



**Promotion of Access to Information Act (PAIA)**

**Annual Report**

**2019/2020**

## **FOREWORD**

The Promotion of Access to Information Act, 2 of 2000 (PAIA) is an essential mechanism for the achievement of the foundational constitutional values of openness, responsiveness and accountability. The PAIA constitutes a comprehensive legislative framework through which to give effect to the right of access to information enshrined in section 32 of the Constitution of the Republic of South Africa, 1996. However, over the course of nearly two decades, the South African Human Rights Commission (Commission) has observed that members of the public continue to struggle to exercise their constitutional right of access to information. This may be ascribed to a variety of factors, including the need for legislative reform and the lack of political will to implement the PAIA.

The Commission has made many recommendations for the improvement and reform of the PAIA over the last several years. Most recently, the Commission provided comments on the PAIA Amendment Bill, 2019. Since few recommendations for reform have been taken up, pertinent recommendations are repeated in this Report. There is an urgent need for PAIA to be simplified, and for the Act to make provision for mandatory proactive disclosure and the creation of an open data portal where automatically available information can be easily accessed.

Moreover, this year the Commission reports the worst levels of compliance witnessed in years, and prevalent across all spheres of government. The Commission thus reiterates its call for Parliament to intervene in an effort to extract accountability from the hundreds of public bodies that continue to wilfully or negligently fail to acknowledge the obligations imposed on all public bodies by the PAIA. Urgent intervention is especially required in respect of local government and institutions created in terms of the Constitution.

The Commission looks forward to continuing collaboration between it and the Information Regulator once the PAIA function is handed over in 2021. Whereas the investigative and enforcement powers that the Information Regulator will wield may go some way in improving compliance levels, political will must be cultivated while legislative reform should be earnestly considered.



**Adv. Tseliso Thipanyane**

**Chief Executive Officer and Information Officer**

## **PREFACE**

In terms of sections 83 and 84 of PAIA, the SAHRC is empowered to fulfil various statutory functions. One of these functions is the tabling of an annual report to the National Assembly. The report must set out any recommendations the SAHRC has made in terms of section 83(3)(a) relating to the “development, improvement, modernisation, reform or amendment” of PAIA (as well as any other legislation relating to access to information). In terms of section 84(b) of PAIA, the report must also include statistical data relating to the PAIA requests handled by public bodies. The duty to report to the SAHRC is a mandatory requirement imposed on all public bodies. Section 84(b) requires that the number of requests received, how these requests were dealt with and the outcomes thereof should specifically be included in the report. Submissions from public bodies to the Commission on an annual basis in terms of section 32 of PAIA provide the data informing reporting in terms of section 84. The current reporting period is for 1 April 2019 until 31 March 2020, although certain important developments falling outside of this period are noted.

## **LIST OF ABBREVIATIONS**

<b>ATI</b>	Access to Information
<b>CER</b>	Centre for Environmental Rights
<b>DPME</b>	Department of Planning Monitoring and Evaluation
<b>IO</b>	Information Officer
<b>DIO</b>	Deputy Information Officer
<b>DMR</b>	Department of Mineral Resources
<b>MPAT</b>	Monitoring Performance and Assessment Tool
<b>NERSA</b>	National Energy Regulator of South Africa
<b>PAIA</b>	Promotion of Access to Information Act
<b>SAHRC</b>	South African Human Rights Commission
<b>POPIA</b>	Protection of Personal Information Act
<b>IR</b>	Information Regulator
<b>IDUAI</b>	International Day for Universal Access to Information
<b>NDP</b>	National Development Plan
<b>SALGA</b>	South African Local Government Association
<b>SOE</b>	State Owned Entity

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## **EXECUTIVE SUMMARY**

Section 84 of the Promotion of Access to Information Act, 2 of 2000 (PAIA) requires the South African Human Rights Commission (the Commission) to submit an annual report to the National Assembly. Since the promulgation of the PAIA, the Commission has reported consistent non-compliance with PAIA to Parliament. The current reporting period demonstrates continued non-compliance with the PAIA across all spheres of government.

Although low levels of compliance may be partially attributed to the national lockdown imposed under the Disaster Management Act after the declaration of a National State of Disaster, it also shows that public bodies lack the systems and policies in place to implement the PAIA properly. The political will to implement the PAIA and cultivate a free flow of information also appears to be sorely lacking.

This Report highlights that legislative development in respect of the PAIA have failed to bring about the reform necessary to ensure that the PAIA can be easily utilised by ordinary members of the public, while remaining fit for purpose in today's information society. Regional standards have been developed, and can be relied upon to effect legislative reform. Certain recommendations in this respect are repeated in the Report.

The analysis of section 32 reporting reflects significant decreases in compliance levels across all spheres of government. Of particular concern is rampant non-compliance by local government, which serves a crucial constitutional function in respect of service delivery. Denial of the right of access to information at the municipal level may thus lead to the infringement of various other human rights. Institutions created under Chapters 9 and 10 of the Constitution also remain largely non-compliant.

It is hoped that once the Information Regulator takes over the PAIA function, compliance levels will improve in the light of the investigative and enforcement powers that the Information Regulator will enjoy under the PAIA as amended.

## 1. INTRODUCTION

Access to information is crucial for the effective functioning of any democracy. Nevertheless, two decades since the promulgation of the Promotion of Access to Information Act, 2 of 2000 (PAIA), the South African Human Rights Commission (Commission or SAHRC) again reports endemic non-compliance with the legislation that aims to give effect to the constitutionally guaranteed right of access to information.<sup>1</sup>

South Africa remains in the midst of untangling the web of State Capture that has prejudiced the attainment of the Constitution's transformative objectives.<sup>2</sup> The free flow of credible and timely information remains necessary to expose corruption. Coupled with an independent media and strong law enforcement accountability mechanism, access to information is thus crucial in the fight against corruption, and in order to give expression to the foundational constitutional values of openness, responsiveness and accountability.<sup>3</sup> However, persistent and widespread non-compliance with the PAIA demonstrates that South Africa still has some way to go until it achieves the paradigm shift from a culture of secrecy to a culture of transparency. A culture of transparency demands open governance and the disclosure of information except in exceptional circumstances.

Moreover, the end of the current 2019/20 reporting period saw the spread of the novel coronavirus (Covid-19) and the beginning of an unprecedented global pandemic that has led to the imposition of stay-at-home orders across the world. In South Africa, a national State of Disaster was declared under the Disaster Management Act, 57 of 2002 (DMA) on 15 March 2020. Subsequent Regulations issued in terms of the DMA have imposed various risk-adjusted levels of national "lockdown" that have impacted on the operations of both public and private bodies. Given that reporting for purposes of this annual PAIA report commenced shortly after the start of the lockdown,<sup>4</sup> on 1 April 2020, it is possible that the national lockdown has had a significant impact on PAIA reporting by public bodies. The restriction of movement and limitations on physically accessing information have again cast the need for South Africa to move expeditiously towards the Fourth Industrial Revolution (4IR) while bridging the Digital Divide, in stark relief.

Although falling outside of the current reporting period, it is important to note that on 22 June 2020, President Cyril Ramaphosa announced the proclamation of various section of the Protection of Personal Information Act, 4 of 2013 (POPIA). In terms of this proclamation, sections 110 and 114(4)

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<sup>1</sup> Section 32 of the Constitution of the Republic of South Africa, 1996 (Constitution).

<sup>2</sup> The situation therefore remains similar to that reported in the previous reporting period, see SAHRC *Annual PAIA Report 2018/19*.

<sup>3</sup> Section 1(d) of the Constitution.

<sup>4</sup> The national lockdown was announced on 23 March 2020, and commenced on 27 March 2020.



of POPIA will commence on 30 June 2021. These sections of POPIA will amend the PAIA and further enable the handover of PAIA functions from the Commission to the Information Regulator. It is hoped that the amendment's introduction of enforcement powers for the Information Regulator will promote greater compliance with the PAIA going forward.

This year's PAIA Report expounds the mandates of the Commission with reference to developments in the access to information field. The Report goes on to reiterate certain pertinent recommendations made to the Department of Justice and Constitutional Development in the past. Finally, it analyses trends gleaned from public body reporting for the 2019/20 period in terms of section 32 of the PAIA.

