

SHADOW REPORT 2016

Access to Information Network

INTRODUCTION

The Access to Information Network (ATI Network)¹ is a network of civil society organisations which cooperates to achieve the common objective of advancing the realisation of the right of access to information for all South Africans. The ATI Network was established in 2008 in response to the need for civil society collaboration to strengthen the effective use and implementation of the Promotion of Access to Information Act (PAIA), the mechanism via which our constitutional right to access information should be realised.

The ATI Network seeks to build and promote a culture of openness, accountability and transparency, through activities such as monitoring the implementation of PAIA by public and private bodies, sharing experiences relating to access to information requests, and encouraging public and private bodies to meet their obligations under PAIA.

Despite the fact that access to information is a constitutionally enshrined right, and the fact that PAIA has been in operation since 2001, members of the ATI Network still experience significant challenges in accessing information from public and private bodies.



369

PAIA requests were made between 1 August 2015 and 31 July 2016



46% of information requests to public bodies were denied in full.



Only 34% of information requests to public bodies were granted in full.



10 of the 15 requests for information submitted to private bodies were denied in full.

¹ Formerly known as the Promotion of Access to Information Act (PAIA) Civil Society Network.

This Shadow Report 2016 was compiled using statistics derived from PAIA requests made by members of the ATI Network during the period 1 August 2015 to 31 July 2016. The key findings of this report include the following:

- Alarming, 46% of information requests to public bodies were denied in full, either actively or as a result of the request being ignored (“deemed refusal”).
- Only 34% of information requests to public bodies were granted in full.
- 10 of the 15 requests for information submitted to private bodies were denied in full.

It is clear from these statistics that accessing information through PAIA can be challenging. However, significant progress has been made in the extent to which certain public bodies make records available automatically – i.e. without the need to submit a PAIA request.² The appointment of the Information Regulator on 1 December 2016 also bodes well for improved compliance with PAIA and increased transparency and openness.

PAIA REQUEST STATISTICS

These statistics are derived from 369 PAIA requests made during the period 1 August 2015 to 31 July 2016 by the following members of the ATI Network:

- South African History Archive (SAHA)
- Centre for Environmental Rights (CER)
- Centre for Applied Legal Studies (CALS)
- Right2Know (R2K)
- Equal Education Law Centre (EELC)
- amaBhungane Centre for Investigative Journalism
- Public Service and Accountability Monitor (PSAM)
- Wits Justice Project

REQUESTS SUBMITTED TO PUBLIC BODIES

Of the 369 requests submitted, 354 (96%) were submitted to public bodies.

Compliance with statutory time frames

142 of the 354 public body requests (40,1%) were responded to within the statutory time frame.

Outcomes of PAIA requests

Of the 354 initial requests submitted, one remained pending as at the close of this reporting period (the statutory time frame for responding had not expired). Of those requests to which a response was received or deemed to have been received,³ 121 (34,2%) were decisions to release the requested information in full, 43 (12,1%) were decisions to release the requested information in part and 13 (3,7%) were decisions to transfer the request to other public bodies. 161 (45,5%) of these decisions were active or deemed decisions to deny the requests in full. In 67 (41,6%) of these refusals, the requester was notified by the public body of the decision

² See the CER’s media releases on this issue: <http://cer.org.za/news/victory-for-environmental-rights-department-of-environmental-affairs-makes-environmental-licences-automatically-available>; <http://cer.org.za/news/another-victory-for-environmental-rights-department-of-water-sanitation-makes-water-licences-automatically-available>.

³ In cases where the requestee has failed to comply with various aspects of PAIA in the manner in which they have responded to the request, but the response is treated as a response, despite these deficiencies.

REQUESTS TO PUBLIC BODIES



34% Decisions to release information in full.



46% Active or deemed decisions to deny the requests in full.



12% Decisions to release information in part.



58% of the refusals were deemed refusals, i.e. the requests were ignored.



4% Decisions to transfer the requests to other public bodies.

that none of the requested records would be released. 94 (58,4%) of the denied requests were deemed refusals, that is, the information holder simply failed to communicate whether or not a decision had been made, within the statutory time frames of PAIA.

Grounds for refusal: public bodies

Public bodies are required, in accordance with section 25 of PAIA, to provide adequate reasons for any refusal of a request for access to information. These reasons must include the provisions of PAIA relied on by the public body to justify the refusal. There are only a limited number of grounds on which a request for access to information may be denied. Unfortunately, members of the ATI Network are seeing these grounds for refusal being deployed in many circumstances in which they should not apply.

Even though providing reasons for a refusal of a request is a statutory obligation, public bodies often do not comply with section 25. In circumstances where the provisions of PAIA relied on for the refusal are not stated, it is sometimes possible to deduce from the wording of the decision which grounds have apparently been used to justify the refusal.

The most common ground for refusal was that the records do not exist or cannot be found (section 23). This is concerning because it speaks either to poor record keeping, and/or to the failure by public bodies to carry out duties which these bodies are required to undertake (since had these duties been carried out, records thereof would be available).

Grounds cited at initial request stage	Number of times relied on (whether stated or implied)	% of active refusals
s23	67	61%
s34	4	3,6%
s36	13	11,8%
s37	9	8,2%
s38	6	5,5%
s39	8	7,3%
s40	3	2,7%
s42	7	6,4%
s43	0	0,0%
s44	8	7,3%
s45	5	4,5%

Internal appeals

64 internal appeals⁴ were submitted, in response to express or deemed refusals to release records. 64,1% of these appeals were deemed to have been dismissed, i.e. the appellants simply did not receive any decision by the appeal bodies. This is a shocking dereliction of statutory duties by public bodies. Responses to 18 appeals (28%) were received within statutory time frames. In the case of six (9,4%) of the appeals, decisions on appeal substituted refusals at the initial requests stage with decisions to release the requested records in full. Five of the appeal decisions substituted refusals with decisions to release the requested information in part (7,8%). In six instances (9,4%), the decisions on appeal were to deny access on the basis of grounds provided for in PAIA.

