

**Parliamentary Officer 30 August 2019**

**Attention : Mr. S.Mthonjeni**

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**RE: COMMENTS ON THE PROMOTION OF ACCESS TO INFORMATION AMENDMENT BILL**

Kindly find comments from the Information Regulator (Regulator) on the draft Promotion of Access to Information Amendment Bill.

Yours Sincerely

\_\_\_Signed\_\_\_\_\_\_\_\_\_\_\_\_

Adv.P.Tlakula

Chairperson, Information Regulator



**COMMENTS ON THE PROMOTION OF ACCESS TO INFORMATION AMENDMENT BILL**

**INTRODUCTION**

1. The Portfolio Committee on Justice and Correctional Services published an invitation to provide written comments on the Promotion of Access to Information Amendment Bill (the Bill) (Government Gazette 42604 of 31st July 2019).
2. The Bill seeks to amend the Promotion of Access to Information Act 2 of 2000 (PAIA) so as to provide for information on the private funding of political parties and independent candidates to be recorded, preserved and made available.
3. The Bill is informed by the Constitutional Court decision of *My Vote Counts NPC v Minister of Justice and Correctional Services CCT 249/17* which confirmed the constitutional invalidity of PAIA made by the Western Cape Division of the High Court in the following terms:

* that information on private funding of political parties and independent candidates is essential for the effective exercise of the right to make political choices and to participate in the elections;
* that information on private funding of political parties and independent candidates must be recorded, preserved and made reasonably accessible;
* that PAIA is invalid to the extent of its inconsistency with the Constitution by failing to provide for the recordal, preservation and reasonable disclosure of information on the private funding of political parties and independent candidates; and
* that Parliament must amend PAIA and take any other measure it deems appropriate to provide for the recordal, preservation and facilitation of reasonable access to information on the private funding of political parties and independent candidates within a period of 18 months.

**THE DEFICIENCIES CITED BY THE CONSTITUTIONAL COURT**

1. The Court looked at whether the definitions of PAIA include political parties and independent candidates and whether "recorded" and disclosable information includes information which is "held" by them.
2. The Court further examined the definition of a private body to assess whether it includes independent candidates.
3. A private body is defined in PAIA as-
4. a natural person who carries or has carried on any trade, business or profession, but only in such capacity;
5. a partnership which carries or has carried on any trade, business or profession; or
6. any former or existing juristic person, but excludes a public body;
7. An independent candidate is excluded from the above definition of a "private body" as this definition applies to a natural person who carries or has carried on any trade, business or profession.
8. The definition of a "private body" is further extended to include any former or existing juristic person. A juristic person is defined as being an entity or association that is awarded legal personality by legislation or the common law. It can sue or be sued; it can acquire rights and possess perpetual succession.
9. Political parties are not established through legislation and are not required by law to be juristic persons. There is currently no legal obligation on political parties to define their legal persona as juristic persons.
10. The constitutional deficiency is that PAIA does not apply to political parties that are not juristic persons. There is no obligation on political parties or independent candidates to maintain records on private funding. The refusal of information under PAIA can then be justified under the protection afforded to third parties.
11. The Constitutional Court found PAIA to be deficient in that it does not provide for:

* "information on private funding of political parties and independent candidates be recorded and preserved";
* "it be made reasonably accessible to the public”; and
* “independent candidates and all political parties are subject to its provisions." Additionally, it suffices to say that no compelling reasons exist to justify these limitations.

1. The Court further held that the long title of PAIA is:

*“to give effect to the constitutional right of access to any information held by the State and any information that is held by another person and that is required for the exercise or protection of any rights; and to provide for matters connected therewith.”*

1. Information on private funding of political parties and independent candidates was found to be vital for the effective exercise of the right to vote in elections and to make political choices in terms of sections 19(1), 19(3), 32 and 7(2) of the Constitution. The right to vote and the legitimacy of the manner in which one exercises this right is central to our democracy.
2. Public disclosure on private funding creates a transparent and accountable government. In a bid to exorcise corruption and build good governance it is indeed necessary that information on private funding of political parties and independent candidates is made available to the electorate. The global standard on financial disclosure of political parties requires that there is legislation on disclosure.
3. The United Nations Convention against Corruption calls on states to take appropriate legislative and administrative measures to enhance transparency in the funding of candidatures for elected public office and where applicable the funding of political parties.