## 2. MANDATE OF THE SAHRC

The Commission is an independent state institution established to support constitutional democracy.<sup>5</sup> The Commission is constitutionally mandated to promote respect for human rights and a culture of human rights, promote the protection of human rights, and monitor and assess the observance of human rights in the country. The Commission is further empowered to realise its mandate through various means, including through investigations, education and the conduct of research. The South African Human Rights Commission Act, 40 of 2013 (SAHRC Act) obliges and empowers the Commission to carry out various functions, including by reviewing government policies and making recommendations to the State where it deems such action advisable for the adoption of progressive measures for the promotion of human rights.<sup>6</sup> The PAIA is the legislation envisaged to give effect to the constitutional right of access to information, enshrined in section 32 of the Constitution. Section 83 of the PAIA obliges and empowers the Commission to make recommendations regarding the reformation, modernization, improvement and development of PAIA. The Commission furthermore continues to target interventions at the full implementation of the PAIA, where human and financial resources so permit, through the provision of assistance to requesters of information, education, tracking of international developments and trends, highlighting the significance of access to information in the course of its work as a National Human Rights Institution,<sup>7</sup> conducting training and monitoring the level of compliance with the PAIA.

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<sup>5</sup> Section 181 of the Constitution.

<sup>6</sup> Section 13 of the SAHRC Act.

<sup>7</sup> UN General Assembly Resolution 48/134 *Principles Relating to the Status of National Institutions* (1993) <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx>>.

## 2.1. Promotion Mandate

The Commission's constitutional mandate to promote human rights is reflected in section 83 of PAIA in respect of the right of access to information. Section 83 of the PAIA thus recognises the role of the Commission in educating the public – and in particular disadvantaged communities – about the important right of access to information. Given the technical nature of the PAIA, the Commission has observed that requesters often struggle to exercise the rights enshrined in the PAIA. Section 83 accordingly also encourages public and private bodies to participate in the development of educational programmes and to conduct such programmes themselves. The Commission's promotional duties set out in the PAIA are subject to the availability of resources.

### 2.1.1. IDUAI

The Commission again collaborated with the Information Regulator in 2019 to celebrate the International Day for Universal Access to Information (IDUAI), which is declared on 28 September each year by the United Nations Educational Scientific and Cultural Organisation (UNESCO). Partners of the Commission and Information Regulator for this event included UNESCO; the South African National Commission for UNESCO; the Department of Communications, Telecommunications and Postal Services; the University of Pretoria (UP); the UP's Centre for Human Rights; the Information for All Programme (IFAP); Media Monitoring Africa; and the African Centre of Excellence for Information Ethics. The theme of the event was Universal Internet Access. The theme was forward looking in that it explored the necessity of internet access to achieve the Sustainable Development Goals, to fulfil the objectives set out in the National Development Plan, and to address the digital divide in order to prepare all who reside in South Africa for the Fourth Industrial Revolution so as to leave no one behind. It was simultaneously backwards looking to provide an opportunity for reflection on challenges remaining in respect of guaranteeing access to information.

The conference consisted of a joint welcoming address by the Chairperson of the Commission, Adv Bongani Majola, and Chairperson of the Information Regulator, Adv Pansy Tlakula. The Minister of Telecommunications and Postal Services, Honourable Stella Tembisa Ndabeni-Abrahams, delivered the Keynote Address. The African Commission on Human and Peoples' Rights Special Rapporteur for Freedom of Expression and Access to Information at the time, Commissioner Lawrence Mute, also delivered a guest address.

This conference successfully afforded the Commission and the Information Regulator, along with key stakeholders, an opportunity to take stock of the access to information landscape in South Africa, and to identify the obstacles that must be overcome in order to ensure digital equality and readiness for the Fourth Industrial Revolution. It ultimately provided participants with a better understanding of the need for universal internet access globally and domestically, the need for comprehensive reform of the PAIA, and the imperative to reinvigorate government's commitment to open data.

### **2.1.2. SAHRC Section 10 Guide**

Section 10 of the PAIA requires that the Commission must, within 18 months after the commencement of this section, compile in each official language a guide containing such information, in an easily comprehensible form and manner, as may reasonably be required by a person who wishes to exercise any right contemplated in the PAIA. The Guide provides information on PAIA, aims to assist people in making requests for information under PAIA, and provides examples of how PAIA has been used in the past to advance human rights. In particular, the Guide aims to assist requesters in:

- Understanding PAIA, its benefits and background.
- Learning the process by which to make a request step-by-step, and additional tips for making that process easier.
- Learn the types of information which can be requested using PAIA.
- Understand the process by which a requester can challenge a decision taken in relation to their request.
- Being introduced to the changes that will occur to PAIA once POPIA is fully operational.

During 2019, the Commission appointed a service provider<sup>8</sup> to update the section 10 Guide in English. The project has been substantially completed, and the new Guide will be published on the SAHRC website prior to the handover of PAIA functions to the Information Regulator in 2021.

### **2.1.3. SAHRC Workshop on the Implications of the Fourth Industrial Revolution in South Africa**

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<sup>8</sup> Gabriella Razzano was appointed as service provider.

The Commission, with assistance from the Human Sciences Research Council, convened a workshop on 5-6 March 2020 to unpack the human rights implications of the Fourth Industrial Revolution.<sup>9</sup> In order for South Africa to keep up with technological developments, it is crucial to enhance access to the internet while bridging the Digital Divide. In addition, access to information is key to mitigate against some of the harmful human rights effects associated with the Fourth Industrial Revolution and Artificial Intelligence. Transparency through readily available and credible information is therefore required.

## 2.2. Monitoring mandate

The constitutional monitoring mandate of the Commission finds expression in section 83 of the PAIA, which provides that the Commission may monitor implementation of the PAIA. This largely involves conducting research, monitoring and making submissions on legislative developments, and receiving private and public body manuals and reports to track substantive compliance with the PAIA. Best practice examples from Africa and globally are also considered by the Commission so as to develop meaningful recommendations in respect of PAIA modernisation and reform.

### 2.2.1. Compliance monitoring

The statistics analysed below indicate that non-compliance with the PAIA remains widespread amongst public bodies. The absence of policies pertinent to the implementation of the PAIA in public bodies must be noted with concern. A significant number of public institutions have no records management policies in place or record managers appointed. It therefore appears as though there is little political will in respect of PAIA implementation and compliance.

The Commission has similarly observed that requesters of information held by private bodies – especially large corporations – struggle to access information regarding how to make a PAIA request. There thus appears to be a failure to understand the PAIA – which demands disclosure as the rule and withholding information as the exception – or to implement it in a way that gives expression to the constitutional right of access to information. The

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<sup>9</sup> SAHRC “Media Advisory: Workshop on “Fourth Industrial Revolution (4IR) and Human Rights: Challenges and Opportunities for National Human Rights Institutions” (04-03-2020) <https://www.sahrc.org.za/index.php/sahrc-media/news-2/item/2284-media-advisory-workshop-on-fourth-industrial-revolution-4ir-and-human-rights-challenges-and-opportunities-for-national-human-rights-institutions>.

Commission notes that ostensibly inaccessible private bodies include private hospitals, telecommunication companies, mining companies and commercial banks.

Section 14 of the PAIA requires that the Information Officer of every public body compile a manual that sets out the procedures for accessing information held by that public body, a description of records held by that body, and other information as prescribed. In the current year of reporting, the Commission received nine manuals as contemplated in section 14. Of these, only two manuals were received from municipalities. This is of concern, since the Commission is aware that many municipalities lack PAIA manuals or even the contact details of the relevant Information Officer and Deputy Information Officer(s). Some public bodies have raised concerns about resource constraints and the financial implications of complying with section 14 of PAIA, specifically with regards to translating the manual into three official languages. Another challenge observed by the Commission is that certain institutions created under Chapter 9 of the Constitution do not regularly update their section 14 manuals. Outdated manuals are of little use, and lead to the frustration of requesters who are unable to submit a PAIA request. The Commission becomes inundated with inquiries as a direct result of outdated manuals or the lack of any manual as required by section 14. Ultimately, compliance with section 14 across the three spheres of government remains very low.

In terms of section 51 of PAIA the head of a private body must, amongst others, compile a section 51 manual, which is required to set out applicable procedures for accessing information of the company, submit the manual to the Commission at its head office, make the manual available as prescribed by PAIA at the company offices and on their website, and must annex a request form to the manual and also make the request form available on the website and at the company premises access points. During the reporting period, the Commission was inundated with inquiries from private bodies on a daily basis to submit, inquire or seek assistance in completing their section 51 manuals as required by PAIA. Due to the onerous nature of complying with section 51, the Commission recommended that the Department of Justice and Constitutional Development reconsider the provision, and in particular, the extensive practical implications of having to comply with section 51 of PAIA. The Commission also recommended that the exemption of certain private bodies from the requirement to compile manuals, be further extended until such time as the matter had been properly deliberated and decided upon, or until the Information Regulator is operational. The request was acceded to and the partial private body exemption has been extended to 31 December 2020.<sup>10</sup>

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<sup>10</sup> In Government Gazette No. 39504 of 11 December 2015 <[https://www.sahrc.org.za/home/21/files/gg39504\\_nn1222.pdf](https://www.sahrc.org.za/home/21/files/gg39504_nn1222.pdf)>.