REQUESTS SUBMITTED TO PRIVATE BODIES

The remaining 15 requests were submitted to private bodies. Responses to six of these requests were received within the statutory time frames. Two of these requests resulted in a full release of records, three resulted in a partial release of records and 10 requests were refused; two of these 10 refusals of records were deemed refusals, i.e. the private body in question failed to respond at all.



Given the size of the sample, it is not possible to derive meaningful statistics from the requests to private bodies. Again, the most common ground for refusal is that the records do not exist or cannot be found (section 55).

Grounds cited at initial request stage: Private bodies	Number of times relied on (whether stated or implied)
s55	7
s63	0
s64	3
s65	1
s66	0
s68	2

⁴ A requester may lodge an internal appeal against the decision of the information officer of a public body referred to in paragraph (a) of the definition of public body. This appeal gets decided by a higher official within the same public body. What this means is that, for certain public bodies, there is an opportunity to have the initial decision reviewed. This internal appeal procedure must first be exhausted before a requester can approach the courts for relief.

TRENDS AND CASE STUDIES

Automatic access to records

Section 15 of PAIA imposes a duty on the information officer of a public body to make certain declarations in respect of records which it must or is able to grant automatic access to – in other words, access without requiring the submission of a request in terms of PAIA.

It is in the State's interests to make information widely, publicly and automatically available. Making information available automatically would not only significantly decrease the number of PAIA requests submitted, but also has the potential to increase public trust in and cooperation with public bodies.

The ATI Network has seen a general trend whereby public bodies are increasing the number of records which they undertake to make automatically available. In April 2016, the Department of Environmental Affairs (DEA) announced that it would make environmental licences (including environmental authorisations, waste management licences and atmospheric emission licences) available to the public automatically without requiring the submission of a PAIA request.⁵ Shortly thereafter, the Department of Water and Sanitation (DWS) committed to making copies of water-use licence applications, water-use licences, and audit and compliance reports available to the public automatically.⁶ Environmental licences and permits set out the conditions under which environmentally harmful operations may be conducted, and access to these documents is crucial in enabling the public to monitor the activities of these operations. The decisions taken to make these records automatically available are significant and long-awaited victories for transparency in environmental governance.

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Teething problems

While automatic access in terms of section 15 of PAIA is intended to facilitate speedy access, the fact that all of this information is not readily available on publicly accessible platforms means that members of the public still need to request the documents from the relevant departments (even though this request does not need to be in the form of a PAIA request). As a result, there are still administrative delays in processing requests for these documents. This has certainly been the experience of ATI Network members – PSAM and the CER.

As the DEA's section 15 notice included "*licences issued in terms of the Waste Act*", PSAM requested, on 12 May 2016, a copy of a licence pertaining to a waste-management facility in the Eastern Cape. In doing so PSAM furnished the relevant contact person at the DEA with the licence reference number and date of issue, the name of the licence holder, a description of the licence, and a brief background as to why it was required (even though such an explanation

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

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

is not required). On 13 May PSAM received acknowledgement of receipt of its request, and an indication that it would be forwarded to the relevant branch for further processing. By 29 May the record had still not been received. PSAM forwarded an enquiry to the contact person, which elicited a response from another official on 31 May indicating that the record would be forwarded on 7 June, since this official was still “*waiting for a responsible manager to sign the record off*”.

In the end the licence was received on 6 June 2016, meaning that the Department took just shy of a month to provide PSAM with this “automatically available” record.

This has also been the experience of the CER: automatically available records have been provided, but they have not been provided “automatically”. Instead, it is taking about the same amount of time for public bodies to process requests for “automatically available” records as it does to process PAIA requests. It is hoped that this is merely a teething problem, and that internal procedures will be put in place to ensure speedy access to these documents. The obvious way to reduce the burden on the departments and to speed up access is to make these documents publicly available online.⁷

Despite the fact that automatic access to records may not be working as well in practice as hoped, the ATI Network encourages public bodies to declare more records automatically available without the need to submit PAIA requests. Taking this step not only reduces the administrative burden of access to information requests, but also promotes a culture of openness and transparency, and removes any doubt as to whether access to these records should be granted.

Department of Mineral Resources resists trend

The Department of Mineral Resources (DMR) makes very little information available automatically and also limits the categories of persons to whom it makes this information available. ATI Network members CALS and the CER wrote to the DMR on 28 September 2016, calling on it to make copies of key mining and environmental records available automatically to the public. Access to these records is fundamental for the realisation of the rights of mining-affected communities, and the promotion of transparency in the mining sector. The CER and CALS also called on the information officer of the DMR to remove all limitations relating to the categories of persons to whom the DMR makes records automatically available, and to ensure that the following records are included (without restrictions) in the DMR’s section 15 declaration:

1. mining and prospecting rights, including mine and prospecting works programmes;
2. environmental authorisations;
3. social and labour plans;
4. environmental management programmes and environmental management plans;
5. the full applications for all the rights and licences listed above; and
6. compliance inspection reports, audit reports and monitoring data in respect of compliance with the conditions of these licences.

⁷ The Department of Environmental Affairs has in fact created an online platform to facilitate access to all waste-management licences. This platform, the South African Waste Information Centre (SAWIC), is exactly the sort of platform needed for all automatically available information, and proves that such an endeavour is not administratively impossible. Unfortunately, when attempting to access the particular licences requested by PSAM, the SAWIC site was unable to retrieve the relevant information. Platforms such as SAWIC need to be managed and updated, but if this is done properly then the availability of these platforms will greatly reduce the number of ad hoc requests for this sort of information.

As at date of publication of this report, the CER and CALS have not had any response from the DMR.⁸

For the first time ever, the Minister of Mineral Resources decides an appeal submitted by the CER

The CER has commented on a number of occasions that the DMR never decides internal appeals against refusals to grant access to records. Drafting appeals against refusals and deemed refusals is an extremely time-consuming and resource-intensive process. For them to be simply ignored is unlawful, and leaves appellants with no other option but to approach the courts for relief. This is an unacceptable position given the clear obligations in PAIA and the high costs associated with litigation.

