substantial advantage or element of need”, the Court made a distinction between “useful and relevant” for the exercise or protection of rights and “essential or necessary”. The latter was required. Thus, ‘of assistance’ is a necessary though not sufficient requirement for satisfaction of the PAIA s 50 standard. In *MEC for Roads & Public Works, Eastern Cape & Another v Intertrade (Pty) Ltd* 2006 (5) SA 1 (SCA), the Court upheld the previous case of *van Niekerk v Pretoria City Council* 1997 (3) SA 839 (T) dealing with legal professional privilege. Granting the request for documents, the court slated ‘technical’ objections to disclosure. In *DPP (Western Cape) v Midi Television t/a E TV* 2006 (3) SA 92 (C), the High Court dismissed denied access to information (argued for in the alternative) where the procedural requirements of the request in terms of PAIA ss 7 & 50 had not been complied with. This issue in the case was persisted with but the decision was upheld on appeal to the SCA in 2007. In *Transnet Ltd and Another v SA Metal Machinery Co (PTY) Ltd* 2006 (6) SA 285 (SCA), the Supreme Court of Appeal delivered another progressive decision on the extent of an exemption. The Court held that the confidentiality clause in

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<sup>16</sup> *Biowatch Trust v Registrar Genetic Resources and Others* (CCT 80/08) [2009] ZACC 14; 2009 (6) SA 232 (CC) (noting full bench decision in para 4).

the tender at issue does not carry through after award of tender as a matter of interpreting PAIA s 37(1)(a). Further, the Court held that the pricing schedule used in the submitted tender would not probably cause harm in terms of PAIA s 36 (1)(c)). In *Earthlife Africa (Cape Town Branch) v Eskom Holdings Ltd* [2006] 2 All SA 632 (W), the first skirmish occurred in litigation that is still ongoing. On subsequent appeal to the Supreme Court of Appeal, this matter saw the invocation of Supreme Court Rule 19bis to determine whether the documents requested fell within the PAIA exemptions.

While the law reports are notoriously inefficient at accurately portraying litigation activity, it would nonetheless appear that PAIA litigation took a dip from this 2005-2006 level. In 2007, there were two reported cases. In *Mittal Steel SA Ltd (Formerly Iscor) v Hlatshwayo* 2007 (1) SA 66 (SCA), the Court, using the control test (but noting that this test was not appropriate in all circumstances), determined that Mittal Steel was a public body at the time of record creation and thus a public body for purposes of the request made in terms of PAIA. In *Clase v Information Officer, SAA (PTY) Ltd* 2007 (5) SA 469 (SCA), the Court interpreted the agreement at issue to provide a contractual right to the applicant for information. The Court then determined that South African Airways should be treated as a private body. The requisite standard met, the Court ordered disclosure and imposed punitive costs on SAA. Along the way, the Court bemoaned the costs of pre-trial litigation seemingly resulting from the PAIA. Moreover, in 2008, there was also just one reportable (but in fact unreported) case turning on PAIA.<sup>17</sup> In *Public Service Accountability Monitor & Another v Director-General, Office of the Premier, Eastern Cape Provincial Government*, the High Court appropriately rendered a restrictive interpretation made of PAIA s 44 and ordered full disclosure.<sup>18</sup>

Finally, in 2009, activity picked up somewhat, with three reported cases concerning PAIA. In *Brümmer v Minister of Social Development & Others* (SA History Archives Trust & SAHRC as Amicus Curiae) 2009 (6) SA 323 (CC); [2009] ZACC 21, the CC considered a major component of the PAIA enforcement regime in a case notable for the high and effective participation by amici curiae. The Court considered the interpretation of PAIA s 78(2) and whether the time periods for lodging applications to court in respect of refusals were a justifiable restriction on s 32 and 34 rights. The Court confirmed the order made in the Western Cape High Court and, pending legislative amendment, determined appropriate time periods for lodging enforcement applications to court in terms of PAIA. In *Sumbana v Head, Department of Public Works, Limpopo Province* 2009 (3) SA 64 (V), a High Court considered the constitutionality of the deemed refusal and internal appeal requirements of PAIA in respect of a public body. The Court dismissed challenges to PAIA ss 25(1)(b) and (c), 27, and 78(1). In *Garden Cities Inc v City of Cape Town and Another* 2009 (6) SA 33 (WCC), the High Court determined that the failure of internal system on the part of a municipality receiving a request for access was an invalid ground for refusal of access to record in terms of PAIA.