Although falling outside of the reporting period, the Commission has been inundated with inquiries regarding the expiration of the partial exemption in 2020. The Commission accordingly wrote to the Minister of Justice in August 2020, requesting that the Minister extends the partial exemption. No official response had been received from the Minister at the time of tabling this report with the National Assembly.

The Access to Information Network (ATI Network) launched its ninth Shadow Report in September 2019, in recognition of the IDUAI celebrations.<sup>11</sup> The Shadow Report again notes widespread non-compliance with the PAIA, which led to a decline in information applications made. The ATI Network thus recommended the urgent operationalization of the Information Regulator, which will enjoy enforcement powers under the amended PAIA.<sup>12</sup>

Whereas non-compliance has consistently been reported by the Commission on an annual basis, it is likely that the introduction of a national lockdown in terms of the Disaster Management Act, shortly before the end of the current reporting period, contributed to section 32 reporting non-compliance this year.

### **2.2.2. Status of the Information Regulator**

The Memorandum of Cooperation (MOC) between the Commission and Information Regulator was duly signed on 4 November 2019. The MOC serves as a guiding document for collaboration between the parties, and the handover of PAIA functions from the Commission to the Information Regulator. The Commission and Information Regulator also continue to meet on a quarterly basis. The two institutions are in the process of developing a Plan of Action under the MOC, in order to ensure a smooth handover process in 2021.

As briefly mentioned above, President Cyril Ramaphosa announced the proclamation of various section of the POPIA on 22 June 2020. Although falling outside of the current reporting period, the proclamation is significant, and has enabled the Commission and Information Regulator to commence the handover process with concrete timelines as guidance. Section 114(4) of the POPIA provides:

#### **114 Transitional arrangements**

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<sup>11</sup> CALS *Civil society concerned about persistent PAIA non-compliance* (27-09-2019) <https://www.wits.ac.za/news/sources/cals-news/2019/civil-society-concerned-about-persistent-paia-non-compliance.html>.

<sup>12</sup> ATI Network *Shadow Report 2018* (2019) [https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/rule-of-law/resources/190926\\_ATI%20Network%20Shadow%20Report%202018.pdf](https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/rule-of-law/resources/190926_ATI%20Network%20Shadow%20Report%202018.pdf).

(4) The South African Human Rights Commission must, in consultation with the Information Regulator, finalise or conclude its functions referred to in sections 83 and 84 of the Promotion of Access to Information Act, as soon as reasonably possible after the amendment of those sections in terms of this Act.

Once the handover of the Commission's PAIA function to the Information Regulator is concluded, it is to be hoped that the introduction of enforcement powers for the Information Regulator under PAIA as amended by the POPIA, will enhance PAIA compliance going forward.

### **2.2.3. Legislative developments**

The PAIA Amendment Bill, which aims to supplement the Political Party Funding Act, 6 of 2018, was published for public comment in July 2019. The Commission and Information Regulator separately made submissions on the Bill, and further presented during public hearings before the Portfolio Committee on Justice and Correctional Services in August 2019. The Commission regarded the Bill as providing 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. However, the PAIA Amendment Bill remained a very limited intervention when it was signed into law subsequent to the current reporting period,<sup>13</sup> and an opportunity for broader legislative reform was thus missed.

In making its written submissions on the Bill, the Commission noted its concerns that the PAIA remains inaccessible for most members of the public. The Commission accordingly reiterated its recommendation that the duty to proactively disclose information be broadened and made compulsory.<sup>14</sup> Given the unique nature of political parties, coupled with the crucial role played by political parties in South Africa's constitutional democracy,<sup>15</sup> the SAHRC recommended that "political parties" be included in the definition of "public body". This suggestion was not incorporated into the eventual PAIA Amendment Act, and "political parties" are instead included in the definition of a "private body". The Commission further submitted that section 15 of the PAIA could be strengthened to require mandatory proactive disclosure by certain bodies including political parties. Furthermore, the Commission made submissions regarding the digital divide in South Africa (almost half the population does not enjoy access to the internet) as well as the fact that the Political Party Funding Act does not cover internal campaign financing records. The Commission made additional submissions on PAIA reform, in

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<sup>13</sup> The PAIA Amendment Act, 31 of 2019, was signed into law in May 2020.

<sup>14</sup> Section 15 and 52 of the PAIA provide for "voluntary" disclosure by public and private bodies, respectively.

<sup>15</sup> *Ramakatsa and Others v Magashule and Others* 2013 (2) BCLR 202 (CC).

respect of offences in the PAIA, section 32 reporting requirements, and the need to amend the prohibitively high standard for disclosure currently set by the public interest override.<sup>16</sup>

On 4 October 2019, new rules of procedure for applications to court under the PAIA were published by the Rules Board for Courts of Law, after approval by the Minister of Justice and Correctional Services. In terms of the Rules, legal proceedings can now be instituted with Magistrate's Courts in addition to High Courts.<sup>17</sup>

#### 2.2.4. Judicial developments<sup>18</sup>

The media fulfils a critical role in accessing relevant information in order to keep the public informed. Media reporting in South Africa has also been successful in exposing irregular conduct and corruption in an era of State Capture. However, many media requesters who attempt to utilise PAIA in order to access information, face similar challenges to other requesters. Often, information requests are simply ignored. Where requests are responded to but disclosure is denied on the basis of the grounds for refusal listed in the PAIA, the provision requiring mandatory disclosure in the public interest (the "public interest override") is rarely utilised.

Moreover, the public interest override explicitly lists and trumps all the mandatory and discretionary grounds for refusal, except the ground for refusal that relates to tax records. This prompted Amabhungane Centre for Investigative Journalism, along with the Financial Mail, to approach the High Court in November 2019 in order to challenge the blanket secrecy in respect of tax records as is evident from the PAIA read with the Tax Administration

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<sup>16</sup> The public interest override is set out in section 70 for private bodies, and section 46 for public bodies:

**46 Mandatory disclosure in public interest**

Despite any other provision of this Chapter, the information officer of a public body must grant a request for access to a record of the body contemplated in section 34 (1), 36 (1), 37 (1) (a) or (b), 38 (a) or (b), 39 (1) (a) or (b), 40, 41 (1) (a) or (b), 42 (1) or (3), 43 (1) or (2), 44 (1) or (2) or 45, if-

(a) the disclosure of the record would reveal evidence of-

(i) a substantial contravention of, or failure to comply with, the law; or

(ii) an imminent and serious public safety or environmental risk; and

(b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question.

<sup>17</sup> Government Gazette No. 42740 of 4 October 2019 <https://www.justice.gov.za/legislation/notices/2019/20191004-gg42740rg10991gon1284-PAIA.pdf>.

<sup>18</sup> Certain judgments relevant to PAIA were delivered during 2020, outside of the current reporting period. See, for example, *Baleni and Others v Regional Manager Eastern Cape Department of Mineral Resources and Others* [2020] 4 All SA 374 (GP) and *The South African History Archive Trust v The South African Reserve Bank and Another* (Case no 17/19) [2020] ZASCA 56 (29 May 2020).



Act.<sup>19</sup> In particular, the applicants seek amendment that will subject even tax records to the public interest override. In addition, Amabhungane Centre for Investigative Journalism submitted various other PAIA requests, some resulting in court orders for disclosure. In a matter concerning access to certain records held by the Hawks, Amabhungane seeks a contempt of court order for a failure to disclose following a court order to do so.<sup>20</sup>

### **2.2.5. International and regional monitoring<sup>21</sup>**

The African Commission on Human and Peoples' Rights adopted the Declaration of Principles of Freedom of Expression and Access to Information in Africa (the Declaration) at its 65th Ordinary Session, which was held from 21 October to 10 November 2019 in Banjul, The Gambia. The Declaration replaces the African Commission's previous 2002 declaration. Importantly, the new Declaration proposes reforms in respect of access to information, which if adopted would address many of the challenges inherent in utilising the PAIA in today's information society.

The Declaration emphasises the need for proactive disclosure (automatic disclosure of information without a request having to be made) in respect of public bodies. The Declaration proposes proactive disclosure duties for private bodies only when such private bodies are publicly funded, perform a public function or deliver a public service.<sup>22</sup> Significantly, the Declaration proposes a duty to create records.<sup>23</sup> Currently in South Africa, PAIA does not create any such duty, although the destruction, alteration, concealment or falsification of records constitutes an offence.<sup>24</sup> In respect of the procedure to be followed to access information, the Declaration provides that "[n]o one shall be required to demonstrate a specific legal or personal interest in the information requested or to provide justification for a request".<sup>25</sup> In contrast, the PAIA requires that a requester for information held by a private body demonstrates that the information is (reasonably) required for the exercise or protection of any right,<sup>26</sup> except the right of access to information. This requirement can constitute an insurmountable burden when requesters are ignorant of the content of requested records. Part IV of the Declaration

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<sup>19</sup> Amabhungane Centre for Investigative Journalism *2019/20 Annual Narrative Report* (2020).