The CER has been submitting requests for access to information to the DMR since the CER opened in 2010. Since 2010, the CER has submitted more than 30 appeals in terms of PAIA to the DMR. These appeals have all been ignored, except for the appeal described below.

In April 2015, the CER submitted a PAIA request to the DMR on behalf of the Federation for a Sustainable Environment, for records relating to the proposed underground coal mine by Atha-Africa Ventures (Pty) Ltd inside the sensitive Mabola Protected Environment. In May 2015, the DMR “partially granted” the request but access was denied in respect of records relating to:

- the financial provision set aside for rehabilitation by Atha-Africa;
- the approved or draft mining works programme; and
- correspondence in pursuit of the written consent required from the Ministers of Environmental Affairs and Mineral Resources for mining to take place in a protected environment.

The CER appealed the DMR’s partial refusal in July 2015.

While the appeal went undecided for over a year, on 15 September 2016 the Minister of Mineral Resources set aside the decision of the deputy information officer and granted access to these important records. This is the first appeal of the CER’s (in over 30 submitted) that the Minister of Mineral Resources has decided. However, despite the significance of finally receiving an appeal decision from the Minister, as at the date of publication of this report the CER has still not received all of the information requested.

SAHA had quickest ever response to a PAIA request

As set out in the PAIA request statistics section on page 2 of this report, only 40,1% of PAIA requests submitted to public bodies were responded to within the statutory timeframe. Furthermore, 26,6% of PAIA requests submitted by ATI Network members were met with deemed refusals – in other words, these requests were not responded to at all. Poor compliance levels with PAIA timeframes is a problem which has persisted throughout the ATI Network’s existence.

There are however exceptions to overall poor compliance. On 8 October 2015, SAHA, in consultation with a master’s student from Switzerland, submitted a PAIA request to the Department of International Relations and Cooperation (DIRCO). Within two hours of submitting the request SAHA received an acknowledgement, the decision and almost all of the records.

⁸ For more information on this submission, see: <http://cer.org.za/news/legal-ngos-call-on-department-of-mineral-resources-to-make-copies-of-licences-automatically-available-to-the-public>.

The request was for a number of specific bi-lateral investment treaties (BIT) South Africa had entered into with various states that were not publicly available at the time. In the response letter the department's information officer explained that the records are actually supposed to be automatically available for public access on its website, but that the website was currently under construction.

SAHA also commended DIRCO on having an accessible section 14 PAIA manual that outlines the process for attaining information from the department; a section 15 list of records proactively available on the website and elsewhere; and for demonstrating that, where proactively available records are requested in a PAIA request, these are made available without the levying of fees ordinarily associated with PAIA requests.

While this is a particularly positive example of a public body providing speedy access to information, there are unfortunately many examples at the opposite end of the spectrum. Transnet, for example, in response to PAIA requests submitted in January 2014 by SAHA on behalf of former Transnet employees, provided its response 593 days later. Transnet entered into protracted disagreement with SAHA about what constitutes reasonably sufficient "proof of capacity" for the purposes of section 18 of PAIA,⁹ even briefing attorneys to deal with the requests. When Transnet finally responded substantively, it was with a section 23 affidavit stating that they could not find the records and that it was unlikely that the records still existed.

CALS experience with the DMR on its Social and Labour Plan (SLP) project

As part of its SLP project, a project aimed at evaluating the extent to which the SLP system is capable of fulfilling the objectives of transformation of the mining sector and ensuring that companies contribute to the development of areas in which mining-affected communities reside, CALS submitted a number of PAIA requests to the DMR for copies of SLPs in respect of various mining operations.

CALS' engagement with the DMR in relation to these requests highlighted a number of challenges also faced by the CER. Perhaps the biggest problem with requests to the DMR is the lack of communication and competing ideologies and views between the national and regional offices.

Perhaps the biggest problem with requests to the DMR is the lack of communication and competing ideologies and views between the national and regional offices.

In accordance with the DMR's PAIA manual, CALS submitted a number of requests to the national office of the DMR. While these requests were approved by the national office, CALS was then often required to liaise with the regional offices to actually gain access to the documents, since it is the regional offices that usually house the information. When CALS liaised with the Mpumalanga regional office, its officials were reluctant to hand over the information – insisting that CALS had to submit a separate PAIA request to the regional office. CALS was eventually able to get the national office to intervene, whereafter the regional office agreed to release the documents. The North West regional office, despite being presented

⁹ Section 18 of PAIA prescribes the form in which requests for information must be made, and specifically requires that if a request is made on behalf of another person, the requester must submit proof of the capacity in which he or she is making the request.

with a full grant decision letter from the national office, took it upon itself to redact certain information without providing reasons.

The CER has had similar experiences in its dealings with the DMR. Regional offices of the DMR have also expressed their frustration that the national office grants requests without an understanding of whether or not the documents actually exist or can be found, which makes it difficult for the regional offices to adhere to the decision letters.

Procedures that violate PAIA

Despite the fact that PAIA has been operational since 2001, there are still far too many public and private bodies failing, or blatantly refusing, to comply with the Act.

For example, in July 2016, one of the CER's partners alerted it to the fact that the Mpumalanga Parks and Tourism Agency (MTPA), a public body established in terms of the Mpumalanga Tourism and Parks Agency Act 5 of 2005, was insisting that she "*clearly state why the information is requested and what your intention is with the requested information*". PAIA does not require that requesters provide reasons when requesting records from a public body – this requirement only applies when records are requested from a private body: there, the requester is required to demonstrate that the information is required for the exercise or protection of a right. In fact, section 11 of PAIA provides that even if a public body were to be aware of the reasons for the request, the known reasons for the request cannot affect its decision on access.

Despite the fact that PAIA has been operational since 2001, there are still far too many public and private bodies failing, or blatantly refusing, to comply with the Act.

