
PROMOTION OF ACCESS TO INFORMATION AMENDMENT BILL

EXPLANATORY MEMORANDUM // DRAFT FOR DISCUSSION

29 NOVEMBER 2021

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Introduction and background

The right of access to information – constitutionally enshrined in section 32 of the Constitution of the Republic of South Africa, 1996 (“Constitution”) – is both a fundamental right in itself and a crucial enabler of the full range of other rights. Importantly, it gives meaning to the constitutional values of accountability, responsiveness and openness, and enables the public to seek transparency from both the public and private sectors.

In order to give effect to this right, the Promotion of Access to Information Act 2 of 2000 (“PAIA” or “Principal Act”) was enacted. While it was heralded at the time as being a progressive piece of legislation, PAIA has also at times frustrated the exercise of the right of access to information. Furthermore, in the more than 20 years since its enactment, it is apparent that PAIA is no longer fit for purpose to respond to the exigencies of the digital era.

Against this backdrop, Media Monitoring Africa, the South African National Editors’ Forum and other like-minded organisations, supported by legal experts and access to information activists, have prepared a draft Promotion of Access to Information Amendment Bill (“Amendment Bill”) in an effort to ensure that PAIA meaningfully realises the right of access to information in a timely and effective manner. The Amendment Bill draws on the recommendations of the South African Human Rights Commission (“SAHRC”) and civil society organisations, jurisprudence from our courts, and the seminal work of the African Commission on Human and Peoples’ Rights (“ACHPR”) through the revised Declaration of Principles on Freedom of Expression and Access to Information in Africa,¹ the Guidelines on Access to Information and Elections in Africa² and the Model Law on Access to Information for Africa.³

The Amendment Bill is informed by the following five key principles:

- **Primacy:** Access to information, as a constitutional imperative, should be treated with appropriate primacy over other laws that otherwise restrict or inhibit the public’s right to be informed. The proposed amendments seek to ensure that the scope and ambit of PAIA are appropriately clarified to assist requesters in obtaining the information to which they are entitled without unnecessary hurdles.
- **Maximum disclosure:** The right of access to information should be guided by the principle of maximum disclosure, with the right only being limited by narrowly defined exemptions that meet the test for a reasonable and justifiable limitation in an open and democratic society.
- **Proactive disclosure:** Information in the public interest should be proactively disclosed, even in the absence of a specific request, in recognition of the role that such information plays in the full realisation of fundamental rights.

¹ Accessible here: <https://www.achpr.org/legalinstruments/detail?id=69>.

² Accessible here: <https://www.sanef.org.za/wp-content/uploads/2019/02/ACHPR-Guidelines-on-access-to-information-and-elections-in-Africa-2017.pdf>.

³ Accessible here: <https://www.achpr.org/legalinstruments/detail?id=32>.

- International commitments: South Africa must abide by its international commitments on access to information, including in respect of open government and open data standards through the Open Government Partnership. These commitments evince a move towards more openness on a proactive basis and are deserving of being effectively fulfilled.
- Online protections: In the current digital era, the exercise of the right of access to information must be respected, protected and promoted, both on- and offline. It is therefore crucial that all persons in South Africa have meaningful access to the internet and online information, and that disclosures are made available through different platforms that render such information readily accessible to the public. This places a duty on public and private bodies to ensure that, in fulfilling their obligations, due regard is had to the medium and format in which information is made available.

Underlying these principles is a core concern about the efficacy of PAIA in meaningfully realising the right of access to information. In the two decades since its enactment, a number of pertinent issues have come to the fore, such as delayed, stifled or incomplete disclosures of information. This cannot be allowed to persist.

It is well-accepted that access to information plays a particularly important role in democratic processes and empowering the electorate to make informed choices. This includes in respect of electing office-bearers, in participating in decision-making and law-making processes, and in holding public and private bodies accountable for their acts or omissions in the execution of their duties. Moreover, the right of access to information fosters a vibrant media culture that plays a central role in receiving and imparting information and ideas. This is more important than ever, and deserving of protection and support from all segments of society.