<sup>20</sup> Ibid.

<sup>21</sup> The University of Pretoria's Centre for Human Rights, with partners including the SAHRC, HSRC, FXI and EISA, conducted an assessment of South Africa's compliance with the Guidelines on Access to Information and Elections in Africa (2017), issued by the African Commission on Human and Peoples' Rights. The resultant report, *Proactive Disclosure of Information and Elections in South Africa*, was released in September 2020. It therefore falls outside of the current reporting period and will be canvassed more fully in the future.

<sup>22</sup> Principle 29 of the Declaration.

<sup>23</sup> Ibid, Principle 30.

<sup>24</sup> Section 90 of the PAIA.

<sup>25</sup> Principle 31 of the Declaration.

<sup>26</sup> Section 50 of the PAIA.

deals with access to information and freedom of expression via the internet. In addition to proposing duties for governments to facilitate access to the internet, the Declaration also balances information rights with privacy and data protection rights. Ultimately, the Declaration serves as a lodestar for PAIA reform in South Africa, in an effort to ensure that the PAIA remains fit for purpose in today's information age.

Access to information is regarded as essential to support constitutional democracy. A broader conceptualisation of access to information is apparent from government initiatives such as South Africa's participation in the Open Government Partnership (OGP). The OGP comprises 78 countries that are implementing open government commitments to promote greater transparency, accountability and citizen engagement in policy making. Under the OGP, South Africa previously committed to various initiatives that aim to promote access to information, chief amongst these being the Pilot Open Data Portal, an environmental system application that helps identify sensitive areas, and the new GovChat communication application.<sup>27</sup> Unfortunately, the Open Data Portal is only a pilot project, rendering it of limited use since datasets are not updated. Furthermore, government has missed its deadline to submit its next set of commitments under the OGP, and was placed "under review" by a subcommittee of the OGP in February 2020.<sup>28</sup>

### 2.3. Protection mandate

The Commission bears a constitutional mandate to promote the protection of human rights, which is further elaborated in the SAHRC Act. The SAHRC Act empowers the Commission to, amongst others, approach a court, investigate, or endeavour to resolve a dispute through Alternative Dispute Resolution (ADR) mechanisms in appropriate circumstances.<sup>29</sup> Currently, section 83(3)(c) of the PAIA provides that the Commission may, "if reasonably possible, on request, assist any person wishing to exercise a right contemplated in this Act". The Commission fulfils this function to the extent reasonably possible, and in the light of the limited resources at its disposal. However, with the downscaling of the Commission's PAIA function in anticipation of the handover thereof to the Information Regulator, the Commission is unable to litigate PAIA matters on behalf of requesters, save in exceptional circumstances. As a result, the Commission supplements its powers under the PAIA with its complaints handling process as set out in the SAHRC Complaints Handling Procedures (CHP) of 1 January 2018. Complaints handling may involve further engagement with information holders

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<sup>27</sup> TL Humby *Independent Reporting Mechanism (IRM): South Africa End-of-Term Report 2016 – 2018* (2019).

<sup>28</sup> A copy of the review notification letter is available at [https://www.opengovpartnership.org/wp-content/uploads/2020/02/South-Africa\\_Letter\\_Under-Review\\_February2020.pdf](https://www.opengovpartnership.org/wp-content/uploads/2020/02/South-Africa_Letter_Under-Review_February2020.pdf).

<sup>29</sup> See further ss 13-15 of the SAHRC Act.

including through ADR mechanisms, or referral for litigation. Inquiries are therefore dealt with in terms of section 83 of the PAIA by the SAHRC Compliance Officer,<sup>30</sup> whereas complaints are dealt with by the SAHRC Legal Services Unit and through the auspices of its provincial offices.

### **2.3.1. Inquiries**

The Commission receives regular PAIA-related inquiries, which are largely dealt with by the SAHRC's PAIA Compliance Officer. Given the complexity of PAIA, some inquiries are general in nature, whereas others involve completing the relevant PAIA request forms and sourcing contact details of Information Officers and Deputy Information Officers.

Many inquiries are submitted to the Commission after an initial, unsuccessful PAIA request had been lodged by the requester. Sometimes such requests were simply ignored ("deemed refusals"), whereas other requests were responded to outside of the timeframes prescribed by the PAIA. Some requests are explicitly denied, but such denials are not always justified with reference to the grounds for refusal set out in the PAIA. Where records are disclosed, such disclosure is sometimes incomplete. Where records do not exist or cannot be found, the requirements for an affidavit to this effect, as required by section 23 of the PAIA, are seldom complied with. Ultimately, many information holders seem unaware of the obligations imposed on them by the PAIA. In respect of public bodies, Information Officers have a duty to assist requesters, and cannot simply deny a request because it was not made in the correct form.<sup>31</sup>

Inquiries received in the public sector range from municipalities and national departments to State Owned Entities (SOEs). For example, an inquiry was received against the Department of Public Works and Department of International Relations and Cooperation regarding the awarding of a contract which the requester had bid for. Both the departments were responsive, but the records were not granted. An affidavit in terms of section 23 of the PAIA (setting out all steps taken to locate the records) was thus requested from the Department. The Commission also intervened in a PAIA request submitted to the Department of Public Works, when it lodged the request on behalf of community members in respect of a list of properties under a trust. The 30 days response period lapsed due to delays on the part of the Department, after which a formal complaint was lodged. Eventually, incorrect

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<sup>30</sup> With assistance of the SAHRC Deputy Information Officer in appropriate instances.

<sup>31</sup> Section 19 of the PAIA.

records were granted. The Commission further intervened in other requests by submitting requests on behalf of requesters to eThekweni Municipality and Eskom, respectively.

Municipalities fulfil an imperative constitutional role through service delivery. It is often through the conduct of local government that the socio-economic rights guaranteed in the Constitution are realised or denied. It is therefore of high concern that PAIA compliance amongst local government remains unacceptably low. Where the Commission is unable to source basic PAIA information in respect of municipalities, it is unlikely that an ordinary member of the public will have greater success in exercising their constitutional right of access to information. There is an urgent need for other branches of government to enforce PAIA compliance at the local government level, since the Commission has been largely unsuccessful in its attempts to extract accountability from this sphere of government in the absence of enforcement powers under the PAIA. Once the Information Regulator takes over the PAIA mandate with the addition of investigative and enforcement powers, it is to be hoped that government will assist the Regulator in bringing about structural reform.

In respect of PAIA requests lodged with private bodies, the Commission observes that requesters continue to struggle to demonstrate that information sought is “necessary for the exercise or protection of any right”.<sup>32</sup> The difficulty in meeting this evidential requirement is exacerbated by the power imbalance that often exists between requesters and big corporations including commercial banks, private hospitals and telecommunication companies. The Commission has sought to assist a requester in respect of records held by pharmacies and related public bodies. The Commission also continues to try and assist requesters who seek medical records of deceased relatives from private hospitals. It appears as though some members of the medical profession are unaware of their obligations under section 32 of the Constitution and the PAIA, which results in requesters having to make numerous attempts to access personal information of their deceased relatives.

In the light of widespread non-compliance with the PAIA, and common failure to understand and correctly apply the legislation, it is vital for the Information Regulator to enforce the Act. Currently, the only remedy for many<sup>33</sup> unsuccessful requesters is to institute proceedings in court within 180 days of a refusal or deemed refusal. Litigation remains prohibitively complex and expensive for ordinary members of the public.

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<sup>32</sup> Section 50 of the PAIA.

<sup>33</sup> Certain public bodies have an internal appeal mechanism which should be exhausted prior to the institution of legal proceedings. Section 74 read with the definition of “public bodies” in the PAIA.

### **2.3.2. Complaints**

The Commission received 97 PAIA-based complaints during the 2019/20 reporting period. The Commission's Western Cape provincial office received the highest number of PAIA complaints (41), followed by the Eastern Cape provincial office (15), and the Mpumalanga (10) and North West (10) provincial offices. Often, the constitutional right of access to information is exercised with a view to realising other human rights guaranteed in the Bill of Rights. Where the right of access to information is denied, this may also lead to the inability to claim other human rights. In cases where access to information serves as an instrumental right, the Commission may register a complaint on the basis of another human right implicated in the matter.