The MTPA does not have a PAIA manual on its website, but instead has an "IM/IS policy – Access to Information and Classification Policy" (the "MTPA's policy"). While the MTPA's policy expressly refers to PAIA, it does not comply with PAIA in a number of respects, namely:

- a) While the MTPA is a public body, the MTPA's policy relies on provisions of PAIA which are only applicable to requests for information submitted to private bodies.
- b) The MTPA's policy requires that a person who requests records from the MTPA in terms of PAIA must provide reasons for that request, whereas PAIA, and section 32 of the Constitution, make it clear that reasons do not have to be provided when the request is to a public body.
- c) The MTPA's policy relies on a confidential classification system in relation to refusing to grant access to requested records, whereas PAIA sets out the only circumstances under which a request can be refused.
- d) The MTPA provides its own form requiring the submission of various information, whereas PAIA requests must be submitted on a standard prescribed form.

The CER wrote to the MTPA on 1 August 2016 pointing out (with reasons and reference to specific sections of PAIA) all of the ways in which the MTPA's policy was inconsistent with PAIA. The CER also engaged with officials at the MTPA telephonically on this issue. The CER requested that the MTPA amend its policy with reference to section 14 of PAIA, which prescribes the content for PAIA manuals which public bodies are required to prepare.

While the MTPA indicated that it was attending to the CER's concerns, there has been no change in the policy to date. The CER will continue to challenge the MTPA's non-compliance with PAIA.

SAHA's requests for copies of court interdicts obtained: #FeesMustFall

In light of the protests across the country in 2015 against planned increases in fees for tertiary education, and the violence associated with these protests, SAHA submitted the same PAIA request to a total of 21 universities in South Africa for copies of all court interdicts obtained by the universities in the last five years against any person or organisation in relation to protest action.

The responses to these PAIA requests were varied. Some universities immediately released the records, while some ignored or refused the requests initially but released the records after SAHA either challenged their refusals or indicated that it would appeal any deemed refusals. Some universities failed to respond at all.

Stellenbosch University gave SAHA trouble, raising technical issues unrelated to PAIA. These included the authority of SAHA employees to act on behalf of SAHA in requesting information. SAHA decided to challenge the University's assertions. After initially pushing back, Stellenbosch University released the records to SAHA.

Of the universities that complied with the provisions of PAIA, the most proactive was the University of Johannesburg (UJ). UJ responded to the PAIA request within four days, advising SAHA that the records would be made available. The records were then made available in less than two hours. Notably UJ decided not to charge SAHA the section 22 request fee nor the access fee. The experience with UJ was impressive and is an encouraging example of compliance with PAIA.

Of the 21 requests submitted, records were released by only 13 universities. Every university that released records to SAHA had obtained court orders in 2015, and some had also done so in 2016.

PAIA LITIGATION

Winding up previously instituted litigation

Two key cases of PAIA litigation were finalised during the reporting period for this report: litigation instituted by the CER (on behalf of Conservation South Africa) against the DMR for information relating to the sale of De Beers' Namaqualand Mines, and litigation instituted by SAHA relating to records from the Truth and Reconciliation Commission's Victims Database.

Although not litigation in terms of PAIA, amaBhungane's intervention as *amicus curiae* in *Nova Property Group Holdings and others v Cobbett & Moneyweb*, in which judgment was handed down by the Supreme Court of Appeal in May 2016, deserves mention in this report as litigation with significant implications for transparency in South Africa.

All three cases are dealt with below.

Conservation South Africa v The Director-General: Department of Mineral Resources and others

Civil society organisation Conservation South Africa (CSA), represented by the CER, had for

two and a half years tried unsuccessfully to access key environmental records from the DMR regarding the sale of De Beers' Namaqualand Mines to TransHex subsidiary Emerald Panther Investments 78 (Pty) Ltd. On 17 September 2015, the Western Cape High Court confirmed, in an order by agreement, that the Minister of Mineral Resources and the DMR must provide those records to CSA.

The DMR had refused to provide access to the information on the basis that the documents contained information that could cause harm to the commercial interests of De Beers. CSA submitted internal appeals, but the DMR failed to take decisions on these appeals.

In March 2014, represented by the CER, CSA instituted High Court proceedings against the DMR, also citing De Beers, TransHex and Emerald Panther for their interest in the matter. In response to the launch of this court application, the DMR initially agreed that the information sought by CSA was "not privileged" and undertook to release the records. However, De Beers then opposed the release of the information, and the DMR then withdrew its undertaking to provide the information.

In an apparent delaying tactic, De Beers provided batches of documents to CSA on three occasions after court papers were issued, none of which were the documents requested. When De Beers delayed filing an answering affidavit to explain why any of the requested documents should not be released to CSA by the DMR, CSA obtained an order from the High Court directing De Beers to file its answering affidavit, failing which De Beers would be barred from delivering answering papers and its opposition to the release of the records would be struck out. De Beers accordingly filed its answering papers. The following month, the transfer of Namaqualand Mines to TransHex was reportedly finalised. CSA filed its replying affidavit thereafter and applied for a date for the hearing of the matter.

On 10 April 2015, De Beers withdrew its opposition to CSA's application, and tendered to pay CSA's legal costs – after the Minister's approval of the transfer of De Beers' mining rights to TransHex was secured behind closed doors. Court proceedings then continued against the DMR, unopposed. The matter was eventually settled and an order by agreement against the DMR was obtained in September 2015.

This case demonstrates the extent to which public bodies fail to apply their minds to requests and appeals. We are seeing a concerning tendency on the part of the DMR to use the alleged commercial interests of private companies as the basis on which to refuse PAIA requests. This case also demonstrates the lengths that some private companies will go to in an effort to prevent public scrutiny of their operations and business deals.

South African History Archive v Minister of Justice and Deputy Information Officer: Department of Justice

The Truth and Reconciliation Commission's Victims' Database has finally been released to SAHA by the Department of Justice and SAHA is preparing it for hosting on the SAHA-SABC Truth and Reconciliation Commission website.

It took a decade, two PAIA requests, the initiation of litigation and constant pressure by SAHA on the Department of Justice and Correctional Services (the department) to obtain a copy of the entire Truth and Reconciliation Commission's Victims Database (the database).