As we look to the future of access to information in South Africa, it is imperative that we continue to strive for a society that is underpinned by our constitutional values and democratic governance. While PAIA is one of the instruments through which this can be done, there remains much work ahead before the right of access to information can be meaningfully realised in South Africa.

Summary of the proposed amendments

As set out in the long title to the Amendment Bill, the proposed amendments may be summarised as follows:

- To amend PAIA so as to insert and amend the contents headings and certain definitions;
- To facilitate access to online information;
- To repeal certain exempted public bodies;
- To facilitate open data;
- To repeal certain sub-sections which are no longer necessary;
- To provide for record and data governance;
- To do away with fees for electronic records;
- To clarify when annual information reports by public bodies are due and the reporting requirements thereof;
- To make certain grammatical and language changes;

- To amend the provisions regarding mandatory disclosure in the public interest by both public and private bodies;
- To amend certain Ministerial and Information Regulator powers;
- To provide for record-keeping obligations of private electoral stakeholders;
- To require private bodies to assist requesters;
- To make provision for courts to amend applicable time periods for urgent requests for access to information and to make punitive costs orders; and
- To update PAIA in line with the ACHPR's revised Declaration of Principles on Freedom of Expression and Access to Information in Africa, the Guidelines on Access to Information and Elections in Africa and the Model Law on Access to Information for Africa.

Section 1 of the Amendment Bill // Description contained in the Principal Act

The proposed amendments highlight the need to bridge information inequalities, both on- and offline. It is well-established by the United Nations and the ACHPR that the same rights that people have offline should be protected online as well. For example, principle 5 of the revised Declaration of Principles on Freedom of Expression and Access to Information in Africa provides that “[t]he exercise of the rights to freedom of expression and access to information shall be protected from interference both online and offline”.

Section 2 of the Amendment Bill // Preamble to the Principal Act

The proposed amendments expand on the preamble contained in the Principal Act in several key ways. First, it acknowledges that the right of access to information can mitigate the abuse of power and human rights violations, help to identify social and economic challenges, and monitor and deliver sustainable development. This is achieved through, for instance, meeting the constitutional values of openness and accountability. This amendment emphasises the broader public interest role that PAIA plays in safeguarding fundamental rights and contributing towards a more informed, just and equitable society.

Linked to the point above, the second proposed amendment recognises the need for more openness in the access to information framework. This includes the need to promote open access to scientific research, open government, open data, open educational resources and open science. In doing so, this amendment seeks to ensure equal access and opportunities for all persons in South Africa, notwithstanding their socio-economic circumstances. It also coheres with South Africa's commitment to the Open Government Partnership, which stresses the need for open government, open data and open contracting.

Third, the proposed amendment emphasises the need to promote the use of electronic infrastructure to improve record-keeping and the management of records of information. The purpose of this is to enable public and private bodies to fulfil access to information requests more swiftly and effectively, and facilitate the transfer of records in a more accessible manner. Maintaining records in hard copy gives rise to various challenges for both the information-holder and the requester in accessing the information that is pertinent to the request received, and can be ameliorated in significant part if records are consistently maintained and updated in an electronic format.

Lastly, the proposed amendment requires public bodies to publish and share relevant information on a proactive basis. Proactive disclosures are an integral component of the access to information framework, which obviate the need for requests to be made in circumstances where such information ought properly to be made available to the public.

Section 3 of the Amendment Bill // Contents of the Principal Act

In addition to the proposed amendments to existing provisions of PAIA, the Amendment Bill further proposes the insertion of four additional sections:

- Section 9A: Access to online information;
- Section 19A: Record and data governance;
- Section 52B: Recording, preservation and disclosure of records of private bodies on election-related matters; and
- Section 82B: Urgent requests.

These proposed amendments address issues on which PAIA is silent or deficient. These are discussed in more detail below.