**DOES THE PAIA AMENDMENT BILL GIVE EFFECT TO THE CONSTITUTIONAL COURT DECISION**

1. In order to respond to the question whether the Bill gives effect to the Constitutional Court decision, the decision of the Court must be read and interpreted holistically. In this regard, the following aspects are pertinent:

* that PAIA is the national legislation envisaged by Section 32 of the Constitution to give substance to a citizen’s right of access to information. (Par.15 of the judgment)
* That the word “everyone” in Section 32 of the Constitution is wide enough to accommodate both a juristic and natural person. Similarly “another person” in this context suggests a person other than the state and is on the face of it wide enough to apply to a natural and juristic person, including a political party or independent candidate.” (Par.20)
* For every citizen to be truly free to a make political choice, including which party to join and which not to vote for or which political cause to campaign for or support, access to relevant or empowering information must be facilitated. Not only must the information be “held” in one form or another, it must also be reasonably accessible to potential voters. They need it to be able to make a quality decision to vote for a particular political party or independent candidate. (Par.34).
* For, there is a vital connection between a proper exercise of the right to vote and the right of access to information. The former is not to be exercised blindly or without proper reflection. In this regard, Nqcobo CJ made the following observations:

*“In a democratic society such as our own, the effective exercise of the right to vote also depends on the right of access to information. For without access to information, the ability of citizens to make responsible political decisions and participate meaning fully in public life is undermined.”[[1]](#footnote-1) (par.35)*

* Public office is so important that it is only to be ascended to by those who have been properly examined and found worthy to represent the electorate. And that may only be so with the benefit of information. Without it, “ the ability of citizens to make responsible political decisions and participate meaningfully in public life is undermined”. (par. 36)
* By its very nature, the proper exercise of the right to vote is largely dependent on information. (par.37)
* The State is under an obligation to do everything reasonably possible to give practical and meaningful expression to the right of access to information and the right to vote. These two are human rights and freedoms. And one of the foundational values of our State is “the advancement of human rights and freedoms.” (par.43)
* Section 32 contemplates two holders of potentially disclosable information – the State and “another person”. Although “another person” is not defined by the Constitution, it is the only category capable of accommodating political parties and independent candidates which obviously do not fall under the category of “the State”. And the definition section of PAIA says “person means a natural person or juristic person”. We thus have to determine first, not only whether the definitional section of PAIA includes political parties and independent candidates, but also whether “recorded” and disclosable information includes that which is “held” by them. (par.61).
* PAIA sets out circumstances under which a requester would be entitled to information, which at times include payment of a fee. And that is information held by what PAIA amongst others refers to as a “private body”. (par.62)
* It follows from the definition of PAIA that, “although an independent candidate is indeed a natural person, he or she is one who is excluded from the meaning of a private body and the application of PAIA. Only “a natural person who carries or has carried on any trade, business or profession but only in such a capacity” could be requested to disclose information or a “record” that relates to that activity. Even if an independent candidate is a professional, trader or business person she would still be excluded. Since the information required from her would not be about what she did or does in her capacity as a professional or trader or business person, but about the private funding of her political activities, then access cannot be granted. An independent candidate for public office is therefore doubly excluded. (par 63)
* The meaning of “private body” extends to “any former or existing juristic person”. A juristic person is by the way an entity or association that possesses attributes such as perpetual succession, the capacity to acquire certain rights apart from its members and to sue or be sued in its name or through its institutional head. This legal personality status is conferrable either by legislation or the common law. Legislation that creates an entity like a university or state-owned enterprise ordinarily bestows legal personality upon that entity. And it is a statutory precondition for the incorporation or registration of some entities that they be juristic persons with the legal capacity to sue or be sued. Other entities could derive their legal personality from their constitutions. (par 64)
* Political parties are neither created by legislation nor required by any legislation to be juristic persons. But, they can in terms of their constitutions clothe themselves with juristic personality, including the capacity to sue or be sued. In all probability, most political parties are juristic persons. PAIA therefore applies to them. However since there is no law that requires political parties to be juristic persons, a real possibility does exist that some have deliberately or inadvertently not provided for their legal personality in their constitutions. That this probably applies to a small number is neither here nor there. It is an absolute necessity that all, not some, political parties be required to record, preserve and disclose information on their private funding. After all, any of them has the possibility to be elected into power aided by private funders. For this reason, to the extent that PAIA does not cover those political parties that are not juristic persons, it is constitutionally deficient. (par. 65).

1. The Regulator is of the view that the Bill complies with the decision of the Constitutional Court to the extent that it addresses the narrow issue that was before the Court, namely the inclusion of the recordal, preservation and reasonable disclosure of information on private funding of political parties and independent candidates in PAIA.
2. However, the Regulator is of the view that the purposeful interpretation of the decision of the Constitutional Court is that PAIA in its entirety should be applicable to political parties and independent candidates.

**RECOMMENDATIONS**

* It is recommended that the definition of “private bodies” under Section 1 of PAIA be extended to include political parties and independent candidates. The extension of the definition of “private bodies” to include political parties and independent candidates will effectively cure the deficiencies highlighted by the Constitutional Court. It will most importantly ensure that PAIA is applicable to political parties and independent candidates.
* The definition of “head” in section 1 of PAIA must also be extended to include the head of a political party and independent candidates.

1. *President of the Republic of South Africa v M& G Media Limited[2011] ZACC 32; 2012 (2) SA 50(CC); 2012 (2) BCLR 181(CC) at para 10.* [↑](#footnote-ref-1)