MONEY TALKS

Commercial interests and transparency in environmental governance

After four-and-a-half years[1] of requesting records on environmental governance and management, the Promotion of Access to Information Act, 2000 (PAIA) remains poorly implemented and inadequately enforced. Constrained by capacity and funding, public bodies often demonstrate reluctance and inexperience in engaging with PAIA and its processes.

However, we also see increased deference by government departments to the wishes of the business sector regarding disclosure, and a perceived duty to protect all information relevant to private enterprises from the public and particularly public interest groups. In 2013 and 2014, this manifested itself in reliance on the 'mandatory protection of commercial information of a third party' under section 36 of PAIA becoming the predominant reason for the refusal of access to information requests, whether or not such protection is justified under PAIA.

240

NUMBER OF PAIA REQUESTS SUBMITTED BY CER SINCE 2010

192 To government departments and state agencies

14 To parastatals

34 To private bodies

Centre *for* Environmental Rights
Advancing Environmental Rights in South Africa

Tel 021 447 1647 | Fax 086 730 9098 | info@cer.org.za | www.cer.org.za

INTRODUCTION

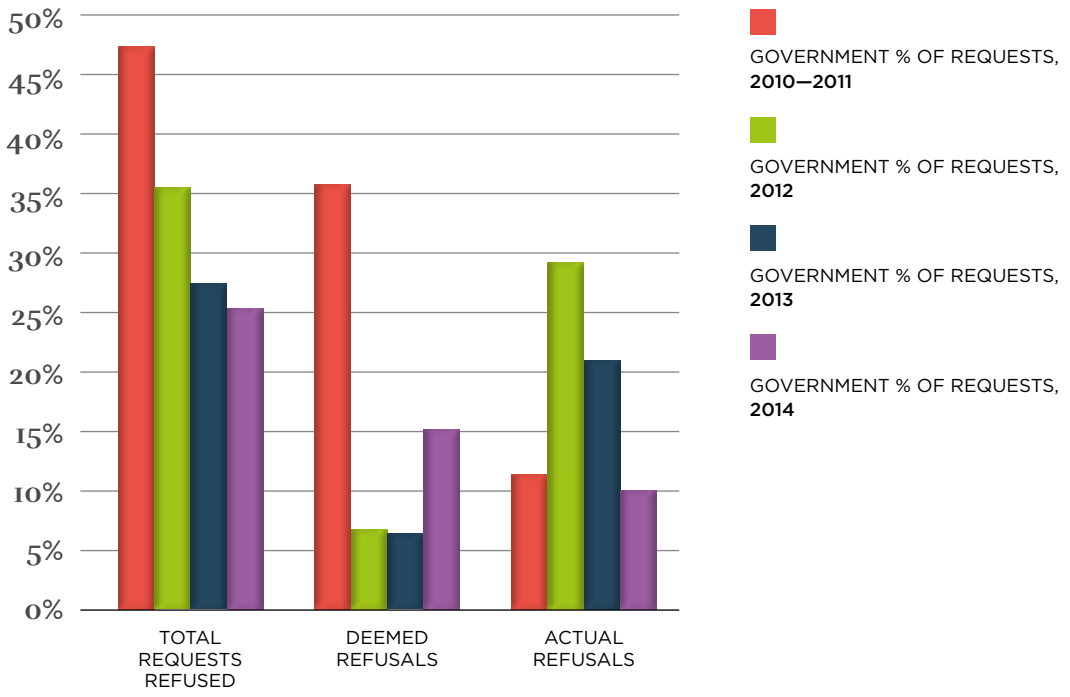
The Centre for Environmental Rights (CER) has been recording data on our use of PAIA to access information on environmental governance and management from government and the private sector for more than four years.

TOTAL NUMBERS OF PAIA REQUESTS BY CER
(January 2010 to August 2014)

Year	TOTAL	Government departments				Parastatals	Private bodies
		All government departments	National government bodies	Provincial government bodies	Municipalities or other local authorities		
2010–2011	90	79	58	15	6	1	10
2012	66	45	26	8	11	6	15
2013	57	48	28	8	12	3	6
2014	27	20	12	2	6	4	3
TOTAL	240	192	124	33	35	14	34

RECORDS REFUSED BY GOVERNMENT DEPARTMENTS PURSUANT TO PAIA REQUESTS BY CER
(January 2010 to August 2014)

Deemed refusals (automatic refusal on the basis of no response), after an initial dramatic decline, have started to increase again in 2014. We have also seen a positive, steady decline of actual refusals from 28.9% in 2012 to 10% in 2014.