Section 4 of the Amendment Bill // Section 1 of the Principal Act: Definitions

The additional definitions inserted by the Amendment Bill seek to give clarity and guidance on the interpretation of the amendments that have been proposed. The definitions also seek to align PAIA with other relevant legislation, including the Electronic Communications and Transactions Act 25 of 2002 (“ECTA”), the Protection of Personal Information Act 4 of 2013 (“POPIA”) and the Political Party Funding Act 6 of 2018.

The new definitions are: Accessibility Guidelines; data; donation; donation in kind; metadata; open data, open government, operator; public body; publish; Relevant Electoral stakeholders; and Technical Standards.

Section 5 of the Amendment Bill // Section 4 of the Principal Act: Records held by official or independent contractor of public or private body

The proposed amendment includes an operator who is engaged by a public or private body that is either in possession of, or has under its control, a record of information. The term “operator” is used in POPIA in this context, and the definition of an operator provided for in the Amendment Bill is the same as that contained in POPIA.

Section 6 of the Amendment Bill // Section 9 of the Principal Act: Objects

The key amendment is the insertion of an additional object in PAIA that recognises the need to establish information infrastructure that enables information to be accessed and used by the widest range of users. This amendment speaks to one of the fundamental tenets of the Amendment Bill in that PAIA should be a mechanism that is effective, non-discriminatory and provides for maximum disclosure. This requires an appropriate infrastructure that facilitates

the right of access to information in a meaningful way. In order to achieve this, the proposed amendment identifies open government and open data infrastructure as core elements.

Section 7 of the Amendment Bill // Section 9A of the Principal Act: Access to online information

The Amendment Bill proposes the insertion of a new section that deals with access to online information, in an effort to update PAIA in line with the realities of the digital era. Section 9A of the Amendment Bill draws in significant part from the guidance of the ACHPR in principles 37, 38 and 39 of the revised Declaration of Principles on Freedom of Expression and Access to Information in Africa. The proposed amendment is structured as follows:

- Sub-section (1) establishes the principle that universal, equitable, affordable and meaningful access to the internet is necessary for the realisation of the right of access to information, as well as the exercise of other fundamental rights. As such, it is imperative that public and private bodies recognise and, to the extent practicable, facilitate the rights to freedom of expression and access to information online, as well as the means necessary to exercise these rights. This aligns with South Africa's policy position in policies such as the National Development Plan and South Africa Connect, which commits to universal access to the internet for all persons in South Africa.
- Sub-section (2) establishes the principle of non-interference. In this regard, it provides that public and private bodies shall not interfere with the right of individuals to seek, receive or impart information through any means of communication and digital technologies, unless that interference constitutes a reasonable and justifiable limitation of the affected right. This is in line with the ordinary principles of constitutional interpretation, in which any limitation of a right – including the rights to freedom of expression and access to information contained in sections 16 and 32 of the Constitution, respectively – is only permissible insofar as it complies with the limitations analysis contained in section 36 of the Constitution.
- Sub-section (3) prohibits internet shutdowns or intentional network disruptions that affect the public's right to access the internet and other digital technologies. This is in line with the position that has been taken by the United Nations and the ACHPR, as well as regional courts such as the ECOWAS Court of Justice in the decision of Amnesty International Togo and Others v Togolese Republic.⁴ In that case, the ECOWAS Court of Justice held that although access to the internet is not a fundamental right, it nevertheless enhances the exercise of freedom of expression, and therefore becomes a derivative right that is a component of the exercise of freedom of expression.
- Sub-section (4) deals with the adoption of economic measures, such as taxes, levies and duties on the internet and information and communication services. The proposed amendment stipulates that a public body may only adopt such an economic measure in circumstances that do not undermine the principle of universal, equitable, affordable and

⁴ Judgement No. ECW/CCJ/JUD/09/20, accessible here: <https://globalfreedomofexpression.columbia.edu/cases/amnesty-international-togo-and-ors-v-the-togolese-republic/>.

meaningful access to the internet. Moreover, to the extent that such measures are adopted, they must be reasonable and justifiable, as this would constitute a limitation on the rights to freedom of expression and access to information.