The Truth and Reconciliation Commission (TRC) was privy to victims of apartheid's tales of desperation, abuse and horror. These tales were all recorded in a systematic manner that enabled the creation of a database encapsulating details of the violations. Persons, sources, acts, perpetrators, witnesses and events were the core categories used in the database, which

provides a wealth of potential data that could be used to analyse, for example, patterns of abuse under apartheid. It is for this reason, amongst others, that the TRC in its final report declared that the records of the TRC belong to all South Africans.

Nova Property Group Holdings and others v Cobbett & Moneyweb

On 12 May 2016, the Supreme Court of Appeal (SCA) delivered its judgment in this matter, finding that public access to shareholder registers is an unqualified right and cannot be refused.

When the matter headed to the SCA, amaBhungane applied to intervene as amicus on the unqualified right to access shareholder information. The matter arose from the attempts by Moneyweb financial journalist, Mr JP Cobbett, to exercise his statutory right in terms of section 26 of the Companies Act 71 of 2008 to access the securities registers of various companies. Nova Property Group and two other companies refused to provide access to their securities registers, resulting in Moneyweb launching an application in the Gauteng Division of the High Court to compel the companies to provide access.

The two main findings of the SCA judgment are, firstly, that the media and any person has a right to access the shareholder registers of any company in South Africa and that such a right is essential for effective journalism. Secondly, the court found that the motive for seeking access to these registers is irrelevant.

In commenting on the relationship between PAIA and section 26 of the Companies Act, the court held that “s 26 makes clear that the right conferred by s 26(2) is additional to the rights conferred by PAIA and does not need to be exercised in accordance with PAIA”.¹⁰ Members of the public seeking to gain access to securities registers can do so directly through the Companies Act, which encourages proactive disclosure of these records.

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NEW LITIGATION INSTITUTED BY SAHA

SAHA instituted new litigation in three matters in this reporting period.

South African History Archive Trust v Minister of Defence and Military Veterans and another

On 17 February 2016, after more than two years of protracted communication with the Department of Defence (DoD), SAHA filed papers in the Gauteng High Court in Johannesburg seeking an order to compel the DoD to grant access to certain records requested by SAHA from the DoD in two PAIA requests in 2013.

¹⁰ *Nova Property Group Holdings v Cobbett* (20815/2014) [2016] ZASCA 63; [2016] 3 All SA 32 (SCA); 2016 (4) SA 317 (SCA) (12 May 2016), at para 19.

The apartheid-era documents requested under the first request, if released to SAHA, will likely provide insight into historical controls over the use of public funds by the apartheid military, potentially containing details of criminal conduct that should be aired publicly.

While the documents requested under the second request are more recent, they are likely to shed light on the effectiveness of measures put in place post-apartheid to guard against the re-occurrence of the types of abuses perpetrated under apartheid, something in which the public clearly has a vested interest.

While there has been ongoing engagement with the DoD since submission of the requests, it became increasingly apparent to SAHA that not only was no final decision imminent, but that the process followed by the DoD in dealing with requests made in terms of PAIA is so hopelessly inadequate and non-compliant that SAHA had no recourse but to approach the court for access to the requested records.

South African History Archive Trust v South African Reserve Bank and another

In February 2016, SAHA filed papers seeking a final order to compel the South African Reserve Bank (SARB) to grant access to apartheid-era records of financial fraud. SAHA, in consultation with the Open Secrets Project (a research project focusing on the legacy of corruption, power and profit in South Africa), submitted a PAIA request to the SARB for various records related to suspected financial corruption that may have occurred during the apartheid era, including fraud through manipulation of the financial rand dual currency, foreign exchange or the forging of Eskom bonds.

While SAHA believes that public access to this information is vital to gain a clearer understanding of ways in which economic crimes of the past may be shaping present day corruption in South Africa, the SARB argues in its decision to deny SAHA access to these records that, in terms of the South African Reserve Bank Act, 1989 (the SARB Act), it is precluded from granting access to these records. The SARB, also, in addition, denied access under PAIA, relying on a shopping list of grounds for refusing access to these decades-old apartheid-era records.

Reasons for refusing access cited by SARB include, but are not limited to, assertions that SARB is bound by a duty of confidence owed to a third party, and that disclosure of the records is likely to materially jeopardise the economic interests or financial welfare of the Republic.

SAHA, however, remains convinced that this reliance on the SARB Act is misplaced for a number of reasons, including the fact that PAIA overrides older laws which limit access to information. Further, SAHA argues that the SARB has misconceived the sections of PAIA on which it is relying, such as those related to confidentiality and a duty to protect the country's economic interests. But perhaps most significantly SAHA maintains that, even to the extent that access could be denied under PAIA, access could still be granted under the public interest override provision in PAIA,¹¹ as these records may well reveal substantial contraventions of the law.

South African History Archive Trust v the Auditor General and another

SAHA filed court papers in April 2016 requesting that the court declare that the Auditor General of South Africa's (AGSA) decision not to grant access to requested records is unlawful and unconstitutional. SAHA, in consultation with the Open Secrets Project and Professor Jane Duncan from the University of Johannesburg, submitted three separate PAIA requests to the

¹¹ Section 46 of PAIA.

AGSA in August 2015. The PAIA requests were for records related to possible failures in modern day intelligence services, tax exemptions on the export, by the diamond company De Beers, of uncut diamonds from South Africa in 1992 and 1993, and the use of secret funding during the apartheid era to promote the policies of that regime.