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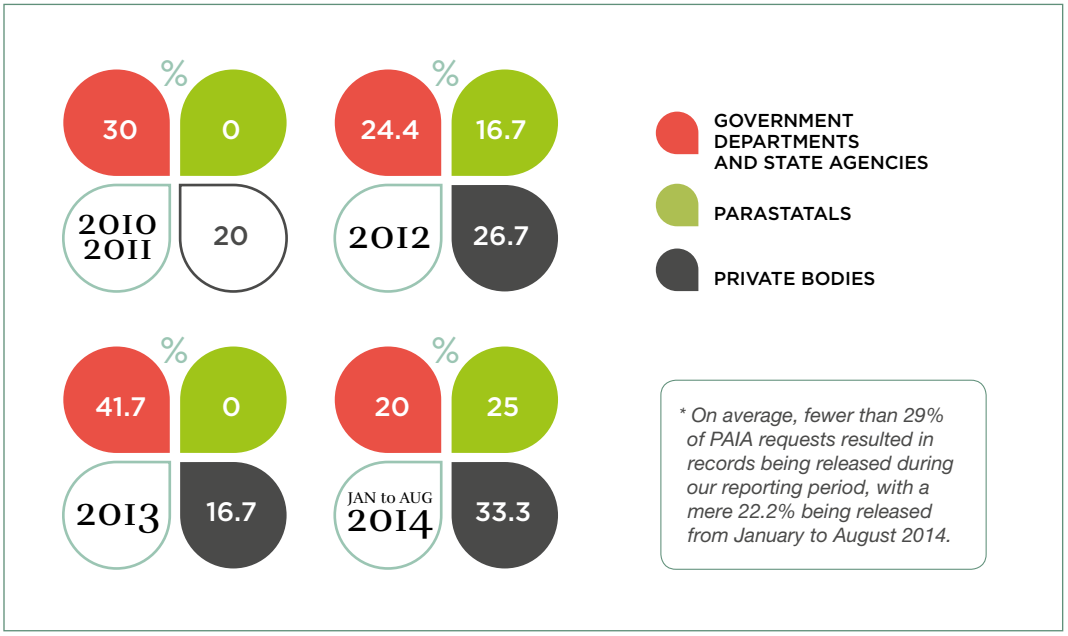
Almost all actual refusals by government departments were based on **the protection of the commercial information of third parties**. Furthermore, in the instance of coal-fired power stations, requested records, including licences and monitoring/compliance reports, have been refused on the grounds that they do not exist or cannot be found.

RECORDS ACTUALLY RELEASED PURSUANT TO PAIA REQUESTS BY CER (January 2010 to August 2014)

The number of PAIA requests by CER that resulted in the actual release of records since 2010 show a mixed result: a 10% drop in records actually released by government departments since 2010–2011; a significant increase in records released by parastatals; and a 13.3% increase in records released by private bodies since 2010–2011. Overall, however, fewer than 25% of records requested have in fact been released during 2014.

Percentage records actually released pursuant to PAIA requests by CER (2010–Aug 2014)



PROCESSING TIMES DURING 2013–2014

The prescribed period for response to a request for information is 30 days following receipt of the request, with the possibility of a once-off 30 day extension. In addition, where PAIA requires a third party to be notified, that must be done within 21 days of receiving the request, and the third party then has 21 days within which to make representations against the release of the records. Ultimately the public body is obliged to make a decision on the request within 30 days of informing every third party. These provisions result in even lengthier processing time periods.

Note that these processing times exclude requests where no response is received, i.e. deemed refusals.

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In all the cases where records were released, the **fastest** response time for each institution was as follows:

Fastest response times to PAIA requests by CER for government bodies (2013–2014)

Gauteng Department of Agriculture and Rural Development (GDARD)	1 day	
National Nuclear Regulator	8 days	
Department of Mineral Resources (DMR)	18 days	
Ekurhuleni District Municipality	19 days	
Department of Environmental Affairs (DEA)	30 days	
Nkangala District Municipality	30 days	
KZN Department of Environment, Agriculture and Rural Development	35 days	
Limpopo Department of Economic Development, Environment and Tourism	47 days	
Gert Sibande District Municipality	60 days	
Eden Municipality	63 days	
City of Cape Town	70 days	
City of Tshwane Metropolitan Municipality	100 days	
Department of Water and Sanitation (DWS)	100 days	
Department of Energy	195 days	
eThekwini Metropolitan Municipality	201 days	
Fezile Dabi District Municipality	236 days	

Of the three national government departments to which we submit most applications:

- the DEA fared best with an average response time of 74 days;
- the DWS came in second, with an average response time of 109 days;[2] and
- the DMR fared the worst, with an average response time of 117 days.

In contrast, GDARD achieved an impressive average of 18.5 days in 2013.

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PUBLIC BODIES: GENERAL TRENDS IN 2013–2014

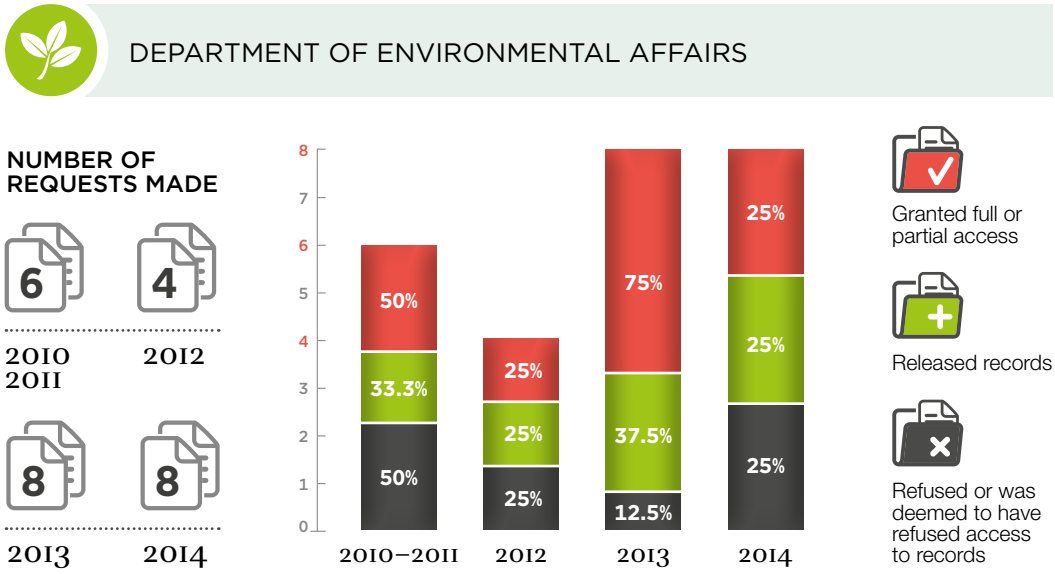
Generally since 2010, we have seen a decline in the number of deemed refusals of requests by government. However, actual records released have reduced from 30% in 2010–2011 to 20% in 2014.