- Sub-section (5) requires that internet intermediaries enable access to all internet traffic equally without discrimination. Furthermore, internet intermediaries shall not interfere with the free flow of information by blocking or giving preference to particular internet traffic, other than in accordance with the law. This amendment seeks to establish the principle of net neutrality in South Africa.

Section 8 of the Amendment Bill // Section 11 of the Principal Act: Right of access to records of public bodies

The Amendment Bill inserts a new sub-section under section 11 of PAIA, which establishes a presumption of disclosure, including proactive disclosure, guided by the principle of maximum disclosure. This seeks to reinforce the rule of law, as well as transparent and accountable public bodies. While the proposed amendment acknowledges that access to information may be limited by exemptions that are provided for in law, such exemptions must comply strictly with international human rights law and standards. Furthermore, in line with principle 33(2) of the revised Declaration of Principles on Freedom of Expression and Access to Information in Africa, it makes clear that to the extent that there is an applicable exemption from disclosure, the exempted portion must be severed or redacted with the remainder of the record being disclosed. This seeks to ensure that the right of access to information is not wholly stymied in circumstances where the record is only partially exempted from disclosure.

Section 9 of the Amendment Bill // Section 12 of the Principal Act: Lack of application to certain public bodies or officials thereof

The Amendment Bill proposes the deletion of section 12 of PAIA, as there is no justifiable basis for the automatic exclusion of certain public bodies from having to comply with the right of access to information. It is indeed critical that all public bodies can be held to account to ensure that the constitutional values and rights can be realised.

Section 10 of the Amendment Bill // Section 14 of the Principal Act: Manual on functions of, and index of records held by, public bodies

The proposed amendment requires public bodies to stipulate the applicable prescribed request fee in the PAIA manual.

Section 11 of the Amendment Bill // Section 15 of the Principal Act: Voluntary disclosure and automatic availability of certain records

The proposed amendment expressly includes open data records as being automatically available without a person having to make a request. This is in line with principle 29(3) of the revised Declaration of Principles on Freedom of Expression and Access to Information in Africa, which provides that: "Information required to be proactively disclosed shall be disseminated through all available mediums, including digital technologies. In particular, States shall proactively publish information in accordance with internationally accepted open

data principles.” The Amendment Bill further provides that the public body should stipulate the tools and resources available to facilitate such access.

Moreover, the Amendment Bill proposes the deletion of section 15(5) of PAIA. This is because section 15(5) undermines the right of access to records of public bodies stipulated in section 11 of PAIA at the discretion of the Minister of Justice and Correctional Services (“Minister”). In its current form, section 15(5) of PAIA allows for an unfettered discretion to the Minister to completely exclude access to categories of information, even in circumstances where the requester has complied with the provisions of PAIA and no grounds of refusal are applicable.

Section 12 of the Amendment Bill // Section 19A of the Principal Act: Records and data governance

The Amendment Bill proposes the insertion of a new section that deals with issues pertaining to records and data governance. The term “data governance” encompasses a broad range of issues, including the management, control, interoperability, access to and sharing of data.⁵ It is also worth noting principle 30 of the revised Declaration of Principles on Freedom of Expression and Access to Information in Africa, which provides that: “Public bodies, relevant private bodies and private bodies shall create, keep, organise and maintain information in a manner that facilitates the exercise of the right of access to information.”