The majority of PAIA complaints received by the Commission related to deemed refusals, otherwise inadequate responses to PAIA requests, or the inaccessibility of a public body's PAIA manual. The Commission was called upon to intervene in relation to various national departments, provincial departments and municipalities. National departments against which PAIA complaints were lodged include various complaints against the Department of Home Affairs, as well as complaints vis-à-vis the Department of Correctional Services, the Department of Labour, the Department of Rural Development, the Department of Social Development, the Department of Defence and the Department of Basic Education. Several complaints were directed at the South African Police Service (SAPS) whereas one complaint was lodged in respect of the Government Employee Pension Fund (GEPF). Complaints were also lodged against two public hospitals. Municipalities complained against include Rustenburg Local Municipality, Enoch Mgijima Municipality, Dr Beyers Naude Municipality, Ephraim Mogale Municipality, Msunduzi Municipality, Beaufort West Municipality and Bitou Municipality.

In respect of private bodies, certain complaints were lodged against medical doctors, and several complaints were lodged against various different mining companies. PAIA complaints against private bodies also include financial services companies and a large telecommunication company as respondents.

Trends apparent from PAIA complaints lodged with the Commission confirm trends in section 32 reporting compliance, namely that non-implementation of the PAIA remains endemic. Complaints trends also show that many private bodies lack awareness of the constitutional right of access to information or the legislation that seeks to give effect thereto. In order for South Africa to cultivate a culture of transparency, it is necessary for all information holders to have earnest regard to the crucial importance of a free flow of information.

### 3. SECTION 84 REPORTING

Section 84 of the PAIA obliges the Commission to submit to the National Assembly an annual report setting out certain particulars which is in line with the data annually submitted by public bodies to the Commission in terms of section 32(a) to (h) of PAIA. Section 84 provides that the annual report must include:

- (a) any recommendation in terms of section 83 (3) (a); and
- (b) in relation to each public body, particulars of-
  - (i) the number of requests for access received;
  - (ii) the number of requests for access granted in full;
  - (iii) the number of requests for access granted in terms of section 46;
  - (iv) the number of requests for access refused in full and refused partially and the number of times each provision of this Act was relied on to refuse access in full or partially;
  - (v) the number of cases in which the periods stipulated in section 25 (1) were extended in terms of section 26 (1);
  - (vi) the number of internal appeals lodged with the relevant authority and the number of cases in which, as a result of an internal appeal, access was given to a record or a part thereof;
  - (vii) the number of internal appeals which were lodged on the ground that a request for access was regarded as having been refused in terms of section 27;
  - (viii) the number of applications made to every court and the outcome thereof and the number of decisions of every court appealed against and the outcome thereof;
  - (ix) the number of applications to every court which were lodged on the ground that an internal appeal was regarded as having been dismissed in terms of section 77 (7);
  - (x) the number of complaints lodged with the Public Protector in respect of a right conferred or duty imposed by this Act and the nature and outcome thereof; and
  - (xi) such other matters as may be prescribed.

### 3.1. Recommendations

Section 84 of the PAIA compels the Commission to include details of any recommendations made in terms of section 83(3)(a) in its annual report to the National Assembly. Section 83(3)(a) of the PAIA provides that the Commission may make recommendations for “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”.

The Commission has made various recommendations to the Department of Justice and Constitutional Development since the promulgation of the PAIA. Unfortunately, few of these recommendations have been accepted or implemented. The various recommendations made and the status of each recommendation is set out in the Commission’s *PAIA Annual Report 2015-2017*.<sup>34</sup> For purposes of the current reporting period, the Commission will therefore largely limit the recommendations made to those submitted to the Portfolio Committee on Justice and Correctional Services in respect of the Commission’s submission on the PAIA Amendment Bill, 2019.<sup>35</sup>

The main thrust of the Commission’s submission on the PAIA Amendment Bill, 2019, was to again underscore the need for proactive disclosure. This recommendation was repeated due to the fact that the Commission continues to observe that members of the public struggle to access information held by both public and private bodies. Closely related to this recommendation was the repeated recommendation for government to establish an open data portal where all proactively disclosed information can be accessed by the public.

Section 90(2) of the PAIA 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 Commission thus recommended 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.

Based on nearly two decades of monitoring compliance with section 32 of the PAIA, the Commission made various recommendations to improve section 32 reporting by public bodies. In particular, the following recommendations were made in respect of section 32:

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<sup>34</sup> SAHRC *PAIA Annual Report 2015-2017* (September 2017): <https://www.sahrc.org.za/home/21/files/Annual%20Report%20landscape%201517.pdf>.

<sup>35</sup> SAHRC *Comments on the Promotion of Access to Information Amendment Bill, 2019* (August 2019).

- A requirement should be added that public bodies must report on requests that have been litigated on.
- The Commission has also previously 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.

Sections 46 (for public bodies) and 70 (for private bodies) of the PAIA provide for mandatory disclosure in the public interest, despite reliance on a ground for refusal. However, the emphatic language used in the "public interest override" sets a high threshold that is difficult to meet:

**46 Mandatory disclosure in public interest**

Despite any other provision of this Chapter, the information officer of a public body must grant a request for access to a record of the body contemplated in section 34 (1), 36 (1), 37 (1) (a) or (b), 38 (a) or (b), 39 (1) (a) or (b), 40, 41 (1) (a) or (b), 42 (1) or (3), 43 (1) or (2), 44 (1) or (2) or 45, if-

(a) the disclosure of the record would reveal evidence of-

(i) a substantial contravention of, or failure to comply with, the law; or

(ii) an imminent and serious public safety or environmental risk; and

(b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question.



The Commission accordingly recommends that the use of the word “and” between subsection (a) and (b) of the public interest override be replaced with the word “or” to lessen the burden on requesters who wish to rely on the provision.

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

Besides the recommendations previously made, the Commission recommends that Parliament intervenes to demand PAIA compliance from local government.

The PAIA requires comprehensive legislative reform in order to remain fit for purpose in today’s information society, while enhancing the free flow of information. Only if the legislation is amended and strengthened to meaningfully give effect to the constitutional right of access to information, will a society based on the foundational values of openness, responsiveness and accountability become a real possibility.

### 3.2. Analysis of section 32 reporting

On an annual basis, the SAHRC distributes section 32 notices accompanied by a template to all public institutions across all spheres of government to remind each public body to furnish the Commission with their section 32 statistics. The notice and template are sent out approximately two months prior to the due date in order for all Information Officers and Deputy Information Officers to gather the statistics in advance. It bears emphasis that section 32 reporting is a long-standing legal obligation that all public institutions should be aware of. Where public bodies do not update their PAIA manuals, the Commission cannot reasonably be expected to direct the notice and template to unidentified officials.

The notices were sent out in April of 2020 with an initial submission deadline of 31 May 2020. For the reporting period in question, the rate of submission was worryingly low. Due to the effects of the Covid-19 pandemic, the declaration of a National State of Disaster under the DMA and ensuing national lockdown, the Information Officer of the Commission decided to further extend the date of submission to 30 June 2020. The extended deadline gave public bodies an opportunity to finalize their reports and confirm their statistics for the 2019/20 reporting period.

The SAHRC collects the data received from the public bodies in order to formulate one report for submission to Parliament. The statistics reflected below are based on all section 32 reports as received from various government departments as at 1 October 2020. The following section provides a broad overview and analysis of section 32 compliance by public bodies for the 2019/20 reporting period.

### 3.2.1. National Departments

<b>NATIONAL DEPARTMENTS</b>	
<b>YEAR</b>	<b>NUMBER OF COMPLIANT DEPARTMENTS</b>
2002/2003	13
2003/2004	15
2004/2005	13
2005/2006	13
2006/2007	18
2007/2008	22
2008/2009	22
2009/2010	18
2010/2011	18
2011/2012	30
2012/2013	28
2013/2014	26
2014/2015	30
2015/2016	29
2017/2018	27
2018/2019	26

2019/2020	20
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For the reporting year of 2019/20, the Commission observed a significant decline in PAIA compliance across the entire public sector, and most notably amongst national departments. Only 20 out of 46 national departments submitted section 32 reports to the Commission. The level of compliance at the national level is at its lowest since 2010/11.

The Department of Correctional services received 121 PAIA requests. Of these, 89 were granted in full and seven were refused in full. Three internal appeals were lodged. The section 32 report notes that these refusals were due to the implication of third parties. However, the report does not specify if section 37 of the PAIA was relied upon<sup>36</sup> and what the results of any third party notification procedures were.<sup>37</sup>

The Department of Defence received 29 PAIA requests. Of these, 17 were granted in full, whereas an additional 11 requests received in the previous reporting period were also granted in full during 2019/20. Four requests were refused in full whereas five requests were partially refused. The response period had to be extended for twelve requests. Two internal appeals were lodged, and one request was subsequently granted as a result of the internal appeal.

The Department of International Relations and Cooperation received 23 requests. Of these, nine were granted in full and eight were refused in full. Two of the requests were transferred. One of the PAIA matters mentioned in the Department's section 32 report was processed by the Commission and discussed above.<sup>38</sup> Two internal appeals were lodged, and two requests were subsequently granted as a result of the internal appeals.