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<sup>17</sup> In addition, see the order granted in favour of the PSAM in *Public Service Accountability Monitor v Head: Department of Housing, Local Government and Traditional Affairs: Eastern Cape Provincial Government* (Case No. 6025/2007, 21 February 2008, Plasket J). Additionally, there was a two sentence mention by the Constitutional Court that PAIA's "provisions do not apply to a record relating to judicial functions of a court or of its judicial officers." *Independent Newspapers v Minister for Intelligence Services* 2008 (5) SA 31 (CC) para 23.

<sup>18</sup> (Case No. 6407/07) (Eastern Cape High Court, 29 May 2008).

Perhaps most significantly, reports from the access to information community indicate that there are numerous access to information cases either brewing at early stages or in fact at an advanced but not yet reported phase. As of early February 2010, there are at least ten matters that are in the pipeline for likely litigation or continued litigation in 2010, based on reports from several of the most active NGOs in this field.<sup>19</sup>

### **Significant Trends in PAIA Litigation, 2005-2009**

This section identifies several significant trends from the body of PAIA litigation surveyed above. First, there are some small changes in the character of the litigation activity over the past five years. As noted above, after years in 2005 and 2006 where there were five cases reported each year, there were only four reportable cases taking 2007 and 2008 together (and one is actually an unreported case, thus presumably not widely known outside the access to information community). While there were three reported cases in 2009 and there are at least ten matters currently in the pipeline, this recent activity would only take the field back to the levels of 2005 and 2006. The explanation for this dip is unclear and it may well be an artifact of law reporting. Nonetheless, simply from the point of view of elaborating the regulatory regime and establishing stable and authoritative interpretations of the PAIA, it thus appears that there is ample scope for further litigation. It may well be that the extension of jurisdiction will have the effect to encourage even further litigation and judicial decisions, but that remains to be seen.

With respect to the character of this litigation, one can point to two incipient trends. One has been identified by Calland, pointing out the importance of coalitions. One example was the *Earthlife* matter, with “a specialist NGO working with a specialist ATI ... organization.”<sup>20</sup> A second possible trend may well be exemplified by the *Brummer* matter. In that CC case, a number of amici joined the litigation in front of the Court and presented complementary analyses. This ‘amici swarm’ may represent a mode of advancing in particular the issues of the PAIA enforcement and implementation through the courts, should that need continue. Such heavy use of the amici legal form has long been a feature of American litigation but is now apparently increasing in South Africa.

Second, it is worth noting both the groups who are and who are not heavy users of PAIA. While this is not reflected in the reported cases, according to media reports, political parties are heavy users of PAIA. To take just a recent example, on 21 January 2010, LegalBrief reported that leader of the Independent Democrats Patricia de Lille was on the scent of a new Parliamentary travel scandal involving MPs profiting from driving and claiming for trips between Johannesburg and Cape Town. De Lille was reported to have approached the Speaker of Parliament for access to a detailed breakdown of travel and accommodation expenditure but to have been refused access and advised to make use of the PAIA. She is reported to be planning both to direct a question to the Speaker and start a process in terms of PAIA. In a LegalBrief report of 10 December 2009, the Democratic Alliance was reported to be using PAIA to ask the Presidency, several government departments and the Industrial Development Corporation to get information relating to the now-cancelled plan to

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<sup>19</sup> ODAC Litigation Report (November 2009); email from Gabriella Razzano to Jonathan Klaaren (26 January 2010); email from Jay Kruuse to Jonathan Klaaren (26 January 2010).