The Amendment Bill addresses the following elements in this regard:

- Sub-section (1) seeks to ensure that public bodies allocate resources and implement policies for the effective governance of information and records, including open data. The purpose of this provision is to facilitate access to information being granted as expeditiously and inexpensively as possible. In particular, the effective governance of information and records will enable the relevant public body to identify and provide the relevant records without any undue delay.
- Sub-section (2) requires public bodies to implement Accessibility Guidelines and Technical Standards for data records that ensure the access to records in human readable, electronic and searchable form to the extent practicable. The terms “Accessibility Guidelines” and “Technical Standards” are defined in the Amendment Bill, and create an obligation on the Information Regulator to develop these frameworks in line with internationally accepted standards. Sub-section (2) further provides that where records are made available in electronic format, such records must include the metadata to facilitate the ease of identifying and discovering the records.
- Sub-section (3) entrenches the principle that public bodies shall publish open data under open licences. This seeks to ensure that the data is available to the broadest range of persons to access and use. In general terms, an open licence is one which grants permission to access, re-use and redistribute data with few or no restrictions, and

⁵ See, for example, Organisation for Economic Cooperation and Development, Recommendation on enhancing access to and sharing of data (2021), accessible here: <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0463>.

premised on the idea that where the data has been procured from public resources, this should subsequently be made available to the public without restrictions.⁶

- In similar terms, sub-section (4) requires public bodies to publish research under open access licences to ensure that the data is available to the broadest range of persons to access and use. It bears reiterating that the use of public resources for such research underscores the public's entitlement to have access to that research without restrictions.
- Sub-section (5) requires public bodies to ensure that records are comprehensive, accurate and, to the extent possible, available in original unmodified form. This seeks to enable the public to be in a position to place credible reliance on the information being received from the public body.
- Sub-section (6) deals with access to historical copies of records. It requires public bodies to preserve and archive such records, and make them accessible for the term of retention applicable to the record. The preservation and archiving of historical records is a critical step in good governance and accountability, as records of public bodies can reflect the functions, procedures and administrative processes of that public body, as well as the facts, acts and transactions affiliated to them.⁷ The proposed amendment also requires public bodies to take proactive steps, where necessary, to ensure the availability and accessibility of the record. This would include, for instance, undertaking a process of digitisation to provide for faster and easier access to the records.⁸
- Sub-section (7) requires public bodies to be transparent as to the processes for publishing and disseminating records that are automatically available. As noted in the preface to the Guidelines on Access to Information and Elections in Africa, the failure of stakeholders to proactively provide information breeds distrust and lack of confidence. It goes on to state that: "A cardinal principle at the heart of the right of access to information is that of proactive disclosure. The principle of proactive disclosure requires that those who hold information of public interest must routinely provide such information to the public even without being requested to do so. Such information must be provided in easily accessible formats and it must consider the needs of its intended users."

Sub-section (8) requires public bodies to train information officers and deputy information officers on the relevant information policies. This is critical to ensuring that, amongst other things, records are created, kept, organised and maintained appropriately, that proactive disclosure obligations are met frequently and accurately, and that requests are responded to timeously and effectively. This aligns with section 65(2) of the Model Law on Access to Information for Africa, which contemplates that public bodies develop implementation plans

⁶ See, for example, Open Government Partnership, Educational resources portal (2019), accessible here: <https://www.opengovpartnership.org/members/slovak-republic/commitments/SK0130/>; Open Definition, Guide to open licensing (undated), accessible here: <http://opendefinition.org/guide/>.

⁷ See, for example, Western Cape Archives and Records Service, Records management policy of the Western Cape governmental bodies (2017), accessible here: https://www.westerncape.gov.za/assets/departments/cultural-affairs-sport/wc_records_management_policy_2017.pdf.

⁸ See, for example, Western Cape Archives and Records Service, Digitisation policy of Western Cape governmental bodies (2017), accessible here: https://www.westerncape.gov.za/assets/departments/cultural-affairs-sport/digitisation_policy_of_western_cape_bodies_2017_pdf.pdf.

that include details on the steps taken to secure continued capacity building and compulsory training plans for staff. Furthermore, as contemplated in section 62(2) of the Model Law on Access to Information for Africa, the Information Regulator may also have a role to play in this regard by providing recommendations and guidelines to information-holders for the internal training of personnel, as well as to monitor the internal training of staff within public bodies.