The South African Police Service (SAPS), as in the past financial years, continues to receive thousands of PAIA requests on an annual basis. For the current reporting period, SAPS received 21 125 requests. Of these, 17 483 were granted in full and 521 were refused in full. Significantly, SAPS was the only public body at national level to grant any request in the public interest (in terms of section 46 of the PAIA). Despite the application of a ground for refusal, SAPS granted 439 requests in the public interest. 521 PAIA requests were refused in full, whereas 229 were

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<sup>36</sup> Section 37 is a ground for refusal: Mandatory protection of certain confidential information, and protection of certain other confidential information, of third party.

<sup>37</sup> Sections 47-49 of the PAIA sets out the procedures for third party notification and intervention.

<sup>38</sup> See part 2.3.1 above.

refused partially. For refusals, a ground for refusal set out in PAIA was relied on for 750 refusals. The response period had to be extended on 1 702 occasions. 353 internal appeals were lodged, and a 168 requests were granted as a result of the internal appeal. 185 court applications were made as a result of an internal appeal being dismissed by failing to give notice of the decision. SAPS notes that this constitutes a 60% decrease in court applications from the previous reporting period. This success can partially be attributed to the efforts of the SAPS National Deputy Information Officer. It is clear that SAPS has a sophisticated PAIA system in place, which allows the public body to process thousands of requests and largely apply PAIA correctly. Due to proper systems, SAPS was also able to report to the Commission timeously despite the national lockdown. Well trained Deputy Information Officers, coupled with comprehensive information and records management systems, are crucial for PAIA compliance.

### 3.2.2. Provincial Departments

<b>YEAR</b>	<b>NUMBER OF COMPLIANT DEPARTMENTS</b>
2002/2003	26
2003/2004	8
2004/2005	4
2005/2006	11
2006/2007	14
2007/2008	13
2008/2009	33
2009/2010	22
2010/2011	56

2011/2012	63
2012/2013	69
2013/2014	56
2014/2015	90
2015/2016	86
2017/2018	51
2018/2019	59
2019/2020	40

The level of compliance for provincial departments has steadily declined over the years. For the current reporting period, compliance is at its worst level since 2009/10, with only 40 reports received from provincial bodies. The highest levels of compliance can be seen during the 2014/15 reporting period, at which time the Western Cape, Limpopo, Northern Cape and KwaZulu-Natal achieved a 100% compliance rate. Limpopo and the Western Cape maintained satisfactory numbers over the years, whereas all provinces' compliance has declined except for the Western Cape maintains full compliance during the current reporting period.

The Western Cape Health Department received a large number of requests for information with 776 requests, of which 524 were granted in full. 178 requests were refused in full while 16 were refused partially. Two internal appeals were lodged on the basis of a deemed refusal.

All but one department in the Free State are compliant. The Free State Health Department received the highest number of requests with 123 received and 53 requests granted in full. Fifteen internal appeals were lodged because of deemed refusals. The Office of the Premier received 28 requests in total and granted 22 requests in full. One court application was launched on the basis that an internal appeal was dismissed by the relevant authority failing to give notice of its decision.

The KwaZulu-Natal Health Department received 1 869 PAIA requests and granted 1 346 requests in full. One request was granted in the public interest in terms of section 46 of the PAIA, despite a ground for refusal having been applied.

Limpopo continues to have satisfactory compliance levels, as in previous years. However, it is noteworthy that the Limpopo Department of Health did not submit a report.

Only one report was received from a North West provincial department, whereas only two reports were received from Gauteng provincial departments. No reports were received from Northern Cape or Eastern Cape. This appears to be a worrying trend, particularly for the Northern Cape.

### 3.2.3. Municipalities

LOCAL GOVERNMENT	
YEAR	NUMBER OF COMPLIANT MUNICIPALITIES
2002/2003	3
2003/2004	4
2004/2005	6
2005/2006	8
2006/2007	11
2007/2008	48
2008/2009	33
2009/2010	25
2010/2011	20
2011/2012	69
2012/2013	37
2013/2014	25

2014/2015	51
2015/2016	48
2017/2018	30
2018/2019	31
2019/2020	26

The vast majority of municipalities are again non-compliant. Non-compliance by local government has plummeted even further, to the same low level witnessed in the 2013/14 reporting period. The Commission has consistently reported these low levels of compliance within the municipal sector to Parliament. Non-compliance with PAIA at local government level is especially concerning given the crucial role played by municipalities in respect of service delivery. Numerous interventions were implemented, which included increasing trainings and collaborations with the South African Local Government Association (SALGA). Training of Municipal Managers has previously proven to be effective, but limited resources have rendered such training unsustainable. Very few requests for training were received from any sphere of government, which demonstrates a lack of political will from top leadership to understand and effectively implement PAIA. With such low levels of compliance, it is difficult to discern trends at local government level. The City of Cape Town reported three court application, but otherwise no PAIA litigation was reported. Nevertheless, the Commission has observed through research and monitoring that PAIA litigation at municipal level does occur but is not reported to the Commission.

#### **3.2.4. Chapter 9 and 10 Institutions**

<b>CHAPTER 9 &amp; 10 INSTITUTIONS</b>	
<b>YEAR</b>	<b>NUMBER OF COMPLIANT CHAPTER 9 &amp; 10 INSTITUTIONS</b>
2002/2003	5

2003/2004	3
2004/2005	2
2005/2006	5
2006/2007	4
2007/2008	3
2008/2009	4
2009/2010	4
2010/2011	1
2011/2012	3
2012/2013	4
2013/2014	4
2014/2015	3
2015/2016	4
2017/2018	2
2018/2019	3
2019/2020	3

For the current reporting period, only three public bodies established in terms of Chapters 9 and 10 of the Constitution submitted their section 32 reports to the Commission. The third compliant body is the Commission itself. As reported by the Commission on an annual basis, compliance by Chapter 9 and 10 Institutions remains far too low. The impact of this is worsened by the specific dynamics within which these institutions operate, and the constitutional mandates that they discharge. In particular, Chapter 9 institutions were created to strengthen democracy, and access to information is vital for the effective functioning of democracy. The Commission continues to call

upon the Office of Institutions Supporting Democracy to take steps to engage with these institutions regarding these dismal compliance figures. In January 2020, the Commission's Information Officer issued correspondence to certain Chapter 9 institutions, pointing out consistent non-compliance with the PAIA. One of these Chapter 9 institutions responded by providing updated contact details. Nevertheless, the fact that compliance did not increase, points to the need for further intervention.



### 3.2.5. Other Public Bodies

Over the past three reporting periods, the Commission has observed a positive increase in the number of other public bodies, including SOEs, that comply with section 32 reporting requirements. This year, as with all spheres of government, there was a marked decline in the reports received. It should be noted that the decline was not as significant as the difference between the previous financial years. Reports received this year numbered 50, compared to 49 reports received for the previous reporting cycle. These reports included four universities, Telkom, South African Revenue Services (SARS), the Reserve Bank and the National Prosecuting Authority (NPA).

### 3.3. Trends and challenges

The current reporting period demonstrates the lowest PAIA compliance levels in years. Although low levels of section 32 reporting may be partially attributable to the national lockdown imposed under the DMA, poor levels of compliance also demonstrate that public bodies lack the systems, personnel and budgets necessary to comply with PAIA, to track and trace requests and respond accordingly. The absence of policies pertinent to the implementation of the PAIA in public bodies must also be noted with concern. Some of the institutions that were consulted confirmed to the Commission that no records management policies were in place and that no records manager had been appointed. Most of the institutions have not designated Deputy Information Officers, which affects how PAIA processes are run and requests are dealt with.

The Commission does not have the capacity to audit section 32 reports received from public bodies. This is challenging, since many large public bodies report zero requests received, whereas the figures in other section 32 reports are not always reconcilable. The Commission proposes in this regard that the Information Regulator be sufficiently resourced to conduct audits of section 32 reports.

Another trend that emerges is that in refusing requests, public bodies do not consistently rely on grounds for refusal set out in the PAIA. This constitutes an incorrect application of the Act, especially in the light of the fact that the grounds for refusal must be narrowly construed so that disclosure is the rule, and exemption from disclosure is the exception.<sup>39</sup>



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<sup>39</sup> *President of the Republic of South Africa and Others v M & G Media Ltd* 2012 (2) SA 50 (CC).

One of the greatest challenges observed by the Commission through monitoring implementation of the PAIA over the course of almost two decades, is the continued failure of local government to ostensibly make any attempts to comply with the PAIA. Municipalities are situated at the coal face of service delivery, and access to information is therefore crucial for the enforcement of other rights such as the socio-economic rights enshrined in the Bill of Rights. The Commission lacks the resources required to conduct PAIA training and law clinics across the local government sector. It is necessary for Parliament to intervene in an effort to improve PAIA compliance amongst municipalities.