The most popular reason given for actual refusals by public bodies is the protection of the commercial information of third parties, as per section 36 of PAIA, in all its various aspects. Public bodies are exceedingly cautious when dealing with requests related to third parties such as companies, as they are tasked under PAIA with avoiding the release of any trade secrets and/or financial, commercial and scientific information, or prejudicing the third party in commercial competition. Unfortunately, such bodies are ill-equipped to assess whether information requested falls within section 36 and thus there is often a failure by local, provincial and national government to apply their minds to objections raised by third parties in the context of third party notification. In fact, in many cases, and despite the clear provisions of PAIA that require the decision-maker to give 'due regard' to a third party's representations, public bodies generally take the view that they are obliged to refuse the request if the third party objects to the release of the records. This is an incorrect interpretation and application of PAIA.

DEPARTMENT OF ENVIRONMENTAL AFFAIRS
16 requests in 2013–2014 (26 requests since 2010)

DEA responds to all requests and has shown consistency in the granting and subsequent release of records. It has also shown a pragmatic approach in dealing with third party notice processes in order to facilitate access to information relevant to the requester.

Track record of key government departments holding environmental records



Grounds for refusal under PAIA relied on by the DEA in 2013–2014 were:

- section 44(1)(b), which provides that a public body may refuse a request where disclosure could reasonably be expected to frustrate the deliberative process of that

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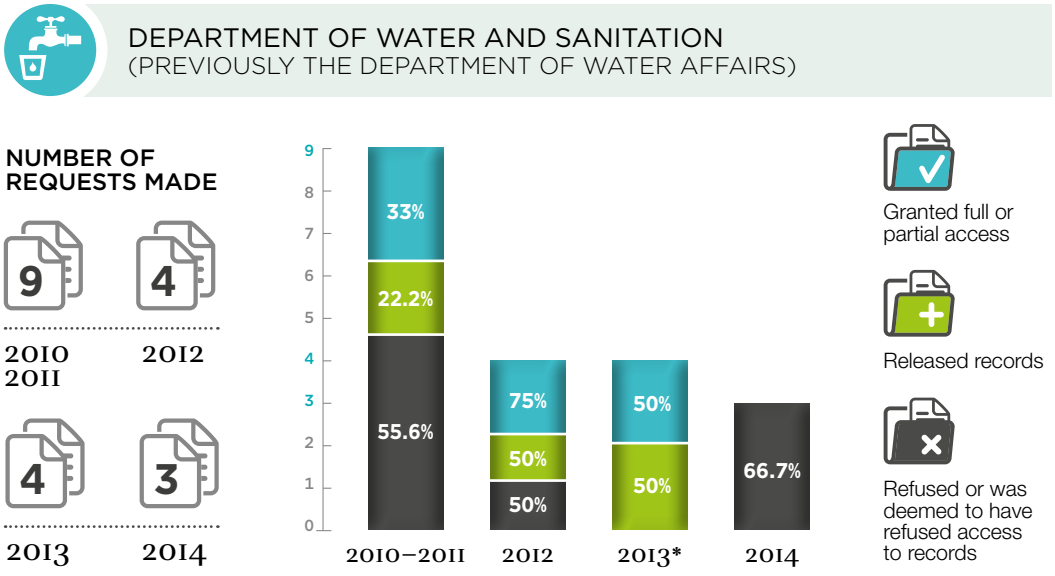
body in the preparation of particular documents, such as reports, or in the conduct of consultations, discussion or deliberations;
- section 36, namely the mandatory protection of the commercial information of a third party;
- section 23, which provides the refusal of access where the requested records either are not in the possession of the requestee, or do not exist.

The DEA's PAIA Manual of 15 April 2011 is available on their website as required, and was duly updated in 2012.

The South African Human Rights Commission's Annual PAIA Report for 2012–2013 (SAHRC Report) reflects DEA as having submitted their required report to the SAHRC within the prescribed timeframes. The DEA's report to the SAHRC reflects 29 requests received in the 2012/2013 cycle, with 21 granted in full and no requests completely refused. However, the records also show that there were 19 requests for extension of the 30-day timeframe in terms of section 26(1) of PAIA by the DEA.

DEPARTMENT OF WATER AND SANITATION
7 requests in 2013–2014 (20 since 2010)

The DWS continues to be willing – in principle – to process PAIA applications, but their record-keeping (particularly in the regions) is poor and the capacity in their Legal Services section severely constrained.



**Although this column reflects 0% refusal, it should be noted that one request, which was pending at the end of 2013, was only deemed to have been refused in 2014.*

The most common ground for refusal relied on by the DWS is the inability to find the document due to the fact that the document does not exist, or cannot be found, in terms of section 23(1) of PAIA.

The CER has submitted appeals against five decisions by the DWS in the past four-and-a-half years. No litigation has been instituted against the DWS. Our internal appeal against

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the deemed refusal of our request in 2012 was met with a refusal on the basis of section 23 of PAIA, i.e. that the requested documents do not exist. To date, the DWS has failed to respond to the last three internal appeals against the deemed refusal of PAIA requests, submitted from as early as November 2013. Although we continue to maintain open communication with the DWS, we often receive little or no feedback from them, and are often asked to re-send requests to them.