Section 13 of the Amendment Bill // Section 22 of the Principal Act: Fees

The proposed amendment provides that, where records are made available electronically, no fee should be prescribed for processing the request. This takes into account the fact that the search for the record and the preparation of the record for disclosure, as contemplated in sub-section (2) of the Principal Act, does not involve the same level of time and input from the information-holder as may be the case with hard copy records. Linked to this, the public body would also not incur costs for copying the record where it is in electronic format.

Notably, section 23 of the Model Law on Access to Information for Africa goes further than the proposed amendment, and stipulates that a requester is not required to pay any fee on lodging a request, in relation to the time spent by the information-holder searching for the information requested, or in relation to the time spent by the information-holder examining the information to determine whether it contains exempt information or deleting exempt information from a record. It also provides that no reproduction fee is payable for the reproduction of personal information of the requester, for reproduction of information which is in the public interest, where an information-holder has failed to comply with the prescribed time period, or where the requester is indigent.

Section 14 of the Amendment Bill // Section 29 of the Principal Act: Fees

The proposed amendment amends this section of PAIA to delete the word “machine-readable”, on the basis that this term is outdated, and the use of the term “electronic form” is both apt and sufficiently encompassing. It further changes the use of the term “copyright” to “intellectual property”, which speaks to broader issues such as inventions, designs and trademarks.

Furthermore, in terms of sub-section (5) dealing with a requester who has a disability, the proposed amendment stipulates that the steps taken by the public body concerned should be in accordance with the Accessibility Guidelines to developed by the Information Regulator, as defined in the Amendment Bill.

Section 15 of the Amendment Bill // Section 32 of the Principal Act: Reports

The proposed amendments of this section seek to ensure that the Information Regulator is more effectively able to exercise its oversight role, with a view that this may consequently enable the Information Regulator to take remedial action in respect of the public body where there has been non-compliance with the provisions of PAIA.

First, the Amendment Bill gives guidance on when the contemplated reports must be submitted to the Information Regulator, stating that this should be within one month of the end

of the public body's financial year. This is relevant to ensure that the reports are current and relevant at the time of being submitted, as well as consistent in terms thereof.

Furthermore, it is proposed that the reports include details of the grounds on which refusals were made, referring specifically to a provision of PAIA and the number of times each provision of PAIA was relied upon. This will offer important insight into the stance taken by the public body in respect of access to information requests, and give some measure of indication as to whether, for instance, the public body has taken a consistent position to deny requests. This applied both to outright refusals and partial refusals.

The proposed amendment also requires public bodies to report on the status or outcome of any court applications which were lodged on the ground that an internal appeal was regarded as having been dismissed. This offers the Information Regulator an understanding of whether the public body is derogating from its constitutional obligations in terms of PAIA by ignoring requests for information received from the public.

Section 16 of the Amendment Bill // Section 37 of the Principal Act: Protection of confidential information of third parties

The key amendment provided for in this section relates to the fact that any duty of confidentiality between a public body and a third party must be provided for in a written agreement. The stipulation that such agreement must be in writing is to safeguard against any claims of confidentiality that cannot be verified or interrogated by the requester.

Section 17 of the Amendment Bill // Section 46 of the Principal Act: Mandatory disclosure in the public interest

The Amendment Bill seeks to ensure that the public interest override gives meaningful effect to the spirit and purport of PAIA and the right of access to information. In its current framing, the provision is unduly narrow, thereby setting the threshold for meeting the public interest override as one that is overly restrictive and inimical to meeting the objects of PAIA.

The first proposed amendment is to provide for the fact that the public interest override also applies to records of the South African Revenue Service ("SARS"). In this regard, there is no basis to exclude such records where the threshold test for the disclosure of these records has been met. The recent judgment in Arena Holdings (Pty) Limited t/a Financial Mail and Others v SARS and Others⁹ confirms this to be the case, in terms of which sections 35 and 46 of PAIA were declared unconstitutional and invalid to the extent that they preclude access to tax records even in circumstances where the requirements set out in section 46(a) and (b) have been met.