<sup>20</sup> R Calland ‘Illuminating the Politics and the Practice of Access to Information in South Africa’ in K Allan (ed) *Paper Wars: Access to Information in South Africa* 15.

purchase eight Airbus A400M transport aircraft for a total of R47 billion. In sharp contrast to this near-routine use of PAIA amongst the political parties (at least the opposition political parties), media groups and journalists are not heavy users.<sup>21</sup> While broadly supportive of the legislation, most journalists do not use its provisions. Even investigative journalists are apparently often put off by the lengthy timelines and do not make extensive use of requests for information, the Brummer case constituting an obvious exception. Despite the valiant efforts to repeat for instance the Daily Telegraph lucrative and longrunning MP expenses freedom of information story of 2009, South Africa awaits its breakthrough PAIA story. On the whole, the experience of PAIA in the court shows the hallmarks of specialist and niche litigation strategy, rather than being a tool of normal professional practice.<sup>22</sup>

As a third and final significant trend to note, it appears to be the case that that substance of PAIA law (understood here as both the content of the exemptions and the circumstances in which those exemptions apply (e.g. the public/private questions of *IDASA* and *Mittal Steel*) is no longer the focus of the reported cases. By and large, the reported cases (and some of the pipeline matters) are turning increasingly on issues of elaborating the regime – the Supreme Court Rule 19bis procedure of *Earthlife Africa*, the timelines issue of *Brummer*, the costs orders of *Clause* and *Biowatch*. If this observation is accurate, then it may be significant to note that the elaboration of the access to information regime appears to be taking place in the courts rather than in the legislative arena.

### **Towards the Holy Grail of Effective Implementation?**

The best known access to information NGO in South Africa, the Open Democracy Advice Centre (ODAC) has launched an effort to develop an Open Democracy Charter, envisioned as a declaration of intent on implementation of access to information principles. From the point of view of ODAC, the Charter is an opportunity to “assert clear standards of compliance, while at the same time employ[ing] empathy and understanding of the depth of the challenge so that we can offer constructive solutions to the problems that we have diagnosed.”<sup>23</sup>

It is useful to consider this drive towards effective implementation of the PAIA in a Commonwealth context. In an evaluation of the first four years of India’s Right to Information Act, Alasdair Roberts draws upon a number of studies that examined the challenges in implementing India’s right to know legislation, enacted in 2005.<sup>24</sup> In sharp contrast to the usage of the PAIA, the

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<sup>21</sup> Roberts notes that media groups and journalists are not heavy users of the right to know legislation in India. Roberts 6.

<sup>22</sup> One exception to this conclusion may be in the area of public tenders. A number of reported cases reviewing or otherwise litigating in relation to public tenders do mention as part of the procedural and litigation history of the tender applications for information made in terms of or referencing PAIA. These cases are not included in this paper since they only make cursory mention of PAIA and do not turn on PAIA. See e.g. *Actaris South Africa (Pty) Ltd v Sol Plaatje Municipality and another* [2008] 4 All SA 168 (NC).

<sup>23</sup> ODAC Charter Concept Paper, p. 5.

<sup>24</sup> Alasdair Roberts ‘A Great and Revolutionary Law? The First Four Years of India’s Right to Information Act’ (9 January 2010, Suffolk University Law School Research Paper). Roberts’ assessment is based upon nine studies with varying methods conducted between 2007 and 2009. Seven of these studies were conducted in 2009, two of them large-scale, relying on surveys and interviews with thousands of Indian citizens and government officials. I am aware of only one focused study of the implementation of PAIA, the 2004 Open Society Institute