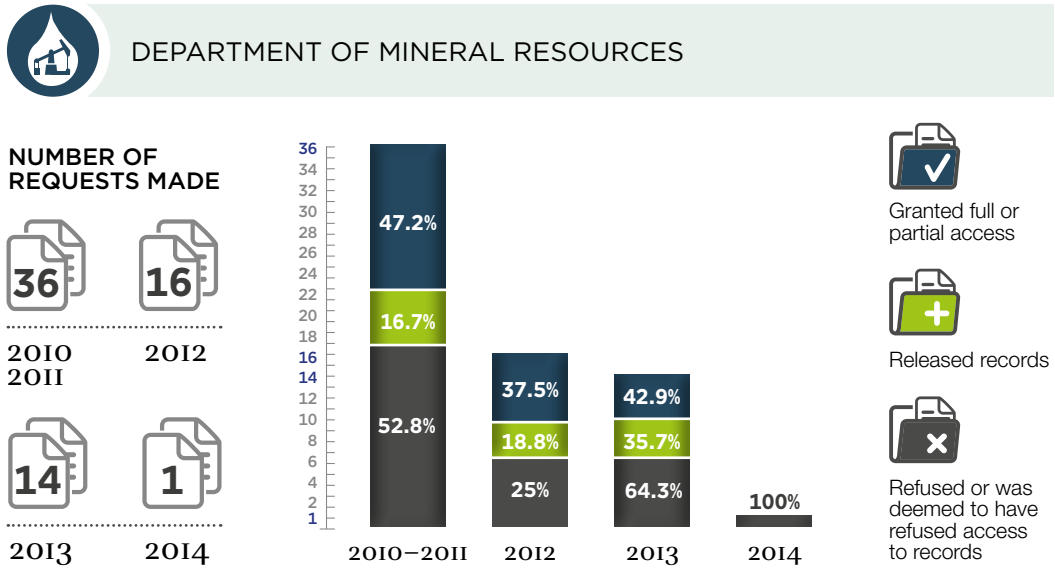
The DWS released an updated PAIA Manual in July 2014. This Manual continues to list water use licences issued under the National Water Act as 'automatically available'; (In other words, without a request) but makes this availability subject to third party notification in terms of section 47 of PAIA. This is at odds with section 15 of PAIA. The CER has taken this non-compliance with PAIA up with the DWS.

The SAHRC Report states that the DWS submitted its required report to the SAHRC within the stipulated timeframe, though it is not compliant with PAIA's section 14. In addition, research undertaken for the Golden Key Awards into substantive compliance with PAIA of a sample of 24 public bodies reflected that the DWS scored 0%. This was measured in terms of their rate of response, records management, road map, internal mechanisms and resources. The DWS's own report indicates that they received 14 requests, five of which were granted in full and two of which were refused in full. The DWS reports one internal appeal received, but no documents were granted on appeal. It also reflects one instance of litigation on the basis of a dismissed internal appeal and four recorded instances where extensions of the 30 day PAIA timeframe were required.

DEPARTMENT OF MINERAL RESOURCES

15 requests in 2013–2014 (67 since 2010)

2013 and 2014 have been the worst years for transparency in environmental governance at the DMR yet. Whereas deemed refusals (where the DMR fails to respond) have come down from 44.4% in 2010–2011 to 14.3% in 2013 (in 2014, the one request submitted was met with a deemed refusal as well), actual refusals have gone up from 8.3% in 2010–2011 to 50% in 2013. The result has been a substantial increase in internal appeals in 2013. In



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addition, only 60% of records to which access was granted were actually released in 2013; exacerbated by the fact that records released are often either incomplete or the incorrect documents. This failure is potentially indicative of difficulties (similar to those of the DWS) encountered in getting the cooperation of regional offices where documents are held.

Grounds for refusal under PAIA most often relied on by the DMR are:

- section 36(1), which mandates the protection of commercial information of third parties; and
- section 44(1), which prevents the release of records requested if it is likely to frustrate deliberative processes and success of policies formulated by the relevant department.

The CER has submitted appeals against 30 decisions by the DMR since 2010, of which 18 were against deemed refusals, i.e. where the DMR did not respond to the request. As at the end of August 2014, six of the ten internal appeals lodged during 2013–2014 were still outstanding. However, it is important to note that the DMR does not appear to make decisions on internal appeals – invariably the response received is a decision with respect to the initial PAIA request sent. Responses to the remaining internal appeals remain overdue, with little or no feedback from DMR and apparent disregard for the provisions of PAIA.

The CER has instituted legal proceedings to compel compliance by the DMR with PAIA on three occasions, once in our name and twice on behalf of a client; in both instances the DMR undertook to provide the records and tendered wasted legal costs. In neither case has it actually provided the records sought. In the third instance, the DMR was willing to provide the documents following the institution of proceedings; however the matter was opposed by the third party and respondent, De Beers. De Beers was thereafter directed by the High Court to file its answering affidavit, explaining why any of the requested documents should not be released by DMR, failing which it would be barred from delivering answering papers, and its opposition to the release of the records would be struck out.[3]

The DMR released an updated PAIA Manual in 2012, which is available on their website.

The SAHRC Report indicates that the DMR submitted their required report to the SAHRC within the requisite time period. The DMR received a total of 510 PAIA requests in the 2012/2013 cycle. Of these, a substantial 325 were refused in full, while only 152 were granted in full. In each instance of refusal, provisions of PAIA were relied upon to refuse access. The DMR reports that there were no instances where an extension of time in terms of section 26(1) of PAIA was required. Only three internal appeals were received, no documents were granted as a result of these appeals (one of which remained pending), and no litigation was instituted against the DMR.

