



SOUTH AFRICAN HUMAN RIGHTS COMMISSION

Comments on the Promotion of Access to Information Amendment Bill, 2019

Submission to the Portfolio Committee on Justice and Correctional Services

August 2019

1. Introduction

The South African Human Rights Commission (SAHRC/Commission) welcomes the publication of the Promotion of Access to Information Amendment Bill, 2019 (the Bill) by the Portfolio Committee on Justice and Correctional Services (the Committee) for public comment.

The Bill provides the opportunity for the SAHRC, other stakeholders and ordinary citizens to actively engage the draft legislation with a view to recommending measures to improve legislative frameworks in South Africa and ultimately strengthen human rights protection and promotion. In particular, the SAHRC must ensure the development of a culture of human rights embedded in a society characterised by the right of all people in South Africa to access any information held by the State, or any other person and that is necessary for the exercise or protection of a right. In fulfilling its constitutional and statutory mandates, the SAHRC aims to promote transparency, accountability and effective governance across all such bodies.

The ultimate objective of the SAHRC is to fulfil its responsibilities and mandate to promote, monitor, and protect human rights in terms of the Constitution of the Republic of South Africa, 1996 (Constitution), the South African Human Rights Commission Act, 40 of 2013 (SAHRC

Act), the Promotion of Access to Information Act, 2 of 2000 (PAIA), and other applicable national legislation, and regional and international instruments. The Commission has additional powers and functions prescribed under the PAIA, under which it is empowered to promote the realisation of the right to access information, report to Parliament on the implementation of the legislation and propose recommendations to address any challenges related thereto. Section 83 (3) of PAIA deals with the additional functions of the Commission, providing that the Human Rights Commission may-

(a) make recommendations for-

(i) the development, improvement, modernisation, reform or amendment of this Act or other legislation or common law having a bearing on access to information held by public and private bodies, respectively; and

(ii) procedures in terms of which public and private bodies make information electronically available.

The SAHRC accordingly has vested procedural and substantive interests in any proposed amendment to the PAIA. Accordingly, the SAHRC sets out its concerns with the Bill hereunder.

2. SAHRC concerns on the Bill

2.1. General

Notwithstanding the enactment of the PAIA, South Africans still struggle to exercise their rights in respect of information requests to private and public bodies alike. In the circumstances, the current focus on political party funding provides South Africa a valuable opportunity to consider the broader principles of transparency, and accountability in the context of rights such as access to information and responsibilities of business to uphold human rights.

Creating compulsory proactive disclosure through the PAIA, by way of appropriate amendment of this Act, will allow for disclosure of more than funding information and extend to other information which should be automatically available in respect of political parties. Currently, the Bill only creates proactive disclosure in respect of funding received by political parties. It is not clear that the limited amendment of the PAIA will allow requesters to request other information from political parties. By restricting the right of the public to access information held by political parties, a key opportunity for legislative improvement will be missed whereas the amendment is under inclusive and arguably unjustifiably limits the constitutional right of access to information.

2.2. Definitions clause

The SAHRC notes the limited nature of proposed Chapter 2A and points to other information of political parties that should be accessible to the public. Given the unique nature of political parties, coupled with the crucial role played by political parties in South Africa's constitutional democracy,¹ the SAHRC recommends that 'political parties' be included in the definition of 'public body'. This amendment can be effected by adding a new subsection (c) to the PAIA's definition of 'public body'.

2.3. Chapter 2A

The SAHRC welcomes the inclusion of legislative provisions that mandate proactive disclosure under the PAIA.

2.3.1. Potential amendment of section 15

Given widespread non-compliance with the PAIA by public (and private) bodies, it is accordingly recommended that instead of inserting a new legislative chapter, section 15 of the PAIA be amended to:

- (a) place an obligation on government to establish an open governmental data portal where all proactively disclosed information may be accessed by the public;
- (b) specify that funding records of political parties must be made proactively available, in terms of the provisions set out in Chapter 2A.

Should 'political parties' be included in the definition of 'public body', Chapter 2A may therefore be incorporated into section 15. Regardless of where the provisions of Chapter 2A are placed, the Commission urges consideration of the expansion of section 15 to provide for an open governmental data portal.

2.3.2. Availability of information

Currently, clause 52B(1)(b) and (2) mandates that the information must be disclosed on 'the social media platforms of the political party concerned'. However, approximately half of South

¹ *Ramakatsa and Others v Magashule and Others* 2013 (2) BCLR 202 (CC).

Africa's population does not have access to the internet. It is accordingly recommended that the following be inserted following 'the social media platforms of the political party concerned' in clause 52(b)(1) and (2):

; its website, if any; and its principal premises, if any

This addition will ensure that funding information is disclosed on a website (for members of the public who do not have access to social media platforms) and further will be physically disclosed (for members of the public who do not have access to the internet).

2.3.3. Accessibility of other information

However, should 'political parties' not be included in the definition of 'public body', Chapter 2A should be retained but expanded to ensure that other information held by political parties – other than funding records – is accessible to the public. A provision mandating proactive disclosure of such information, or providing for *ad hoc* request procedures, should accordingly be inserted.