The second key amendment relates to the threshold test for the applicability of the public interest override. The Amendment Bill proposes doing so in two key ways. First, it broadens the types of risk contemplated, and asserts that this provision should properly apply to any risk that arises that may reasonably result in public harm. Second, it provides that the test to

⁹ Case No. 88359/2019, accessible here: <https://amabhungane.org/wp-content/uploads/2021/11/JUDGMENT-OF-ARENA-HOLDINGS-PTY-LTD-t-a-FINANCIAL-MAIL-OTHERS-v-SOUTH-A...-OCR.pdf>.

be applied when determining disclosure should be read disjunctively. In other words, the proposed amendment contemplates that the threshold would be sufficiently met if any one of the following applies: the disclosure of the record would reveal evidence of, or failure to comply with, the law; or the disclosure of the record would reveal evidence of an imminent and serious risk; or the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question.

Section 18 of the Amendment Bill // Section 51 of the Principal Act: Manual

The Amendment Bill proposes that the manual contemplated in this section also include information regarding the categories of records which are available on an open data basis, as well as the prescribed request fee, if any. This will assist requesters in understanding what information is, or ought to be, made available for anyone to access, use and share, as well as knowing upfront what the cost of access will be.

Furthermore, it proposes that the power to grant an exemption in terms of this section be exercised by the Information Regulator, rather than the Minister. This proposal takes into account the fact that the Information Regulator is an independent and statutorily-mandated body that holds the primary responsibility for the implementation of PAIA, and would therefore be better-placed to make this determination without undue interference.

Section 19 of the Amendment Bill // Section 52 of the Principal Act: Voluntary disclosure and automatic availability of certain records

The proposed amendment includes open data as being among the automatically available categories of records that must be provided for in the description submitted to the Minister. Furthermore, it provides that information be provided regarding the tools and resources available to facilitate access and use of such records, which would include, for example, the necessary passwords for online databases, any automated processes to sort through and search the records, and so on.

The proposed amendment also calls for the deletion of section 52(5). As described above in respect of the equivalent provision pertaining to public bodies, section 52(2) undermines the right of access to records of private bodies at the discretion of the Minister, who is given an unfettered discretion to access to categories of information.

Section 20 of the Amendment Bill // Section 52A of the Principal Act: Recording, preservation and disclosure of records on private funding of political parties

The Amendment Bill requires the head of a political part to create and keep records in an ongoing and systematic manner. Guidance in this regard is drawn from the minority concurring judgment of Froneman J in My Vote Counts NPC v Minister of Justice and Correctional Services and Another,¹⁰ in which it was noted that: "It is difficult to conceive that the constitutional obligation to record, preserve and make information on private political funding reasonably accessible can ever be an unsystematic, sporadic, one-off, or intermittent

¹⁰ [2018] ZACC 17, 2018 (8) BCLR 893 (CC), 2018 (5) SA 380 (CC), accessible here: <http://www.saflii.org/za/cases/ZACC/2018/17.html>.

obligation, as opposed to a systematic and continuous one ... It would simply be irrational not to do it systematically and on a continuous basis.”

The Amendment Bill further provides that such records should be created and kept in electronic and other searchable formats. This would facilitate ease of access, and enable requesters to engage with the records more efficiently and effectively. Lastly in this regard, the proposed amendment includes that records should be made available both on request, as well as in terms of the periodic reporting that is required.

Section 21 of the Amendment Bill // Section 52B of the Principal Act: Recording, preservation and disclosures of records of private bodies on election-related matters

The proposed insertion of this section is drawn from sections 3 and 4 of the Guidelines on Access to Information and Elections in Africa, and seeks to ensure a heightened degree of transparency and accountability in respect of election-related matters.