The discrepancies between the DMR's report and our own records are apparent, particularly since the number of internal appeals submitted by CER significantly exceeds the total number of internal appeals recorded by DMR. Notably, it has been our experience that, while it is correct that the DMR never requests extensions of time, they also simply ignore the 30-day time period prescribed by PAIA.

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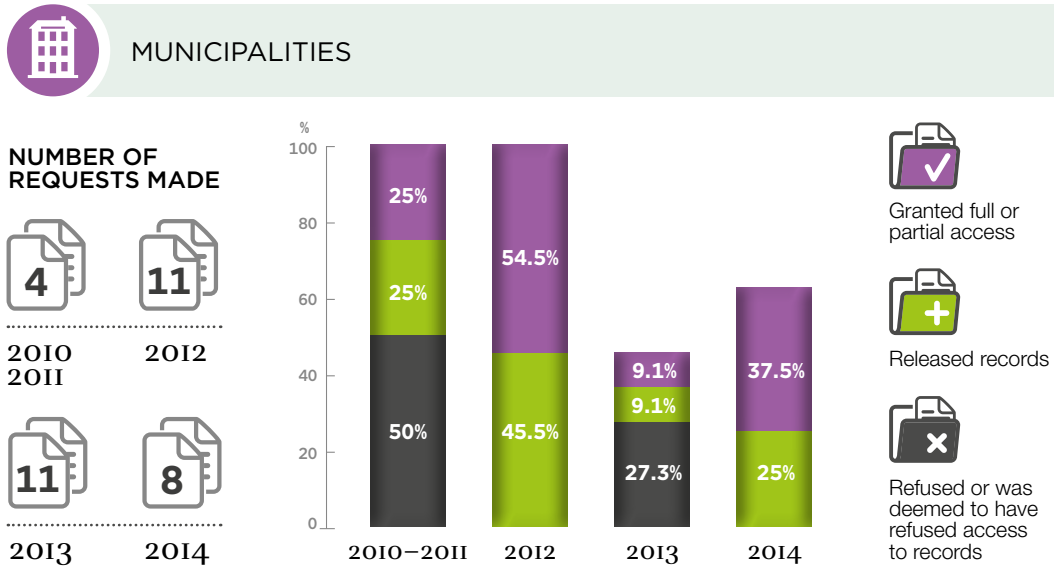
MUNICIPALITIES
19 requests in 2013–2014 (34 since 2010)

2013 was the worst year for transparency in environmental governance at municipalities since 2010. While deemed refusals (where there is a failure to respond) were only 9% in 2013 (down from 25% in 2010–2011), actual refusals rose from 0% in 2012 to 18.2% in 2013.



The ground for refusal under PAIA most often relied on by municipalities is the mandatory protection of commercial information of third parties under section 36(1).

The CER has submitted appeals against five decisions by municipalities since 2010, four of which were in 2013. The requests to many of the municipalities have been characterised by lengthy delays and local government's inexperience in the use and understanding of PAIA. While the City of Cape Town granted our appeal, and Eden District Municipality partially granted redacted records, eThekwini Municipality took more than 12 months to decide an internal appeal against a refusal on the basis of section 36(1) of PAIA (almost a year and half after the initial PAIA request).[4] Notably, Gert Sibande Municipality responded that it intended to convene a hearing for the purposes of deciding the internal appeal. No such appeal hearing is envisaged by PAIA. However, 13 months after the submission of the internal appeal, no hearing has been convened.

The CER has not yet instituted legal proceedings against a municipality to compel compliance with PAIA, but given the increased rate of refusal, this seems to be likely in the near future.

Most of the municipalities to which CER has submitted a request have a PAIA Manual which is publicly available, including the City of Cape Town, Ekurhuleni Metropolitan Municipality, eThekwini Municipality and Eden District Municipality. The manuals appear to be updated regularly.[5] We were, however, unable to retrieve the City of Tshwane, Gert Sibande District Municipality and Nkangala District Municipality's PAIA Manuals from their respective websites. This is despite these manuals being required, in law, to be available on each public body's website.

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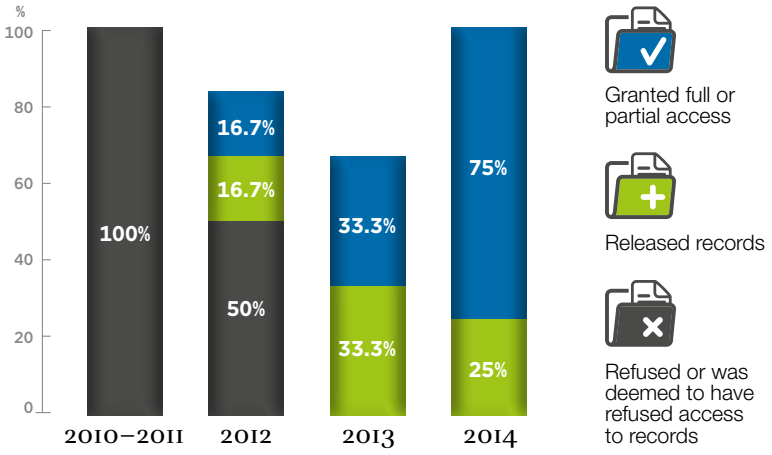
The SAHRC Report states that, since the enactment of PAIA, over 90% of municipalities have been, and remain, in non-compliance with PAIA. However the Report provides that 441 requests were granted, out of a total of 656 requests received by the end of July 2013, and 66 requests were refused in full.