2.3.4. Internal political party campaigns

The Political Party Funding Act, 6 of 2018, has been welcomed for the transparency it will inculcate in respect of the private funding of political parties. However, the Act is silent on the disclosure of information pertaining to the funding of internal candidates for discrete internal political party campaigns.

Recent political events have caused the President of the Republic of South Africa to urge Parliament to consider whether it is necessary and desirable for internal party contests to be regulated.² The same influence can be assumed to be exerted on internal party candidates as that applied when funding political parties, in that contributions might be made to internal candidates to advance a certain policy agenda in the benefactor's interest. Thus, the Constitutional Court has held:

Politicians who use public office in the furtherance of the agendas of benefactors, at the expense of the best interests of all, are very likely to be found out where there is transparency.

² D Friedman 'If I must disclose my funding, everyone else must too, Ramaphosa tells Malema' (22-08-2019) *The Citizen* <<https://citizen.co.za/news/south-africa/parliament/2170232/if-i-must-disclose-my-funding-everyone-else-must-too-ramaphosa-tells-malema/>>.

The recordal, preservation and disclosure of information on the private funding of political players will thus keep voters better-equipped to make out the real interests these politicians are likely to serve... [I]t also frees our public representatives to do what they promise and are obliged to do, unencumbered by potentially corrupt deals that could be enabled by undisclosed private funding. If secrecy thrives, then our constitutional project would be at risk of being betrayed or shipwrecked.³

The same reasoning proffered by the apex court in *My Vote Counts* thus extends to the funding of internal party contests, and the need for transparency in this context.

2.4. Other provisions susceptible to amendment

Section 83(3) of the PAIA provides:

The Human Rights Commission may-

(a) make recommendations for-

(i) the development, improvement, modernisation, reform or amendment of this Act or other legislation or common law having a bearing on access to information held by public and private bodies, respectively...

Having fulfilled the mandate stipulated in PAIA for close to two decades, the Commission has observed that several provisions in PAIA need to be amended or improved so as to ensure that PAIA remains fit-for-purpose in the information age. Accordingly, the Commission has made several recommendations for the development, improvement, modernisation, reform and amendment of the PAIA.⁴

The SAHRC is cognisant that, once fully promulgated, the Protection of Personal Information Act, 4 of 2013 will amend the PAIA in such a manner as to introduce enforcement powers for the Information Regulator. The Commission welcomes this development, and recognises that it addresses certain issues such as the limited availability of internal appeals.

³ *My Vote Counts NPC v Minister of Justice and Correctional Services and Another* [2018] ZACC 17 paras 51-52. See also the dissenting judgment in *My Vote Counts NPC v Speaker of the National Assembly and Others* [2015] ZACC 31 para 42:

Private contributions to a political party are not made thoughtlessly, or without motive. They are made in the anticipation that the party will advance a particular social interest, policy or viewpoint. And political parties, in turn, depend on contributors for the very resources that allow them to conduct their democratic activities. Those resources keep flowing to the extent that they meet their contributors' and funders' expectations. There can be little doubt, then, that the identity of those contributors, and what they contribute, provides important information about the parties' likely behaviour.

⁴ These recommendations are set out in *SAHRC Annual PAIA Report 2015-2017* (2018).

The SAHRC accordingly recommends the following amendments:

(a) Section 90(2) makes failure to comply with section 14 of PAIA an offence. However, there is no similar provision in respect of failure to comply with section 32. The SAHRC recommends that Section 90 of PAIA be amended to include the following wording:

'An information officer of a public body who has willingly and fully or in a grossly negligent manner, failed to comply with the provisions of Section 32, commits an offence, and is liable on conviction to a fine not exceeding R5000, or imprisonment of a period not less than 2 years'

(b) The SAHRC recommends the following in terms of Section 32 of PAIA:

- The Commission has often raised concerns about the absence of a clear directive within the legislation to enable it to test the veracity of the content of a section 32 report. It has come to the SAHRC's attention that a number of public bodies are not tracking and reporting on requests submitted to them. The SAHRC and/or Information Regulator should therefore be empowered to conduct randomised audits of section 32 reports.
- The provision should be amended to make reference to the public body's compliance with the proactive disclosure provisions set out in section 15 of PAIA;
- Section 32(d) should be amended to include a requirement that public bodies must indicate the specific grounds relied upon to refuse a request for information.

(c) The Commission recommends that the use of the word 'and' between subsection (a) and (b) of section 46 (Public Interest Override) be replaced with the word 'or' to lessen the burden on requesters who wish to rely on the provision.

(d) The SAHRC recommends that section 22, 25 and 26 be amended to clearly reflect that the 30 (thirty) day time period cannot be deviated from in any circumstances. In addition, it is recommended that shorter time periods be introduced where access to information is vital to safeguarding the liberty of people.

The amendments set out above will help improve and modernise the PAIA. Furthermore, the creation of an open data portal in terms of section 15 will greatly enhance transparency and openness, and thereby promote responsiveness and accountability.

5. Conclusion

The Commission commends the Portfolio Committee for its initiative in regulating proactive disclosure. The SAHRC extends its gratitude to the Portfolio Committee for the opportunity afforded in commenting on the draft legislation and avails itself for further engagement on the Bill.

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