SAHA believes that the requested records will enable both researchers and the South African public to test certain claims made by public and private bodies, both pre- and post-1994, about intelligence oversight, and the management of public funds. Access to the records related to intelligence services will likely make it possible to test whether weaknesses in intelligence oversight mechanisms that were identified by the Matthews Commission, a Ministerial Review Commission on Intelligence set up to look into the 2005 intelligence services crises, have yet been addressed. This is especially critical given the United Nations Human Rights Committee's finding that South Africa has "relatively weak safeguards, oversight and remedies against unlawful interference with the right to privacy".¹²

POPI AND THE INFORMATION REGULATOR

In terms of PAIA, once a request for information from a public body is refused, the only available recourse is to submit an internal appeal to the relevant authority (if the public body falls under part (a) of the definition of "public body"), and thereafter (if the initial decision is confirmed or if no decision is made on the appeal) to approach the court for a review of the refusal. As is clear from the PAIA request statistics section on pages 2–4 of this report, internal appeals rarely result in the reversal of the original decision. This is because they are made to the head of the same public body which refused access to the information in the first place. As a result, individuals may be faced with a situation where their only further right of recourse is to approach the courts, which is both time consuming and resource intensive.

In the case of a refusal of access to information by a private body, or a public body which falls under part (b) of the definition of "public body", there is no internal appeal option and the requester's only option is to approach the courts. Due to the exorbitant costs involved in litigation, approaching the courts is simply not possible for most requesters.

This dilemma led civil society organisations to call for an alternative, cost-effective avenue through which refusals could be challenged.

An alternative avenue for reviewing PAIA decisions has been introduced through the enactment of the Protection of Personal Information Act 4 of 2013 (POPI) in November 2013. POPI amends Part 4 and Part 5 of PAIA (which deal with internal appeals against decisions and the role of the Human Rights Commission in relation to access to information issues respectively) and provides for the establishment of an Information Regulator to take on specific responsibilities in terms of Part 4 and Part 5 of PAIA.

The amended provisions provide that a requester aggrieved by the decision of a public body or private body to refuse a request for access to information can, within 180 days of the decision, submit a complaint to the Information Regulator alleging that the decision was not in compliance with PAIA and request appropriate relief.

The amendments provide that, on receipt of a complaint, the Information Regulator must investigate the complaint and, if required, refer the complaint to the Enforcement Committee

¹² United Nations Human Rights Committee, 116 Session, Concluding observations on the initial report of South Africa, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=1016&Lang=en.

established in terms of section 50 of POPI. POPI provides that the Enforcement Committee must consist of at least one member of the Regulator and the Regulator must, in consultation with the Chief Justice and the Minister of Justice and Constitutional Development, appoint either a judge of the High Court, a magistrate with at least 10 years' appropriate experience, or an advocate or attorney with at least 10 years' appropriate experience as Chairperson of the Enforcement Committee.¹³

The amended provisions provide that, after having conducted an investigation and considered the recommendation of the Enforcement Committee, the Information Regulator may serve the information officer of the public or private body in question with an enforcement notice confirming, amending or setting aside the decision which is the subject of the complaint and requiring the officer to take action specified by the Information Regulator.

These amendments, and many of POPI's other provisions, are not yet in effect. This is in part due to the lengthy delay that occurred between the statute's enactment and the appointment of the Information Regulator. Part A of Chapter 5 of POPI, which provides for the establishment of the Information Regulator, came into effect in April 2014. A full year later, in April 2015, Parliament requested that the nomination of five candidates for the position be submitted to the Portfolio Committee on Justice and Correctional Services by August 2015. The office of the Information Regulator was only formally appointed on 26 October 2016, with effect from 1 December 2016.

The newly appointed office of the Information Regulator consists of Advocate Pansy Tlakula (Chair), Advocate Cordelia Stroom (full-time member), Mr Johannes Weapond (full-time member), Professor Tana Pistorius (part-time member) and Mr Sizwe Snail Ka Mtuze (part-time member).¹⁴

The President must still proclaim the commencement date for the provisions of POPI which are not yet in effect.

As the office of the Information Regulator was only appointed with effect from 1 December 2016, and the majority of POPI's provisions have not yet commenced, its impact is yet to be seen. However, the ATI Network hopes that the provision of an alternative, inexpensive mechanism to challenge refusals will enhance access to information for many and reduce the need to institute court proceedings. This is particularly so in the case of requests to part (b) public bodies and private bodies, where there is no right of internal appeal.

RECOMMENDATIONS

Based on the experiences of ATI Network members, and previous submissions, the ATI Network makes the following recommendations:

1. Need for increased disclosure

In both the public and the private sector, ATI Network members have encountered repeated instances of public and private bodies using PAIA to resist and slow down access to information. Because of the many incorrect ways in which PAIA is implemented and understood, providing access to information is not the default position envisaged by the Constitution. This not only creates a heavy burden on both the State and those who seek information, but also hampers the ability of civil society to assist the State in monitoring compliance and enforcing laws.

¹³ POPI, section 50.

¹⁴ <http://www.sanews.gov.za/south-africa/members-information-regulator-appointed>.

Public bodies must be educated regarding their obligation to submit a description of categories of information automatically available in terms of section 15 of PAIA. Public bodies must also be encouraged to broaden their categories of automatically-available information, and should be encouraged to place all such information on their websites. This will work not only towards ensuring that access to information is established as the default position, but will also assist the State by reducing the number of PAIA requests submitted – since more information will be freely and easily accessible.

Public bodies must also be encouraged to broaden their categories of automatically-available information, and should be encouraged to place all such information on their websites.

The ATI Network also submits that information which is listed as automatically available must in fact be made available and PAIA should provide for remedies to urgently address any failures to make this information available. It is the Network's experience that information listed as automatically available is often not actually available and we have experienced significant delays and difficulties in gaining timeous access to such information. This is clearly not the intention of section 15 of PAIA.

The most obvious solution is for public bodies to place all automatically-available information on their websites. As the Department of Environmental Affairs has demonstrated with the South African Waste Information Centre (SAWIC),¹⁵ which provides online access to waste-related information including licences, such an endeavour is not administratively impossible. Platforms such as SAWIC obviously need to be managed and updated, but if this is done properly then the availability of these platforms will greatly reduce the number of *ad hoc* requests for information.

2. Need for mandatory disclosure of all authorisations, approvals, permits and licences

Authorisations, approvals, permits and licences required in order to lawfully conduct operations (of any kind) should always be in the public domain, as these documents represent the minimum requirements for lawful conduct of the activities associated therewith.