**4. SECTION 32 REPORTS**

**COLOUR KEY**

	<p><b>HAS COMPLIED WITH SECTION 32</b></p>
	<p><b>HAS NOT COMPLIED WITH SECTION</b></p>

4.1. National departments

NATIONAL DEPARTMENTS	Number of requests received	Number of requests granted in full	Number of requests granted in the public interest (section 46)	Number of requests refused in full	Number of requests refused partially	Number of times provisions of the Act were relied on to refuse access in full or part	Number of instances in which the periods stipulated in section 25(1) were extended in terms of section 26(1)	Number of internal appeals lodged with the relevant authority	Number of requests granted as a result of the internal appeal	Number of internal appeals lodged on account of a deemed refusal	Number of applications to court on grounds that an internal appeal was dismissed by the relevant authority failing to give notice of its decision (section 77(3))	Other information relating to implementation
The Presidency	24	10	0	6	0	6	4	0	0	0	0	
Department of Planning Monitoring and Evaluation*												
Parliament of the Republic of South Africa	12	10	0	0	1	1	2	1	0	1	0	
Department of International Relations and Cooperation	23	9	0	8	3	11	5	2	2	0	0	
Department of Communications												
Department of Trade and Industry	41	11	0	5	15	2	1	0	0	0	0	
Department of Justice & Constitutional Development	230	32	0	24	8	32	0	0	0	0	0	

Public Administration Leadership and Management Academy/ National School of Government												
Department of Economic Development												
Department of Science and Technology	0	0	0	0	0	0	0	0	0	0	0	
Department of Defence	29	17	0	4	5	9	12	2	1	2	1	
Department of Energy												
Department of Mineral Resources												
Department of Cooperative Governance												
Department of Correctional Services	121	89	0	7	2	2	7	3	0	0	0	
Department of Environment and Fisheries	67	23	0	6	2	8	15	13	2	0	0	
Department of Agriculture, Forestry and Fisheries												
Department of Basic Education	33	3	0	1	0	1	2	0	0	0	0	
Department of Social Development	11	6	0	0	0	0	3	0	0	0	0	
National Treasury	20	8	0	0	4	8	4	4	3	0	0	













































Department of local government	2	0	0	1	1	0	0	1	0	0	0	
Provincial Treasury	4	2	0	0	0	0	0	1	0	0	0	
Department of Agriculture	4	3	0	0	0	0	0	1	0	0	0	
Department of Transport and Public Works	22	15	0	4	0	0	9	0	0	0	0	
Department of Education	776	524	0	178	16	194	254	2	2	2	0	
Department of Cultural Affairs and Sport	0	0	0	0	0	0	0	0	0	0	0	
Department of Community Safety	0	0	0	0	0	0	0	0	0	0	0	
Department of Social Development	11	9	0	0	1	0	0	0	0	0	0	

### 4.3. Municipalities

Non-compliant Municipalities			
<b>Eastern Cape Province</b>	<u>Chris Hani District</u>	Mlhontlo Local Municipality	Ngwathe Local Municipality
<u>Buffalo City Metropolitan</u>	Emalahleni Local Municipality	Nyandeni Local Municipality	<u>Lejeweputswa District</u>
Nelson Mandela Bay Metropolitan	Engcobo Local Municipality	Port St Johns Local Municipality	Masilonyana Local Municipality
<u>Alred Nzo District</u>	Inkwanca Local Municipality	<u>Sarah Baartman District</u>	Matjhabeng Local Municipality
Matatiele Local Municipality	Intsika Yethu Local Municipality	Bavivaans Local Municipality	Nala Local Municipality
Mbizana Local Municipality	Inxuba Yethemba Local Municipality	Blue Crane Route Local Municipality	<u>Thabo Mofutsanyana District</u>
Ntabankulu Local Municipality	Lukhanji Local Municipality	Camdeboo Local Municipality	Dihlabeng Local Municipality
Umzivubu Local Municipality	Sakhisizwe Local Municipality	Ikwezi Local Municipality	Maluti-A-Phofung Local Municipality
<u>Amathole District</u>	Tsolwana Local Municipality	Kou-Kamma Local Municipality	Mantsopa Local Municipality
Amahlathi Local Municipality	<u>Joe Gqabi District</u>	Kouga Local Municipality	Nketoana Local Municipality
Great Kei Local Municipality	Elundini Local Municipality	Makana Local Municipality	Phumelela Local Municipality
Mbhashe Local Municipality	Gariiep Local Municipality	Ndlambe Local Municipality	Kopanong Local Municipality
Mnquma Local Municipality	Maletswai Local Municipality	Sunday River Valley Local Municipality	Imbabazane Local Municipality
Nxuba Local Municipality	<u>OR Tambo District</u>	<b>Free State Province</b>	Mthonjaneni Local Municipality
Ngqushwa Local Municipality	Ingquza Hill Local Municipality	Mangaung Metropolitan Municipality	Nkandla Local Municipality
Nkonkobe Local Municipality	Greater Kokstad Local Municipality	Xhariep District Municipality	Ntambanana Local Municipality
Letsemeng Local Municipality	Ingwe Local Municipality	Tokologo Local Municipality	<u>Zululand District Municipality</u>
Mohokare Local Municipality	Ubuhlebezwe Local Municipality	Fezile Dabi District Municipality	AbaQulusi Local Municipality
Naledi Local Municipality	uMzimkhulu Local Municipality	Mafube Local Municipality	eDumbe Local Municipality

<b>Gauteng Province</b>	<u>iLembe District Municipality</u>	Tswelopele Municipality	Nongoma Local Municipality
<u>Sedibeng District</u>	KwaDukuza Local Municipality	Setsoto Local Municipality	Ulundi Local Municipality
Lesedi Local Municipality	Maphumulo Local Municipality	Metsimaholo Local Municipality	uPhongolo Local Municipality
Merafong City Local Municipality	Ndwedwe Local Municipality	Moqhaka Local Municipality	<b>Limpopo Province</b>
Randfontein Local Municipality	Ezingoleni Local Municipality	Richmond Local Municipality	Aganang Local Municipality
Emfuleni Local Municipality	Umdoni Local Municipality	Msunduzi Local Municipality	Blouberg Local Municipality
<b>KwaZulu-Natal Province</b>	Umuziwabantu Local Municipality	uMngeni Local Municipality	Lepelle-Nkumpi Local Municipality
eThekweni Metropolitan	Umzumbe Local Municipality	uMshwathi Local Municipality	Molemole Local Municipality
<u>Amajuba District Municipality</u>	Vulamehlo Local Municipality	<u>uMkhanyakude Local Municipality</u>	Polokwane Local Municipality
Dannhauser Local Municipality	<u>uMgungundlovu Local Municipality</u>	Hlabisa Local Municipality	<u>Mopani District Municipality</u>
eMadlangeni Local Municipality	Impendle Local Municipality	Jozini Local Municipality	Ba-Phalaborwa Local Municipality
Newcastle Local Municipality	Mkhambathini Local Municipality	Mtubatuba Local Municipality	Greater Giyani Local Municipality
<u>Harry Gwala District Municipality</u>	Mpofana Local Municipality	uMhlabuyalingana Local Municipality	Greater Tzaneen Local Municipality
Maruleng Local Municipality	Mookgophong Local Municipality	<u>uMzinyathi District Municipality</u>	Richtersveld Local Municipality
<u>Skekhukhune District Municipality</u>	Thabazimbi Local Municipality	Umvoti Local Municipality	Emthanjeni Local Municipality
Elias Mostoaledi Local Municipality	<b>Mpumalanga Province</b>	<u>uThukela District Municipality</u>	Kareeberg Local Municipality
Ephraim Local Municipality	Thembisile Hani Municipality	Indaka Local Municipality	Makhado Local Municipality
Fetakgomo Local Municipality	Chief Albert Luthuli Municipality	uMtshezi Local Municipality	Renosterberg Local Municipality
Greater Tubatse Local Municipality	Govan Mbeki Municipality	<u>uThungulu District Municipality</u>	Siyancuma Local Municipality
Makhuduthamaqa Local Municipality	Gert Sibande District Municipality	Mfolozi Local Municipality	Siyathemba Local Municipality
<u>Vhembe District Municipality</u>	<u>Ehlanzeni District Municipality</u>	uMlalazi Local Municipality	Thembelihle Local Municipality
Musina Local Municipality	Bushbuckridge Local Municipality	Steve Tshwete Local Municipality	Ubuntu Local Municipality
Mutale Local Municipality	Mbombela Local Municipality	Victor Khanye Local Municipality	Umsobomvu Local Municipality