- eThekwini Municipality's section 32 PAIA Report reflects 54 requests granted in full, out of 90 received, and only two refused in full.
- In contrast, the City of Cape Town reports 213 requests received, of which 115 were granted in full, 22 were refusals, and only 7 instances of extension of time periods.

PARASTATALS[6]

7 requests in 2013–2014 (14 since 2010)

In the case of parastatals, despite the limited number of requests, the trend since 2010 has been a positive one. As parastatals constitute public bodies in terms of paragraph (b) of the definition of 'public body' under section 1 of PAIA, there is no right of internal appeal under PAIA (see section 74(1)). However, Eskom has developed its own internal appeal process so as to enable it to reconsider its decisions on requests.



In 2014, the CER submitted a PAIA request to Eskom for studies/reports conducted by or for Eskom on the impacts on human health of the atmospheric emissions from Eskom's coal-fired power stations and the costs associated with those health impacts. This request was subsequently granted. The health reports received were commissioned in 2006 and, although outdated, reveal the substantial impact on, and risks posed to, human health by the power stations operating at the time. This information is of direct relevance to the work being done to draw attention to the impact of Eskom's emissions on air quality and, subsequently, the health of those communities in closest proximity, and encourage the mitigation of harm to human health and well-being.[7]

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WHAT OUR REFINERIES DO NOT WANT YOU TO KNOW

South Africa has a total of six oil refineries, all of which are significant contributors to air pollution.

Two of these refineries are situated in areas declared as Priority Areas in terms of the National Environmental Management Act: Air Quality Act, 2004 (AQA); so declared because of the extremely poor air quality in these areas and in order to protect the health of people living in the Priority Areas. Another two are based in South Durban, an area with a long history of environmental justice struggles around air pollution and with one of the highest ambient sulphur dioxide levels in the country.

Amongst the many environmental permissions refineries require for lawful operation, all refineries must have a valid atmospheric emission licence (AEL) under AQA. During 2013–2014, on behalf of community organisations, the CER made applications in terms of PAIA for access to the AELs and compliance reports against the AELs for all six refineries. We submitted applications to the refineries themselves. We also submitted requests to the DEA, who transferred our requests to the local authorities; as well as to the local authorities directly, now responsible for licensing and compliance monitoring under AQA.

The table below sets out the results of these requests:

Refinery	Company's response	Municipality's response
Chevron South Africa (Pty) Limited Refinery (CHEVREF), Cape Town	*Not applicable	The City of Cape Town released the following documents in 2013: 1. Atmospheric Pollution Prevention Act, 1965 (APPA) registration certificate; 2. Application for the conversion of its APPA registration certificate to an AEL in terms of AQA (as APPA registration certificates would cease to be valid from 1 April 2014); and 3. CHEVREF's 2011 and 2012 Annual Reports reporting on compliance with APPA registration certificate. In August 2014, we requested access to CHEVREF's AEL (which it was required to have by 1 April 2014) and compliance report.

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Refinery	Company's response	Municipality's response
National Petroleum Refineries of South Africa (Pty) Limited (NATREF), Sasolburg	NATREF advised that it had made the required application to convert its existing APPA registration certificate to an AEL in terms of AQA. It therefore took a decision not to provide us with a copy of its APPA registration certificate, as it was of the view that it would '*…become redundant in the short term…*' NATREF also refused to grant access to its application to 'convert' its APPA registration certificate to an AEL, indicating that, as a national key point '*…a disclosure of such information to third parties may prejudice the security of our buildings and structures, and as such, cause prejudice to the security of the Republic…*' NATREF also relied on section 68(1)(b) of PAIA, indicating that the application contained '*…sensitive proprietary information which…would likely place NATREF at a material disadvantage to its competitors and would consequently prejudice NATREF in commercial competition…*' When NATREF's AEL was issued in March 2014, they granted access to the cover page only, advising that the other pages were protected from disclosure under PAIA. The Minister of Environmental Affairs has since advised NATREF that it would not be possible to apply for exemption from the minimum emission standards, and NATREF is now preparing further postponement applications.	Fezile Dabi District Municipality initially failed to respond to our PAIA request within the prescribed period and our request was therefore deemed to have been refused in terms of section 27. Only following the submission of an internal appeal against the deemed refusal, was NATREF's final licence application under AQA, APPA registration certificates, and its compliance report released. Although access was granted to NATREF's AEL, we have not received a copy to date, despite numerous follow-up correspondence. The municipality advised that it had agreed with NATREF that NATREF would send a copy of its AEL to us. This was surprising as NATREF refused to provide us with a copy of their full AEL.

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Refinery	Company's response	Municipality's response
Shell and BP Petroleum Refinery (SAPREF), Durban	SAPREF refused to release records on the grounds that information requested contain '*trade secrets of SAPREF; financial, commercial, scientific and/or technical information other than trade secrets, where the disclosure thereof would be likely to cause harm to the commercial or financial interests of SAPREF; and that disclosure of SAPREF information could put SAPREF at a disadvantage in negotiations or commercial competition*.' Although not specified, refusal was therefore based on the protection of commercial information of a private body (section 68). SAPREF also does not consider that the information contained in the AEL could '*reveal a serious public safety or environmental risk*'.	eThekwini Municipality refused access to SAPREF and Engen's AELs and compliance reports in respect of such licences, relying on section 36 of PAIA, being the mandatory protection of commercial information of third parties. We submitted an internal appeal in August 2013 against the municipality's refusal to grant access. After much delay, a decision on appeal was received in October 2014, fifteen months later. The appeal authority upheld the municipality's original decision to refuse access to the documents because it was satisfied that the information requested contained confidential information of third parties which, if disclosed, may cause harm and prejudice to the operations of the third parties in terms of section 36(1)(a) and (b) of PAIA.[8]
Engen Petroleum Limited Refinery, Durban	We did not receive acknowledgement of receipt nor a response to our PAIA request, and it was therefore deemed to have been refused in terms of section 58 of PAIA.	Same as above.
Sasol Limited Secunda Refinery, Secunda	Sasol's response to the request was the same as NATREF's response. We were offered access to extracts of their AEL, once granted, as well as the documentation being prepared for their application for exemption and postponement of their compliance with minimum emission standards under AQA.	Gert Sibande District Municipality refused access on the following grounds: 1. mandatory protection of commercial information of third parties (section 36); 2. mandatory protection of certain confidential information of third parties (section 37); and 3. mandatory protection of safety of individuals and protection of property (section 38) (because Sasol is a National Key Point).