This is consistent with, and is in fact a lower standard than that which is required in the environmental context by the Environmental Impact Assessment (EIA) Regulations¹⁶ published under the National Environmental Management Act, 1998. Regulation 26(h) of the EIA Regulations requires that all environmental authorisations, environmental management programmes, any independent assessments of financial provision for rehabilitation and environmental liability, closure plans, audit reports, and all compliance monitoring reports be made available for inspection and copying at the site of the activities, to anyone on request, and on the website of the authorisation holder.

Each piece of sector specific legislation, following the example of the EIA Regulations in the context of environmental management, should be amended to provide for mandatory disclosure

15 <http://sawic.environment.gov.za/>

16 GNR 982, published in *Government Gazette* No. 38282, dated 4 December 2014.

of authorisations, approvals, permits and licences required for lawful operation. Mandatory disclosure of these documents is in the public interest and would empower civil society to assist the State in monitoring compliance.

Mandatory disclosure of these documents is in the public interest and would empower civil society to assist the State in monitoring compliance.

Until these amendments are made, another option available to all regulators is to simply include a condition within all licences issued that requires the licence holder to make a copy of their licence available on their website or to anyone on request. Including this requirement as a licence condition does not require any legislative amendments. This is a measure which all regulators can immediately start to implement. Shifting this obligation to the licence holder will also alleviate the administrative pressure on state institutions.

3. Severability clauses in PAIA

Far too many record holders appear unaware of, or circumvent the peremptory severability provisions, namely section 28 (public bodies) and section 59 (private bodies) of PAIA, and in so doing frustrate access to records that would otherwise be capable of being released once protected information is redacted.

ATI Network members have in the past raised, and will continue to raise awareness on the applicability of these clauses. Greater adherence to the severability clauses would promote the objectives of PAIA while respecting the need to withhold portions of records that should remain protected from disclosure.

In an effort to support improved adherence to these severability clauses, it is also recommended that sections 25(3), 56(3) and 77(5) be amended to specifically require the information officer, private body and relevant authority to provide written assurance when notifying the requester/appellant that they have considered section 28/59 (whichever is applicable) before arriving at a decision to refuse or only partially release records sought.

4. Definitions needed for the terms “trade secrets” and “commercial information”

As is clear from the PAIA request statistics section on pages 2–4 of this report, sections 36 and 68 of PAIA (which deal with the protection of commercial information) are frequently relied on by public and private bodies to justify decisions to refuse to release information. In the experience of ATI Network members, these sections are often relied on in circumstances which are not justified.

Definitions of the terms “trade secrets” and “commercial information” are necessary because other statutes that govern commercial transactions in South Africa, such as the Patent Act, the Trade Marks Act, the Copyright Act, the Companies Act, the Close Corporations Act, the Protection of Personal Information Act, the Public Finance Management Act and the Banks Act, do not make mention of either “trade secrets” or “commercial information”. Without any definitions for these terms, in PAIA or otherwise, there is wide discretion left for public and private bodies to refuse requests arbitrarily by relying on these vague terms.

5. Public interest override too narrow

In the experience of ATI Network members, sections 46¹⁷ and 70¹⁸ of PAIA (public interest override sections) are not used by information officers. A possible reason for this is that the wording of these sections, read with the definition of “public safety or environmental risk” in PAIA, is too narrowly framed.

If these sections are to feature more in decision-making on PAIA requests, they need to be more widely crafted. This could be achieved through the following amendments:

- Removal of the word “substantial” prior to the word “contravention” – alternatively there needs to be a narrowly crafted definition for “substantial contravention of, or failure to comply with, the law”.
- The definition of “public safety and environmental risk” should be broadened or deleted.
- The word “clearly” in sections 46(b) and 70(b) of PAIA should be deleted.

Information officers should also be obliged to include a declaration in the reasons for their decision stating that they have considered the public interest override and have determined whether it is, or is not applicable.

6. Addressing capacity constraints within public bodies

While some public bodies have designated deputy information officers and administrative support staff dealing specifically with PAIA requests, many do not.

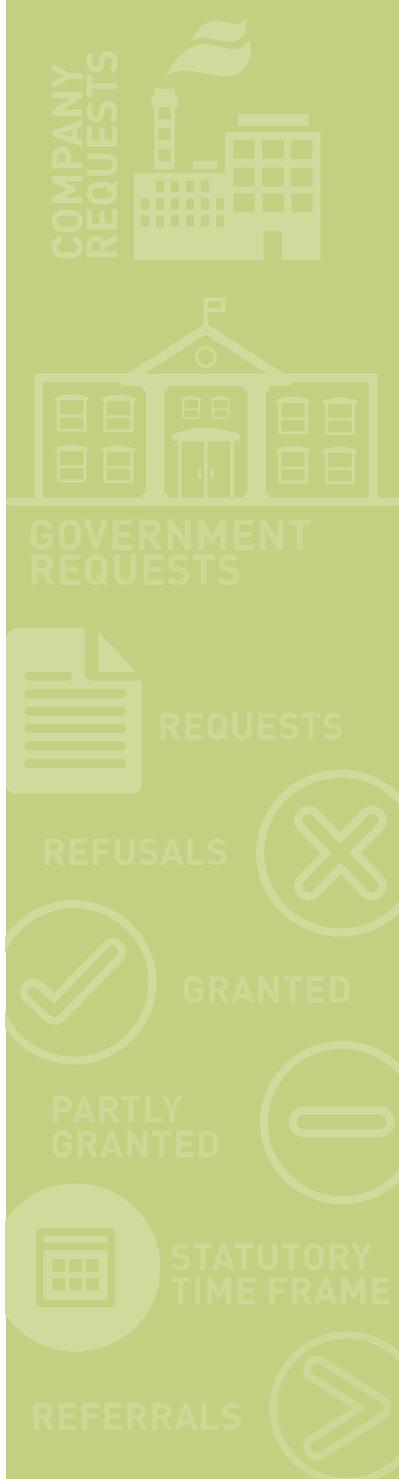
Public bodies’ obligations under PAIA need to be built into their staff organograms and specific obligations included in appointed officials’ performance contracts. Generally speaking, busy departments need to appoint at least one dedicated, qualified deputy information officer at a sufficiently senior level, and one full-time PAIA administration officer. Where records are held in regional offices, that model must be replicated in the regions.