Thulamela Local Municipality	Nkomazi Local Municipality	<b>Northern Cape Province</b>	<u>ZF Mgcawu District</u>
<u>Waterberg District Municipality</u>	Thaba Chewu Local Municipality	Dikgatlong Local Municipality	Kheis Local Municipality
Bela-Bela Local Municipality	Dipaleseng Local Municipality	Magareng Local Municipality	Khara Hais Local Municipality
Lephalale Local Municipality	Lekwa Local Municipality	Phokwane Local Municipality	Kai !Garib Local Municipality
Modimolle Local Municipality	Mkhondo Local Municipality	Sol Plaatje Local Municipality	Kgatelopele Local Municipality
Mogalakwena Local Municipality	Msukaligwa Local Municipality	<u>John Taolo Gaetsewe District</u>	Mier Local Municipality
Umsina Municipality	<u>Nkangala District Municipality</u>	Ga-Segonyana Local Municipality	Tsantsabane Local Municipality
Big 5 False Bay Municipality	Dr JS Moroka Local Municipality	Gamagara Local Municipality	
Kwa Sani Municipality	Emakhazeni Local Municipality	Joe Morolong Local Municipality	
Sibonelo-GoodenoughBhengu Municipality	Emalaheni Local Municipality	<u>Namakwa District</u>	
Hibiscus Coast Municipality	Ditsobotla Local Municipality	Hantam Local Municipality	
Umhlathuze Municipality	Mahikeng Local Municipality	Kamiesberg Local Municipality	
Mandeni Municipality	Ramotshere Moiloa Local Municipality	Karoo Hoogland Local Municipality	
Okhahlamba Municipality	Ratlou Local Municipality	Khai-Ma Local Municipality	
Emnambithi Municipality	Tswaing Local Municipality	Nama Khoi Local Municipality	
Endumeni local Municipality	<b>Western Cape Province</b>	Cape Agulhas Local Municipality	
	Breede Valley Local Municipality	George Local Municipality	
	Langeberg Local Municipality	Cederberg Local Municipality	
<b>North West Province</b>	Overberg Local Municipality	Matzikama Local Municipality	
Tlokwe Municipality	Beaufort West Local Municipality	Saldanha Local Municipality	
<u>Bojanala Platinum District</u>	Prince Albert Local Municipality	Drankenstein Municipality	
Kgetlengrivier Local Municipality	<u>Eden District Municipality</u>		
Madibeng Local Municipality	Bitou Local Municipality		

Moretele Local Municipality	Central Karoo Local Municipality		
Moses Kotane Local Municipality	Kannaland Local Municipality		
Rustenburg Local Municipality	Knysna Local Municipality		
<u>Dr Kenneth Kuanda District</u>	Stellenbosch Municipality		
Maquassi Hills Local Municipality			
Ventersdorp Local Municipality			
<u>Dr Ruth Segomotsi Mompati Local Municipality</u>			
Greater Taung Local Municipality			
Kagisano-Molopo Local Municipality			
Lekwa-Teemane Local Municipality			
Mamusa Local Municipality			
Naledi Local Municipality			
<u>Ngaka Modiri Molema District</u>			

<b>LOCAL GOVERNMENT</b>	<b>Number of requests received</b>	<b>Number of requests granted in full</b>	<b>Number of requests granted in the public interest (section 46)</b>	<b>Number of requests refused in full</b>	<b>Number of requests refused partially</b>	<b>Number of times provisions of the Act were relied on to refuse access in full or part</b>	<b>Number of instances in which the periods stipulated in section 25(1) were extended in terms of section 26(1)</b>	<b>Number of internal appeals lodged with the relevant authority</b>	<b>Number of requests granted as a result of the internal appeal</b>	<b>Number of internal appeals lodged on account of a deemed refusal</b>	<b>Number of applications to court on grounds that an internal appeal was dismissed by the relevant authority failing to give notice of its decision (section 77(3))</b>	<b>Other information relating to implementation</b>
<b>EASTERN CAPE</b>												
Senqu Municipality	8	6	0	2	0	2	0	0	0	0	0	
<b>GAUTENG</b>												
City of Johannesburg	125	43	3	3	9	3	19	3	2	1	0	23 of the requests could not be found, another 23 requests were transferred to other public bodies. 5 requests were withdrawn and 20 were pending at the time of concluding this report.



Capricorn District Municipality	3	2	1	0	0	0	0	0	0	0	0	
<b>WESTERN CAPE</b>												
Theewaterskloof Local Municipality	9	6	0	1	0	3	0	0	0	0	0	
Cape Winelands Municipality	0	0	0	0	0	0	0	0	0	0	0	
City of Cape Town	645	212	0	184	112	296	61	51	21	21	3	
Mossel Bay Municipality	103	67	0	9	6	15	0	1	0	0	0	
Bergrivier Local Municipality	0	0	0	0	0	0	0	0	0	0	0	
Hassequa Municipality	9	5	0	3	1	4	0	1	0	1	0	
Overstrand Local Municipality	37	17	0	17	2	17	0	1	0	1	0	
Swartland Municipality	0	0	0	0	0	0	0	0	0	0	0	
Weitzenberg Municipality	4	4	0	0	0	0	0	0	0	0	0	
West Coast District Municipality	20	20	0	0	0	0	0	0	0	0	0	
Oudtshoorn Local Municipality	19	9	0	7	0	0	0	0	0	0	0	



4.4. Other Public Bodies

OTHER BODIES	Number of requests received	Number of requests granted in full	Number of requests granted in the public interest (section 46)	Number of requests refused in full	Number of requests refused partially	Number of times provisions of the Act were relied on to refuse access in full or partial	Number of instances in which the periods stipulated in section 25(1) were extended in terms of section 26(1)	Number of internal appeals lodged with the relevant authority	Number of requests granted as a result of the internal appeal	Number of internal appeals lodged on account of a deemed refusal	Number of applications to court on grounds that an internal appeal was dismissed by the relevant authority failing to give notice of its decision (section 77(3))	Other information relating to implementation
Council for Medical Schemes	11	8	0	2	1	3	2	0	0	0	0	
Accounting Standards SA	0	0	0	0	0	0	0	0	0	0	0	
Blind SA	0	0	0	0	0	0	0	0	0	0	0	
Brand SA	0	0	0	0	0	0	0	0	0	0	0	
Film and Publication Board	1	1	0	0	0	0	0	0	0	0	0	
SASRIA	0	0	0	0	0	0	0	0	0	0	0	
Financial and Fiscal Commission	0	0	0	0	0	0	0	0	0	0	0	
Road Accident Fund	8772	69650	1807	718	0	0	0	0	0	0	0	
State security Agency	9	2	0	1	2	9	9	2	2	0	0	

Information Regulator	0	0	0	0	0	0	0	0	0	0	0	
University of Kwa Zulu Natal	9	8	0	0	1	1	5	0	0	0	0	
Independent Police Investigative Directorate	192	87	0	45	1	46	20	0	0	0	0	
Market Theatre Foundation												
South African National Biodiversity Institute												
ESKOM												
South African Social Security Agency	2903	2897	0	2	1	0	6	0	0	0	0	
Land and Agricultural Development Bank of South Africa	3	1	0	1	0	0	1	0	0	1	0	
Ithala Development Finance Corporation	6	6	0	0	1	0	3	0	0	0	0	
Independent Regulatory Board	2	2	0	0	0	0	0	0	0	0	0	
Airports Company South Africa												
Legal Aid South Africa	4	1	0	2	1	3	1	0	0	0	3	
National Nuclear Regulator	2	1	0	0	1	1	0	1	0	1	1	











## **5. CONCLUSION**

Over the course of two decades, the Commission has achieved many milestones in raising awareness about the constitutional right of access to information, and the legislation that gives effect thereto. The Commission has established structures representing Information Officers, brought together stakeholders to celebrate IDUAI on an annual basis, advised countless members of the public as to how to exercise their rights under the PAIA, and has facilitated compliance for many public and private bodies. The PAIA itself is a comprehensive legislation that provides for access to information held by both public and private bodies. However, despite gains made by the Commission and a legislative framework in which to realise the constitutional right, people continue to struggle to access information. This may be ascribed to a combination of factors, including the technicality of the PAIA, the fact that the PAIA has not been amended to keep up with today's information society, and a lack of political will to understand and implement the PAIA. The Commission hopes that a process of legislative reform will be undertaken to simplify and update the PAIA as South Africa gears up for the Fourth Industrial Revolution. Handover of the PAIA function to the Information Regulator in 2021 will hopefully also improve compliance, in the light of the investigative and enforcement powers that the Information Regulator will wield under the amended PAIA. Until that time, the Commission repeats its call for the public and private sectors to work together to create a culture of transparency for the benefit of all who reside in South Africa.