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Refinery	Company's response	Municipality's response
Sasol Limited Secunda Refinery, Secunda	The Minister of Environmental Affairs has since advised Sasol that it would not be possible to apply for exemption from the minimum emission standards, and Sasol is now preparing further postponement applications.	We submitted an internal appeal in September 2013. The municipality responded that it intended to convene a hearing for the purposes of deciding the internal appeal, even though no such appeal hearing is envisaged by PAIA. As at August 2014, the municipality's response to our appeal remained outstanding.
PetroSA (Pty) Limited Refinery, Mossel Bay	*Not applicable	Eden Municipality granted access to PetroSA's redacted provisional AEL (i.e. with sections blacked out), as well as various incident and investigation reports, and a compliance report. The municipality advised that the provisional AEL was redacted following consultation with PetroSA, relying on sections 36 and 37 of PAIA (mandatory protection of commercial information of third parties and mandatory protection of certain confidential information of third parties).

In summary, the only records released in relation to the six refineries have been the following:

- Chevref's APPA registration certificate, AEL application and Annual Report, released by the City of Cape Town.
- NATREF's final AEL application, five APPA registration certificates, and NATREF's compliance report (although we are still waiting for a copy of the AEL, seven months after access was first granted), released by Fezile Dabi District Municipality.
- The redacted provisional AEL, as well as various incident and investigation reports, and the compliance report, released by Eden Municipality.

What appears from this is that (a) management at a number of South Africa's refineries believe that the conditions under which they are permitted to operate by government, as well as the extent of their compliance with these conditions, should be secret; (b) despite the harmful health impacts of refineries' emissions, a number of municipalities across the country believe that they are obliged to protect the 'secrecy' of the licence conditions for the refineries, as well as the extent to which refineries comply; and (c) there is no consistency amongst municipalities across the country, which creates the impression that information about some refineries is more 'secret' than others.

The CER has requested the DEA to intervene to address this injustice and violation of rights. The CER also holds instructions to institute legal proceedings to compel disclosure of these records.

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PRIVATE BODIES: GENERAL TRENDS

In 2013–2014, we submitted nine PAIA requests to private bodies. During 2013, 16.7% of requests were granted or partially granted and the same percentage of records were released. As at the end of August 2014, two of our three requests submitted in 2014 were pending.[9]

Of our 2013 requests, 75% were refused in terms of sections 66(b) and 68(1) (a), (b) and (c) of PAIA. Section 66(b) provides for refusal of access where the disclosure of the record would prejudice or impair the security of property or methods/plans for the protection of an individual or the public. Section 68(1)(a)–(c) provide for refusal where the record contains: trade secrets of the private body; commercial, financial, technical or scientific information which could harm the commercial or financial interests of the private body; or information that could reasonably be expected to put the private body at a disadvantage in contractual or other negotiations; or prejudice the body in commercial competition.

Private bodies	2010–2011	2012	2013	2014
Granted full or partial access	20%	26.7%	16.7%	33.3%
Released records	20%	26.7%	16.7%	33.3%
Refused or was deemed to have refused access to records	80%	53.3%	66.7%	0%

It is not really feasible to ascertain trends from such a small sample, responses to the majority of which remain outstanding as at the end of the reporting period. On the face of it, the percentage of refusals by private bodies appears to have decreased from 80% in 2010–2011 to 0% in 2014. This may be attributed to the fact that private companies often have the financial resources to employ larger legal teams than government departments, and therefore have the ability to attend to PAIA requests more efficiently and timeously. Companies that disclosed records in response to PAIA requests in 2013–2014 include: Engen Petroleum, Kelvin Power, Samancor Chrome and Columbus Stainless.

LITIGATION TO COMPEL DISLOSURE OF RECORDS

During 2013–2014, CER represented clients in four different court cases aimed at compelling compliance with PAIA.

In the case of ***Vaal Environmental Justice Alliance v ArcelorMittal South Africa***, the CER represented community organisation VEJA, which has been trying to access environmental records related to ArcelorMittal South Africa (Amsa)'s Vanderbijlpark and Vereeniging plants, previously owned by Iscor, for a number of years. VEJA's first request for records under PAIA, made in 2011, was for a copy of Amsa's Environmental Master Plan, compiled by Amsa in 2002 for rehabilitation of its Vanderbijlpark site. In February 2012, VEJA also requested records relating to the closure and rehabilitation of the company's Vaal Disposal Site, situated in Vereeniging, after the company had illegally dumped hazardous waste here. VEJA also requested various documents referred to in the National Environmental Compliance and Enforcement Report 2010–2011.