Public bodies also need to invest in educating staff on PAIA and compliance requirements, and on the importance of the right of access to information. This is particularly important given the onus PAIA and the Constitution place on bodies receiving requests to assist the requesters with those requests and to ensure the development of a culture of transparency and accountability. Many of the organisations that have contributed to this report have extensive experience in the use and implementation of PAIA and experience in the formulation of PAIA request descriptions. The experiences of individuals that have less experience may be even more dire, making the need for proper training and sensitisation even stronger.

17 Section 46. Mandatory disclosure in public interest. Despite any other provision for this Chapter, the information officer of a public body must grant a request for access to a record of the body contemplated in section 34(1), 36(1), 37(1)(a) or (b), 38(a) or (b), 39(1)(a) or (b), 40, 41(1)(a) or (b), 42(1) or (3), 43(1) or (2), 44(1) or (2) or 45, if – (a) the disclosure of the record would reveal evidence of – (i) a substantial contravention of, or failure to comply with, the law; or (ii) an imminent and serious public safety or environmental risk; and (b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question.

18 Section 70. Mandatory disclosure in public interest. Despite any other provision of this Chapter, the head of a private body must grant a request for access to a record of the body contemplated in section 63(1), 64(1), 65, 66(a) or (b), 67, 68(1) or 69(1) or (2) if – (a) the disclosure of the record would reveal evidence of – (i) a substantial contravention of, or failure to comply with, the law; or (ii) imminent and serious public safety or environmental risk; and (b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question.

A SUMMARY OF STATISTICS



ATI NETWORK

A network of civil society organisations which cooperate to achieve the common objective of advancing the realisation of the right to access information for all South Africans.



369

PAIA requests were made between 1 August 2015 and 31 July 2016



4%
of these requests were made to companies



96%
of these requests were made to government and State Owned Companies (SOCs)

REQUESTS TO COMPANIES

REQUESTS TO GOVERNMENT & SOCs (excluding pending requests)



67% of requests were refused by companies



46% of requests were refused by government



13% of requests were granted in full



34% of requests were granted in full



20% of requests were granted in part



12% of requests were granted in part



Only 40% of requests were responded to within the statutory time frame



4% of requests were transferred to other government bodies



Only 40% of requests were responded to within the statutory time frame

REFUSALS BY GOVERNMENT & SOCs

58%

OF REQUESTS WERE DEEMED REFUSALS, I.E. THE REQUESTS WERE IGNORED

INTERNAL APPEALS (GOVERNMENT)



64 internal appeals were submitted challenging refusals to release records



9% of appeals submitted were successful



64% of these appeals were deemed to have been dismissed, i.e. the appeals were ignored



8% of appeals submitted were partially successful



Only 28% of appeals were decided within the statutory time frame

APPENDIX: MEMBERS OF THE ATI NETWORK

The ATI Network currently consists of the following members (in alphabetical order):



AMABHUNGANE CENTRE FOR INVESTIGATIVE JOURNALISM

amaBhungane is a non-profit company founded to develop investigative journalism in the public interest.

They are mandated to do so through:

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

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

www.amabhungane.co.za

CENTRE FOR APPLIED LEGAL STUDIES

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

www.wits.ac.za/cals/

CENTRE FOR ENVIRONMENTAL RIGHTS

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

www.cer.org.za

CORRUPTION WATCH

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

www.corruptionwatch.org.za



EQUAL EDUCATION LAW CENTRE

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

www.eelawcentre.org.za

KHULUMANI SUPPORT GROUP

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

www.khulumani.net

OPEN DEMOCRACY ADVICE CENTRE

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

www.opendemocracy.org.za

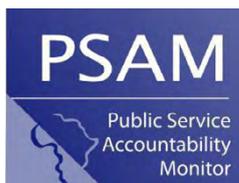
OXPECKERS INVESTIGATIVE ENVIRONMENTAL JOURNALISM

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

www.oxpeckers.org

PROBONO.ORG

ProBono.Org harnesses the enormous skill, might and strength of the South African private legal fraternity to cases and clients that it identifies. Its existence is a response to the lack of access to justice for people in South African who are unable to pay for their own private legal representation. Section 34 of our Constitution, giving everyone the right to have any dispute resolved by the application of law decided in a fair public hearing before a court, or... another independent and impartial tribunal or forum, has no meaning whatsoever, if a person is unable



to afford representation. ProBono.Org has as its goal, the creation of sufficient free legal representation for all who need it.

www.probono.org.za

PUBLIC SERVICE ACCOUNTABILITY MONITOR

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

www.psam.org.za

RIGHT2KNOW

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

www.right2know.org.za

SOUTH AFRICAN HISTORY ARCHIVE

The South African History Archive (SAHA) is an independent human rights archive dedicated to documenting and providing access to archival holdings that relate to past and contemporary struggles for justice in South Africa. SAHA's Freedom of Information Programme (FOIP) is dedicated to using PAIA in order to extend the boundaries of freedom of information and to build up an archive of materials released under the Act for public use.

www.foip.saha.org.za

WITS JUSTICE PROJECT

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

www.witsjusticeproject.co.za

A SPECIAL WORD OF THANKS

The ATI Network takes special note in this edition of the work done for and on behalf of the Network by the outgoing Director of SAHA, Catherine Kennedy. Catherine, whose time at SAHA came to an end in December 2016, has, since the early days of the Network, been heavily involved on behalf of SAHA in the work of the Network. Over the years Catherine has contributed in many ways to the work of the Network, not least of which was her contributions to the Shadow Reports, some of which she authored on behalf of the Network and others that she gave significant input to, specifically with respect to statistical information. The Network would like to take this opportunity to thank Catherine for all the invaluable hours, effort and insight ploughed into the work of the Network and to wish her all the best with her future endeavours.