Section 22 of the Amendment Bill // Section 54 of the Principal Act: Fees

This provision requires the head of a private body to provide reasonable assistance to a requestor to exercise their rights in terms of PAIA, where such assistance has been requested. This takes into account that not all persons may be familiar with the provisions of PAIA or the processes that need to be undertaken in order to exercise their rights in terms thereof, which should not prejudice their ability to realise their right of access to information.

Section 23 of the Amendment Bill // Section 70 of the Principal Act: Mandatory disclosure in the public interest

The proposed threshold test to be applied for disclosure in the public interest is amended in the same manner as in respect of public bodies.

Section 24 of the Amendment Bill // Section 82 of the Principal Act: Decision on application

The proposed amendment makes clear that, in granting a just and equitable order, a court may make a punitive costs order in circumstances where a request for access or an appeal against a deemed refusal has been ignored. Notably, this amendment recognises the significant challenges faced by requesters when requests are ignored without good cause, thereby resulting in delays, unnecessary litigation and wasted costs.

This amendment is consonant with the approach taken in, for instance, the matter of M&G Centre for Investigative Journalism NPC and Another v Minister of Defence and Military Veterans and Another,¹¹ in which the court made a punitive costs order against the respondents on an attorney-and-client scale. In recognising that a punitive costs order ought not to be taken lightly, the court took into account a number of different factors, including the objectives of PAIA to afford the public a simple and inexpensive mechanism of information held by public bodies; the conduct and unresponsiveness of the respondents; the fact that the

¹¹ [2017] ZAGPPHC 195, accessible here: <http://www.saflii.org/za/cases/ZAGPPHC/2017/195.html>.

delay resulted in the information having lost a considerable amount of currency; and the nature of the applicants as investigative journalists, which the court recognised as being pivotal to a vibrant democracy. The proposed amendment does not in any way depart from the discretion that a court has to make a punitive costs order, or the ordinary principles that have been developed by the courts in respect of such orders. It remains a mark of displeasure that a court may impose,¹² bearing in mind the relevant context and conduct.

Section 25 of the Amendment Bill // Section 82A of the Principal Act: Urgent requests

Section 9(d) of PAIA stipulates that one of the objectives of the law is to “establish voluntary and mandatory mechanisms or procedures to give effect to that right in a manner which enables persons to obtain access to records of public and private bodies as swiftly, inexpensively and effortlessly as reasonably possible”. However, the time periods provided for in PAIA can sometimes be inimical to realising this objective, with requesters having to wait lengthy periods for responses before being able to access a record.

The proposed amendment seeks to address this challenge by empowering the courts, “on good cause shown”, to amend the time periods in PAIA in order to cater for urgent requests for access to information. In exercising this discretion, a court would be required to take into account all relevant factors, including the nature of the request, the relevance and time-sensitivity of the information sought, the public interest in the disclosure, and the feasibility of compliance with the request on an urgent basis. The non-exhaustive list of factors to consider seeks to offer guidance to a court in striking the appropriate balance between the public interest in the information held and the practicalities of complying with an urgent request.

Section 26 of the Amendment Bill // Section 83 of the Principal Act: Additional functions of the Information Regulator

The proposed amendment authorises the Information Regulator in respect of transparency obligations pertaining to the development, use and application of artificial intelligence, algorithms and other similar technologies by public bodies, as well as the compatibility thereof with international human rights law and standards. This seeks to ensure greater transparency, accountability and compliance with fundamental rights when engaging with such technologies.

Proposed next steps

Once the consultation process has been completed, the intention is to hand over the Amendment Bill to the Information Regulator, the SAHRC and the Department of Justice and Constitutional Development, with a view for the Amendment Bill to be processed by the Executive and Parliament.

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Johannesburg, November 2021**

¹² *Clause v Information Officer of South African Airways (Pty) Limited* [2006] ZASCA 134, 2007 (5) 469 (SCA), accessible here: <http://www.saflii.org/za/cases/ZASCA/2006/134.html>.