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VEJA made these requests on the premise that it is in the public interest, and more specifically, the interest of the Vaal community, to know what impact Amsa has on the environment and people's health. Amsa refused access to the records, on the basis that VEJA does not require the records for the exercise or protection of any rights (section 50(1)(a) of PAIA). This left VEJA with no option but to institute legal proceedings to compel compliance with PAIA.[10] In court, Amsa argued that VEJA had no right to these records, and that they were trying to 'usurp' the role of the state.

In the judgement handed down on 10 September 2013, Acting Judge Carstensen rejected Amsa's arguments and ordered the company to deliver the records to VEJA, and to pay VEJA's costs. He also stated that—

> "The participation in environmental governance, the assessment of compliance, the motivation of the public, the mobilisation of public, the dissemination of information does not usurp the role of the State but constitutes a vital collaboration between the State and private entities in order to ensure achievement of constitutional objectives."

Amsa was granted leave to appeal the judgement, and the matter now heads for the Supreme Court of Appeal. In the interim, VEJA has been emboldened by this success in court. Yet the impact of this judgement of course resonates far wider, and confirms the right of fence-line communities to have access to environmental documents of corporate polluters, so that they can be in a stronger position to protect their constitutional rights to a safe and healthy environment.

In two other cases, court proceedings resulted in records being released by companies. In the case of ***Vaal Environmental Justice v Omnia Holdings Limited***, the CER represented VEJA in court proceedings brought to compel fertiliser company Omnia Holdings Limited (Omnia) to disclose water monitoring data which it was required to make available to the DWS in terms of its water use licence. Omnia refused VEJA's request to access this information on the basis that the monitoring data was commercial and confidential information of a third party (sections 64 and 68 of PAIA). In its answering affidavit, Omnia also alleged that the records requested were not required for the exercise or protection of any of VEJA's rights. Omnia eventually handed over the documents in question and tendered VEJA's costs.

In the case of ***Earthlife Africa Johannesburg v DRDGold and the DMR***, an application was made to compel production of licences, monitoring and performance reports and inspection reports pertaining to DRDGold's re-mining operations next to the impoverished suburb of Riverlea outside Johannesburg. Both DMR and DRDGold initially opposed the application, partly on the basis that disclosure would likely cause harm to DRDGold's commercial or financial interests (sections 36, 64 and 68 of PAIA). DRDGold subsequently disclosed certain records.

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In the last case, ***Conservation South Africa (CSA) v Director General: Department of Mineral Resources and five others***, the CER launched an application on behalf of CSA to compel the DMR to produce documents (including amendments to financial provisions) in relation to the transfer of seven mining rights by De Beers Consolidated Mines (De Beers) to a subsidiary of Trans Hex Limited. The mining rights are in respect of the Namaqualand mines in the Northern Cape Province. The DMR refused the PAIA request relying on commercial and confidential information of a third party (section 36 of PAIA).

In response to the institution of the High Court application, the DMR resolved that the documents should have not been refused in the first place and granted them to the CER. When De Beers subsequently opposed the release of the information, DMR withdrew its undertaking to provide the information. Until 9 September 2014, De Beers failed to submit their answering affidavit to explain why any of the requested documents should not be released to CSA by the DMR, only doing so after CSA obtained an order from the High Court directing De Beers to file its answering affidavit by that date. The case now continues to the hearing.

More information about our litigation, including copies of court papers, is available on the CER website at www.cer.org.za.

ENDNOTES

1 January 2010 to August 2014.

2 This was based on two requests only. The remaining 4 requests submitted during this period were all deemed to have been refused.

3 See *Conservation South Africa (CSA) v Director General: Department of Mineral Resources*.

4 In October 2014, more than a year after our internal appeal was submitted, we were finally advised that our internal appeal was not granted. However, we are still awaiting formal notification thereof.

5 Ekurhuleni Metropolitan Municipality's Manual was updated as recently as September 2014, while the City of Cape Town's Manual was last updated in November 2013.

6 Eskom, Transnet, South African National Roads Agency, Trans-Caledon Tunnel Authority.

7 See media release 'Eskom's coal is a killer, new study finds' issued on 3 July 2014 http://cer.org.za/news/media-release-eskoms-coal-is-a-killer-new-study-finds. It also resulted in front page news (see: http://mg.co.za/article/2014-06-19-power-stations-are-deadly-internal-report-reveals).

8 Although we still have not yet received the municipality's formal response to our internal appeal, we have been advised, in October 2014, that the internal appeal has failed.

9 However, it should be noted that, in September 2014, we received timeous response to these two requests.

10 See press release 'Vaal environmental organisation takes Amsa to court for withholding records' issued on 31 May 2013 http://cer.org.za/news/media-release-vaal-environmental-o+rganisation-takes-arcelormittal-south-africa-to-court-for-withholding-records.

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"Any pursuit of open governance must respond to the needs of the voiceless; the marginalised in society; especially women, the youth and people with disabilities. At the same time our endeavours must necessarily benefit from the ideas of these people as part of deepening public participation. South Africa believes that open governance is not necessarily an easy ideal to achieve in totality. It requires on-going and sustained commitment."

– President Jacob Zuma's Acceptance Remarks, on being Co-Chair of the Open Government Partnership, at the OGP Heads of State and Government Level Side Event, at the 69th United Nations General Assembly, New York on 24 September 2014

This report was compiled by Eishe Heitmann, Li-Fen Chien, Robyn Hugo and Melissa Fourie at the Centre for Environmental Rights. The CER would like to thank all our partners and funders for their ongoing support for this important project. As always, we also acknowledge the contribution of all government officials who believe that transparency makes for better environmental governance, and who do what they can to ensure compliance with PAIA.

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