Indian uptake on their legislation from civil society has been massive.<sup>25</sup> Around two million requests for information were filed in the first two and a half years after the law was passed. A quick calculation yields a figure of seven times as many per capita access to information requests in India by comparison with South Africa. Roberts' assessment is measured but hopeful: '[Indian] citizens and civil society organizations have been able to use the RTIA to fight mismanagement and corruption and improve governmental responsiveness. But there are still daunting barriers to use of the law because of poor planning and bureaucratic indifference or hostility. Provisions in the law to promote "proactive disclosure" of key information are often disregarded. Some of the commissions established to enforce the law are struggling with a growing caseload of complaints about non-compliance by public authorities.'<sup>26</sup>

In Roberts' view, with respect to the enforcement of the law, the Indian law suffers from an inherent problem in the widely diffused model of enforcement of right to know laws focusing on the resolution of a specific complaint -- what might be termed the perverse incentives of backlogs.<sup>27</sup> To address this and other problems of enforcement and implementation, several experimental practices have been implemented in various Indian locations including fast-tracking certain complaints, placing personal liability on non-performing information officers, and addressing systemic problems directly. Of further relevance, according to Roberts, '[Indian] [g]overnment agencies and civil society organizations are also developing innovations in practice that might prove useful in other developing nations.'<sup>28</sup> These practices include the ability to obtain an automated update on the status of appeals by sending a text message from a cell phone, allowing individuals to make requests through a single toll-free number, the potential to mandate use of public authorities' rights to access information from private bodies, and the absorption of RTI principles into other legislation.<sup>29</sup>

While different in many ways from India, South Africa is, like that country, cannot be classified as a developed or First World nation. Thus, the focus on implementation and specifically on implementation in the specific context outside the circle of developed nations initially having developed access to information legislation must be right.<sup>30</sup> That emphasis leads one to question the relative lack of routine enforcement activity in South Africa the legislatively chosen arena of enforcement, the courts. The explanation for this paucity of enforcement action may be the high costs of High Court litigation.<sup>31</sup> If that is so, then the 16 November 2009 extension of jurisdiction

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Justice Initiative Monitoring Study on the state of access to information in 14 countries, which was conducted in South Africa by ODAC. However, ODAC and the SAHRC have combined forces to conduct the research and monitoring behind the Golden Key Awards. See eg ODAC and SAHRC, Golden Key Awards 2009. This research is conducted on a somewhat limited sample and is geared towards identifying the best performing responding organisations rather than overall systemic use and response.

<sup>25</sup> As far as I am aware, the comparable figure for PAIA is not available.

<sup>26</sup> Roberts 3-4.

<sup>27</sup> As identified by Roberts, 'as the number of complaints increases, the commission's ability to quickly resolve them declines, encouraging more non-compliance by authorities, and yet more complaints.' Roberts 18.

<sup>28</sup> Roberts 4.

<sup>29</sup> Roberts 19-22.

<sup>30</sup> See Calland 'Illuminating the Politics and the Practice of Access to Information in South Africa' 9-13 (making the point that attention to politics in implementation has recently risen to prominence on the international agenda of access to information advocates).

<sup>31</sup> As pointed out by Glenn Penfold, another reason working in tandem with the high costs of High Court litigation to dampen enforcement actions may be the uncertainty relating to the meaning of a large number of



would become highly significant. It is perhaps too soon to answer that particular question. What the stakeholders in the Open Democracy Charter process ought to address is a question along the following lines: Given the continued state reliance upon and rolling out of this judicial enforcement model, how can stakeholders interested to effectively implement the right of access to information most effectively complement and supplement such enforcement? The question is significant to South Africans and others concerned with the governance, accountability and other goals of access to information legislation.

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PAIA's provisions. AS he points out, 'the last thing a requester wants to do is spend the money, alienate the party on the other side, and risk losing!'. This uncertainty is exacerbated by the broad nature of several of the grounds of refusal as well as narrow breadth of the public interest override. It is therefore often difficult to advise with confidence that a court considering the matter will grant access.